## T CBR

### AT: T – CB – 2AC

#### We meet. The plan does not change the scope of collective bargaining rights. It expands access to existing rights.

#### Hoffman legally removed collective bargaining rights for undocumented workers.

Craig Robert Senn 08 - Assistant Professor of Law at Charleston School of Law. “ARTICLE: PROPOSING A UNIFORM REMEDIAL APPROACH FOR UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW, October 2008, Fordham Law Review 77(113).

In the almost twenty years after Sure-Tan, the federal circuits disagreed as to whether the "legal (or lawful) presence" condition for NLRA back pay applied to all, or only certain, undocumented workers. Three federal circuits (the U.S. Courts of Appeals for the Second, Ninth, and D.C. Circuits) had concluded that this condition should be applied narrowly - namely, only to undocumented workers who (like those in Sure-Tan) were already physically absent from the United States. 95 In contrast, one federal circuit (the Seventh Circuit) had decided that this condition should be applied universally - namely, to all such workers, regardless of presence in, or absence from, the country. 96

[\*129] In its March 2002 decision in Hoffman Plastic, the Supreme Court substantially cleared these muddied waters. 97 Hoffman Plastic was a chemical compound formulation business that had hired Jose Castro as a machine operator in May 1988. 98 At the time of his hire, "Castro presented documents that appeared to verify his authorization to work in the United States." 99 In fact, however, he had "gained employment with Hoffman only after [fraudulently] tendering a birth certificate belonging to a friend who was born in Texas." 100 About six months after Castro was hired, several employees (including Castro) supported a local union that was attempting to become the collective bargaining agent for the business's employees. 101 Hoffman Plastic then proceeded to lay off Castro and others who had participated in these support and organizing activities. 102

The NLRB concluded that Hoffman Plastic had engaged in unfair labor practices under the NLRA by discriminatorily laying off Castro and others "in order to rid itself of known union supporters." 103 The NLRB then ordered Hoffman Plastic to provide appropriate "make whole" back pay to these employees to compensate for "any loss of earnings and other benefits they may have suffered." 104 After a hearing to determine the amount of this due back pay, the NLRB awarded Castro - who still remained in the country after his layoff - four and a half years of back pay, totaling almost $ 67,000. 105

[\*130] On appeal, the D.C. Circuit upheld the NLRB's remedial order that provided this back pay to Castro, notwithstanding his undocumented worker status. 106 The court employed a two-step rationale to support its decision. First, addressing Sure-Tan, the D.C. Circuit narrowly interpreted its "legal (or lawful) presence" condition for NLRA back pay to "deal with the precise problem [the Seventh Circuit] faced - undocumented discriminatees returning to the country illegally to claim backpay." 107 Consequently, the court viewed Sure-Tan as "not barring back pay to undocumented discriminatees" on a universal basis, but rather dealing only with "unique circumstances … not present in this case." 108

Having overcome Sure-Tan, the D.C. Circuit then opted merely to defer to the NLRB's administrative authority and discretion to fashion appropriate remedial relief in Castro's circumstances. 109 The court initially noted that an administrative agency's decisions must both ""fully enforce the requirements of its own statute'" 110 and accommodate, rather than ignore, ""other … equally important Congressional objectives.'" 111 The D.C. Circuit then concluded that the NLRB had "fully satisfied" these administrative obligations by considering both the NLRA and IRCA when crafting Castro's back pay remedy. 112 More specifically, the NLRB had argued that back pay relief for undocumented workers served the purposes and policies of both statutes, by (i) "reducing employer incentives to prefer undocumented workers ([the] IRCA's goal)"; (ii) "reinforcing collective bargaining rights for all workers (the NLRA's goal)"; and (iii) "protecting wages and working conditions for authorized workers (the goal of both Acts)." 113 Consequently, the court concluded that the NLRB had "fully enforced" the NLRA, while "carefully considering" (and not ignoring) "other … equally important Congressional objectives." 114

The Supreme Court reversed. 115 In a broadly worded holding, the Court stated that the NLRB's "award[of] backpay to an undocumented alien who has never been legally authorized to work in the United States … is [\*131] foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." 116

#### PTIV – most predictable and prevents mixing burdens. “Collective bargaining rights” constrain the scope of the plan.

#### The strength of a right is measured by its remedy.

Kai Yi Xie 17, Articles Editor, Volume 164, University of Pennsylvania Law Review; J.D., 2016, University of Pennsylvania Law School; M.Eng. & B.S. in Biomedical Engineering, B.S. in Mathematics, University of Maryland, "Improving the Patent System by Encouraging Intentional Infringement: The Beneficial Use Standard of Patents," University of Pennsylvania Law Review, vol. 165, 03/01/2017, pp. 1019-1022

In proposing to adjust patent strength, I must emphasize that I do not mean adjusting patent scope. Adjusting scope by, for instance, varying the amount of underlying matter the patent seeks to protect is not the aim of this proposal. Changing how much an issued patent's claims cover is antithetical to efficiency because doing so would heighten uncertainty over the scope of a patent and would defeat the public-notice function of patent claims. 10 In terms of what it means to vary patent strength, I proceed from the notion that the strength of a right ultimately lies in the right's redressability. As Chief Justice Marshall said, "[E]very right . . . must have a remedy, and every injury its proper redress." 11 So the strength of the patent right lies in how violations of that right are to be rectified (or not rectified, as the case may be).

#### Collective bargaining rights refer to enforcement of collective bargaining agreements.

Linda R. Hirshman & Earle Putnam 81, Hirshman is Counsel at Jacobs, Burns, Sugarman & Orlove; Putnam is General Counsel at Amalgamated Transit Union, "Jackson Transit Authority and the City of Jackson, Tennessee, Petitioners, v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, Respondent," Supreme Court of the United States, No. 81-411, 02/17/1981, Lexis

The legislative history thus leaves no doubt that federal law is the source of the right that the Union asserts to have its collective bargaining agreement with Jackson remain in effect. It was the intent of Congress that federal law would determine the binding effect of labor protection agreements under § 13(c) and of the collective bargaining agreements reached pursuant to § 13(c) between unions and receipients of UMTA funds. Federal law is thus the source of the right the Union asserts in this case. For that reason, the Union's claim arises under federal law for purposes of 28 U.S.C. §§ 1331 and 1337(a), and those sections would create federal jurisdiction over the Union's claim regardless of the Congressional intent discussed above, to continue the right to federal enforcement [\*41] of collective bargaining agreements as part of the "collective bargaining rights" that § 13(c)(2) preserves. That conclusion is not affected by the fact that the federal rights the Union seeks to enforce have been embodied in a § 13(c) agreement and in a collective bargaining agreement. An action to enforce either of those agreements arises under federal law.

1. The sum and substance of § 13(c) as it passed the Senate, and as it was ultimately enacted, is that state and local governments have a choice when they take over a private transit company which had a collective bargaining relationship with a labor union; Either they can acquire and operate the transit system without federal funds, and exercise whatever authority they have as employers under state law; or, they can receive federal funds and accept the conditions imposed by § 13(c) of UMTA, including the preservation of collective bargaining rights, notwithstanding what state law would otherwise provide. Under UMTA, as enacted, acceptance of federal funds brought the public transit authority under the federal regime.

That federal regime is effectuated by labor protective arrangements required by the Act, which Congress [\*42] understood would be embodied in agreements between the grantee governmental entity and the representatives of its employees (the § 13(c) agreement). It also includes the obligation to make and maintain collective bargaining agreements -- the essence of the "collective bargaining rights" preserved by § 13(c)(2).

#### Prefer it:

#### Overlimiting. Tiny procedural tweaks have no advantage ground.

#### Aff ground. Enforcement affs key to beat circumvention

#### C) Functional limits. States, politics, econ, kritiks.

#### D) No ground loss. Every aff increases worker leverage.

#### E) Reasonability. Arbitrary interps are infinitely regressive.

### AT: List of Workers

## T Substantial

### T – Substantial – 2AC

#### b. GRAMMAR---generic statements are proven true by subsets.

Andrei Cimpian 10, Amanda C. Brandone, Susan A. Gelman, Generic statements require little evidence for acceptance but have powerful implications, Cogn Sci. 2010 Nov 1; 34(8): 1452–1482

Generic statements (e.g., “Birds lay eggs”) express generalizations about categories. In this paper, we hypothesized that there is a paradoxical asymmetry at the core of generic meaning, such that these sentences have extremely strong implications but require little evidence to be judged true. Four experiments confirmed the hypothesized asymmetry: Participants interpreted novel generics such as “Lorches have purple feathers” as referring to nearly all lorches, but they judged the same novel generics to be true given a wide range of prevalence levels (e.g., even when only 10% or 30% of lorches had purple feathers). A second hypothesis, also confirmed by the results, was that novel generic sentences about dangerous or distinctive properties would be more acceptable than generic sentences that were similar but did not have these connotations. In addition to clarifying important aspects of generics’ meaning, these findings are applicable to a range of real-world processes such as stereotyping and political discourse.

1. Introduction

A statement is generic if it expresses a generalization about the members of a kind, as in “Mosquitoes carry the West Nile virus” or “Birds lay eggs” (e.g., Carlson, 1977; Carlson & Pelletier, 1995; Leslie, 2008). Such generalizations are commonplace in everyday conversation and child-directed speech (Gelman, Coley, Rosengren, Hartman, & Pappas, 1998; Gelman, Taylor, & Nguyen, 2004; Gelman, Goetz, Sarnecka, & Flukes, 2008), and are likely to foster the growth of children’s conceptual knowledge (Cimpian & Markman, 2009; Gelman, 2004, 2009). Here, however, we explore the semantics of generic sentences—and, in particular, the relationship between generic meaning and the statistical prevalence of the relevant properties (e.g., what proportion of birds lay eggs).

Consider, first, generics’ truth conditions: Generic sentences are often judged true despite weak statistical evidence. Few people would dispute the truth of “Mosquitoes carry the West Nile virus”, yet only about 1% of mosquitoes are actually carriers (Cox, 2004). Similarly, only a minority of birds lays eggs (the healthy, mature females), but “Birds lay eggs” is uncontroversial. This loose, almost negligible relationship between the prevalence of a property within a category and the acceptance of the corresponding generic sentence has long puzzled linguists and philosophers, and has led to many attempts to describe the truth conditions of generic statements (for reviews, see Carlson, 1995; Leslie, 2008).

#### 3. Counter-interp: affs may strengthen CBRs for considerable subsets of the workforce.

#### 4. Substantial is considerable.

Shannon Prost 4, Judge at the United States Court of Appeals of the Federal Circuit, "Committee for Fairly Traded Venezuelan Cement, Plaintiff-Appellant, v. United States, Defendant-Appellee, and Cemex Venezuela, S.A.C.A. ('Vencemos'), Defendant-Appellee," 06/18/2004, http://www.ll.georgetown.edu/federal/judicial/fed/opinions/04opinions/04-1016.html

The URAA and the SAA neither amend nor refine the language of § 1677(4)(C). In fact, they merely suggest, without disqualifying other alternatives, a “clearly higher/substantial proportion” approach. Indeed, the SAA specifically mentions that no “precise mathematical formula” or “‘benchmark’ proportion” is to be used for a dumping concentration analysis. SAA at 860 (citations omitted); see also Venez. Cement, 279 F. Supp. 2d at 1329-30. Furthermore, as the Court of International Trade noted, the SAA emphasizes that the Commission retains the discretion to determine concentration of imports on a “case-by-case basis.” SAA at 860. Finally, the definition of the word “substantial” undercuts the CFTVC’s argument. The word “substantial” generally means “considerable in amount, value or worth.” Webster’s Third New International Dictionary 2280 (1993). It does not imply a specific number or cut-off. What may be substantial in one situation may not be in another situation. The very breadth of the term “substantial” undercuts the CFTVC’s argument that Congress spoke clearly in establishing a standard for the Commission’s regional antidumping and countervailing duty analyses. It therefore supports the conclusion that the Commission is owed deference in its interpretation of “substantial proportion.” The Commission clearly embarked on its analysis having been given considerable leeway to interpret a particularly broad term.

## States

### AT: CP – States – 2AC

#### Hoffman preempts the states.

Hugh Alexander Fuller 06 - J.D., cum laude at Baylor University School of Law. “Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages after Hoffman Plastic Compounds, Inc. v. NLRB,” 2006, Baylor Law Review 58(3), pp. 985-1010.

Many of the cases that have cited Hoffman have distinguished it or limited its holding to the facts of that case. 60 However, Hoffman has begun to have an effect on both federal and state courts, not least of which is the application of Justice Rehnquist's broader language to state tort law. 6 1 While some courts have distinguished Hoffman and refused to apply it to state remedies for future lost earnings, many others have applied it to limit future lost earning capacity damages in state courts.

A. Hoffman Distinguished As Inapplicable to State Tort Law

The Twelfth Court of Appeals in Texas distinguished Hoffman and expanded on the state's openhanded lost earning capacity damages model first articulated by the Eighth Court of Appeals in Wal-Mart Stores, Inc. v. Cordova.6 2 In Tyson Foods, Inc. v. Guzman, a forklift struck Guzman, an employee of a Tyson subcontractor, causing permanent spine and nerve damage.63 At trial, Guzman was awarded $210,000 in future lost earning capacity damages.64 Tyson appealed, claiming that Hoffman held that "national public policy, as expressed by the United States Congress in enacting immigration reforms, militates against any award of wages as damages to undocumented alien laborers. 65 The court of appeals disagreed, holding that Hoffman's concern was with NLRB remedies and did not apply to state common law personal injury damages.66 The court further noted that Hoffman only applied to remedies for an employer's violations of the NLRA, and that Texas does not require citizenship or work authorization permits in order to recover lost future earnings.67 However, the court noted that Tyson's objection was in the nature of a federal preemption defense, was not raised in the trial court, and thus was waived, leaving the possibility of a preemption defense open to tort defendants in Texas.68

B. Hoffman As Controlling Authority

While a few courts have distinguished Hoffman, many federal and state post-Hoffman cases have held that Hoffman and IRCA preempt state tort law claims for future lost earning capacity damages. 69 The result in Sanango v. 200 E. 16th St. Hous. Corp.,70 a case decided by the First Department of the New York Supreme Court, Appellate Division, is typical of the new direction post-Hoffman courts are heading. In Sanango, the plaintiff, Arcenio Sanango, fell from a ladder on a worksite and sued for damages including lost future earning capacity based on United States wages. 71 The Sanango court believed that awarding lost future wages based on United States pay rates interfered with "IRCA's federal immigration policy in substantially the same manner as did the NLRB backpay award in Hoffman," by compensating an illegal alien in the United States for wages that he could not earn legally and could only collect through evasion of the authorities, as well as by encouraging future IRCA violations.72 The court buttressed its argument by holding that the Supremacy Clause mandates the preemption of state laws that "frustrate[] the accomplishment of a federal objective., 73 The court held, "we believe that plaintiffs acceptance of unlawful employment [is] misconduct contravening IRCA's policies" no matter who the actual violator of the law is. 74 However, the court went on to note that it was unaware of any federal policy forbidding the awarding of lost future earnings at the wage scale of the plaintiff's home country and thus remanded for a new trial to determine the proper measure of damages.75

Veliz v. Rental Serv. Corp. USA, a Florida case involving a claim for future lost earnings after a forklift struck and killed a worker, reached a similar, yet subtly different result.76 In contrast to the result in Sanango, the Veliz court does not even refer to the possibility of recovery for future wages. 7 Accordingly, the court "grants the Defendants summary judgment on the Plaintiffs claim for lost support insofar as it encompasses the lost wages Mr. Ignacio would have earned as an employee in the United States of America., 78 No further distinction is made between past lost wages and future lost wages, and no mention is made of measuring lost wages by United States wage rates or rates in the immigrant's country of origin.

C. Hoffman As Persuasive Authority

Even in states where Hoffman is not found to be controlling, it may still be regarded as persuasive. In Rosa v. Partners in Progress, Inc., the New Hampshire Supreme Court rejected Hoffman as controlling state tort law.80 However, it looked to both Hoffman and the conflicting decisions discussed above as persuasive authority in holding that illegal aliens "generally ... may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment."'" The court then went on to carve out a narrow exception in cases where the tortfeasor is an employer who hires an illegal alien knowing of his illegal status.82

#### Patchwork. State-by-state protections are imbalanced. That weakens the entire labor movement.

Alexis N. Walker 19 – Associate Professor in the Department of History and Political Science at Saint Martin's University. “Conclusion: The Consequences of Labor’s Enduring Divide,” 12/13/2019, Divided unions: The Wagner Act, federalism, and organized labor, Chapter 8, pg. 130-146.

In October 1953, the “Trade Union and Collective Bargaining Rights of Public Employees” conference was held in Munich, Germany. The conference brought together public sector labor leaders from Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Holland, Norway, Sweden, Switzerland, Tunisia, and the United States. In his opening remarks at the conference, General Secretary M. C. Bolle of the International Federation of Unions of Employees in Public and Civil Services commented on the state of trade union rights around the world. He noted that in his travels he had discovered that many countries in Asia and Latin America that were members of the International Labor Organization, which affirms collective bargaining rights for employees, continued to deny these basic rights to workers (IFUEPCS 1953, 6). But, he emphasized, disregarding the rights of workers happens “even in countries reckoned the most advanced” (6). As an example, he singled out the United States for the “inclination on the part of the authorities to withhold trade union and bargaining rights from public servants” (6).

At a conference bringing together public sector unionists from many advanced industrial countries, Bolle was right to note that the United States stands out for its approach to public sector employees’ collective bargaining rights. As Chapter 1 emphasized, among advanced industrialized countries, the United States continues to be distinctive for the way in which it has separated public sector labor law from private sector labor law and the limited, piecemeal rights that have been granted to government employees. In 1940, David Ziskind noted, “The law pertaining to government labor disputes has been especially inchoate. It cannot be found congealed in court decisions or flaunted in legislative enactments” (231). His assessment is equally appropriate today. The last seven chapters have traced chronologically the consequences of public sector employees’ exclusion from the Wagner Act. This chapter examines the consequences of this exclusion for today’s labor movement and then addresses the policy implications of these findings.

Consequences for the Modern Labor Movement

What does government employees’ exclusion and the separation of American labor law mean for the development, size, and strength of the U.S. labor movement today? The AFL-CIO’s Public Employee Department summed up one part of the answer nicely: “one country . . . two dif­ferent worlds” (Lucak 1987). Absent a national public sector labor law, government unionism was ultimately limited because state- and local-level innovations proved to be imperfect approximations of the Wagner Act. Federalism cannot explain every aspect of labor’s development over the last half century, but it is vital for understanding the brief rise and then plateauing of public sector union density at the same time that private sector union density was declining. More broadly, the damage to the public sector labor movement from exclusion has shaped the broader labor movement as well. The institutional split of public and private sector labor law has had important consequences for the movement’s size, strength, and effectiveness today.

Labor’s Size: The Geographic Concentration of Labor

The absence of an overarching federal law has contributed to the dramatic variation in and regional concentration of state-level public sector union density (see Figure 8).1 As discussed earlier, states with a strong, existing union movement and Democratic governors and legislatures were more likely to pass pro–public sector collective bargaining laws; the existing union movement and Democratic states were already regionally concentrated in the 1960s and 1970s. As a result, the regional nature of labor has continued unabated with the rise of public sector unionism. States in which more than 40 percent of the public sector workforce is unionized are limited to parts of the West, Midwest, and Northeast, whereas less than 30 percent of the public sector workforce is unionized in the South, Mountain-West, and Central-Midwest (Hirsch and Macpherson 2017). Labor’s geographical concentration, both public and private, is remarkable: “fully one-half of all union members lived in only six states by 2000” (McCartin 2008, 123). Thus, while labor represents over 14 million Americans, its electoral clout is limited by its geographical concentration. Continued geographical concentration is particularly problematic for organized labor because it suggests that the possibility of a filibuster-proof supermajority in the Senate to support federal labor law reform is increasingly remote.

If public sector employees had been included in the Wagner Act or had been able to pass their own national public sector law before the closing of the window of opportunity in 1976, public sector employees likely would have had greater success than their private sector counterparts organizing in antiunion states owing to the constraints public sector employers face that prevent serious resistance to unionization. The success public sector employees have had in organizing in anti-union states gives a sense of this possibility. The lowest public sector union density is still over 10 percent in states that have no public sector collective bargaining rights (Hirsch and Macpherson 2017). This union density is certainly due in part to federal employees, but it is also because government unions have successfully gained limited recognition from some school boards and municipalities despite the legal prohibitions in place (Freeman and Han 2012b). Today’s public sector union density levels in anti-union states illustrate what public sector unions have been able to achieve despite the lack of collective bargaining rights, which suggests great possibilities for growth if they were given a legal foundation to support their efforts. Instead, government unions have had to pursue collective bargaining rights on a state-by-state basis and have been prevented from making significant inroads in anti-union states, reinforcing the geographic concentration of labor.

Labor’s Strength: The Unequal, Vulnerable Rights of Public Sector Employees

Public sector unions found success and expanded their membership at the same time private sector unions were being frustrated at the national level, but the victories made at the state and local levels were not equivalent to what would have been possible had public sector unions been included in the Wagner Act. The multiple points of access at the state and local levels provide opportunities for reformers, but decentralization inevitably results in laws that lack the kind of national standards needed to promote equality (Mettler 1998, 13). Legislative reforms were hard-won and highly variable. In states strongly opposed to unionization, public sector unions had to navigate just as many veto points as private sector unions have faced at the national level. The result for public sector labor law is what AFSCME has declared “a patchwork quilt of conflicting, confusing and often inadequate legislation” (AFSCME 2002). This patchwork quilt includes an estimated “110 separate state statutes governing public sector labor relations, augmented by numerous local ordinances, executive orders, and other legal authority” (Slater 2004, 196). A third of states either explicitly outlaw collective bargaining for public sector employees or have no statute addressing the issue (Freeman and Han 2012b, 17). Other states vary tremendously in how pro-bargaining their collective bargaining laws are and in terms of which groups of public sector employees are included or excluded.

Collective bargaining provisions frequently apply differently for teachers, state employees, police, and other government workers. One of the areas of greatest variation is whether the state or locality permits government employees to strike, but states differ on even the most basic tenets of collective bargaining, including which groups of public sector workers are permitted to unionize and what issues they may bargain over. One consequence of this variation is that an estimated 33 percent of local and state employees (six million workers) did not have collective bargaining rights in 2002 (USGAO 2002, 14; U.S. Census Bureau 2003).2 Not only is federalism synonymous with variation, but, as Aaron Wildavsky (1984) identified over thirty years ago, “federalism means inequality.” Suzanne Mettler notes that “when social and labor policies have been left in the hands of states and localities, standards have been lowered or neglected in more areas than not” (1998, 13). Public sector bargaining law is certainly no exception. Leaving public sector labor law to the states not only lowered standards and created unequal treatment but also left labor law more vulnerable to the vagaries of the states.

The recent conservative turn in state legislatures across the country illustrates the precarious nature of public sector labor law and an important lesson about federalism: “for every liberal state policy ‘laboratory,’ there are at least as many—or more—conservative policy laboratories” (Robertson 2014). Lou Cannon notes that “as of mid-June [2011], 49 bills had been enacted in 23 states and Puerto Rico that included some form of restriction on collective bargaining in the 2011 session” (2011, 14). Using data from the National Conference of State Legislatures’ Collective Bargaining and Labor Union Database, Freeman and Han estimate that, from 2011 to 2012, there were: “733 bills in 42 states relating to public employee unions, 140 bills relating to union dues/agency fees, 55 bills on political activities and contributions, 171 bills for public safety employees, and additional bills in other categories making a total of 1,707 bills in 50 states. . . . The majority of these bills . . . were designed to weaken unions and their collective bargaining rights” (2012a, 393). While the scope of the attacks in 2011–2012 is large, the nature of the attacks is not unique.

Even before the most recent wave of attacks, changes in public sector bargaining laws have been frequent and often regressive (Wasserman 2006). The year 2011 may have seen the most active retrenchment of public sector labor law, but it had started long before. For instance, in 2005 Indiana governor Mitch Daniels rescinded the executive order permitting collective bargaining with state employees, and Missouri governor Matt Blunt also rescinded an executive order recognizing state employee collective bargaining. In 2011, the Indiana legislature passed a law barring future governors from regranting collective bargaining rights to state employees (Freeman and Han 2012a, 390). The attacks in Wisconsin, Ohio, Indiana, and elsewhere demonstrate the mixed blessing of federalism: excluding public sector workers from the Wagner Act allowed them to succeed at the state and local levels while private sector unions struggled to reform federal law, but the flexibility of federalism can go both ways and public sector collective bargaining rights have been retrenched as well.

The 2016 elections illustrate the continued vulnerability of public sector collective bargaining rights and the enduring importance of divided labor law for understanding organized labor today. The elections ushered in singleparty Republican rule at the national level and in twenty-five states. Several of these states have sought to remake their state’s government employee labor laws. For instance, in Iowa, lawmakers moved swiftly to pass a bill very similar to Act 10 in Wisconsin. The bill limits collective bargaining to wages, eliminates dues checkoff even though workers already opted into the system, and requires recertification elections with a majority of all workers in the bargaining unit—not just those voting—approving the union before negotiating every contract. Also taking a page from Wisconsin, the bill exempts public safety workers, in what opponents saw as a “divide and conquer” strategy (Noble and Pfannenstiel 2017; Rodriguez and Sanders 2017). Without a national public sector Wagner Act, actions like Iowa’s are to be expected as the states continue to address the issue of government employee collective bargaining in their own ways.

At the national level, the absence of a public employee Wagner Act has also made federal workers legally vulnerable. The election of Donald Trump to the presidency in 2016 raised the specter that he might take aim at federal employee unions. Harkening the “divide and conquer” strategy, Trump has actively met with and courted private sector unions, particularly construction, mining, and steelworkers unions (Scheiber 2017; Greenhouse 2017). At the same time, Trump has signaled much less sympathy for public sector unions. Governor Scott Walker made headlines when, after visiting the White House, he reported that he had talked with Vice President Mike Pence about “what we’ve done here in Wisconsin, how they may take bits and pieces of what we did with Act 10 and with civil service reform, and how they could apply that at the national level” (Spicuzza and Marley 2017).

President Trump cannot simply pass an Act 10 for federal employees because many federal workers’ rights are bound up in civil service law, but, absent a Wagner Act for federal employees, he can weaken these rights through executive order. In his 2018 State of the Union Address, Trump suggested that he was considering taking on federal collective bargaining rights, albeit through Congress rather than an executive order. He asked Congress “to empower every Cabinet Secretary with the authority to reward good workers and to remove federal employees who undermine the public trust or fail the American people” (Trump 2018). However, Trump ultimately chose to act unilaterally, signing three executive orders in May 2018. The first order “makes it easier to fire and discipline federal employees,” including weakening seniority rules and shortening the appeal period (Scheiber 2018). The second order “directs federal agencies to renegotiate contracts with unions representing government employees so as to reduce waste.” Finally, the third order limits the amount of “official time” federal employees with positions in the union can use during normal working hours to perform their union roles (Scheiber 2018). As part of the implementation of these executive orders, federal agencies have begun evicting unions from office space within the agencies, making it harder for unions to meet with and thus represent their members (Naylor 2018). The content of Trump’s executive orders is being challenged in the courts. To date, however, the Trump administration’s efforts have sought to weaken federal workers’ collective bargaining rights and make it harder for federal employee unions to do business with their members.

By paving the way for legislation like Act 10, its sister law passed in Iowa in 2017, and Trump’s executive orders, divided labor law thus continues to shape the fortunes of organized labor today. For public sector unions, the only legal development at the national level has been a dramatic step backward as a result of the recent Supreme Court decision Janus v. American Federation of State, County and Municipal Employees (2018). The case was in some ways the culmination of attacks on public sector unions at the state level begun in 2011. As anti-union opponents achieved legislative success in over a dozen states across the country in the 2010s, they expanded their efforts to the judiciary as well (Scheiber and Vogel 2018). One legal avenue these groups pursued was a “paycheck protection” movement that sought to challenge how and in what ways unions could collect dues. Prior to Janus, any government employee who did not join a union but was covered by that union had to pay an agency fee to the union, also known as a “fair share” fee. Labor unions argued that this fee, which is expressly not used for political activity, prevents workers from free riding by enjoying the benefits of the union without joining or paying for the union representation they are receiving. In contrast, opponents argued that all activity by public sector unions, including negotiating contracts, is inherently political and thus non-members should not be forced to subsidize activities that violate their free speech.

In 1977, the Supreme Court in Abood v. Detroit Board of Education made a distinction between agency fees that went toward collective bargaining and money that went toward political activities. The Court held that nonmembers’ dues being used for political activities was a violation of their First Amendment free speech but that agency fees were not a violation and helped prevent free riding. In Janus (2018), the Court reversed its decision, ruling that “in addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters” and thus merits First Amendment protection. The Janus decision essentially makes public sector employment equivalent to private sector employment in right-to-work states where non-members can opt out of supporting the union that is representing them in collective bargaining. It is unclear at this time how much money public sector unions will lose or how many members they will be expected to represent without financial support. Thus, rather than a floor of protection through a public sector Wagner Act, government employees have instead been dealt a crippling blow that serves as a ceiling, preventing states from passing more union-friendly legislation. National legislation like the Wagner Act that grants a floor of protection provides the most potent, durable, and meaningful rights, but, like Taft-Hartley, decisions at the national level that undermine rights can have the reverse effect, dampening rights across the country.

Labor’s Effectiveness: The Lack of a Nationally Cohesive, Geographically Diverse Movement

Whereas the Wagner Act gave private sector workers the fundamental right to unionize, as the preceding examples illustrate, the rights of public sector employees have proven more vulnerable. There is no firm commitment at the national level that government “employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing” (NLRA 1935, Sec. 7). Instead, as the AFSCME president Jerry Wurf noted in testimony to Congress in 1974, “No one pattern prevails among the 50 states and 80,000 governmental units, save one: that public employees are no where near the equals of workers in the private industry” (Wurf 1974, 4). Federalism as a governing structure welcomes experimentation and innovation at the state and local levels. Experimentation in public sector labor law might sound appealing because it allows union-friendly states to pass very generous legislation. Indeed, in some states government employees possess greater rights than do their private sector counterparts, such as mandatory card-check certification, a much more manageable means of organizing a union than the traditional NLRB election procedure. But these gains come with serious costs; state- and local-level collective bargaining laws will never be on an equal footing with national-level rights because of the inherent differences between the two: national-level rights create a durable level of uniform protection that state-or local-level laws cannot provide.

In thinking through the consequences of divided labor law, it is helpful to consider the alternative. What if public sector employees had been included in the Wagner Act or received their own national-level law? Public sector unions might have had more success than private sector unions in hostile states if given the chance through a national-level law that protected their collective bargaining rights because of the constraints on public sector employer resistance. Private sector unions have struggled to organize new members as a result of the outdated legal framework that fails to constrain employers’ union-avoidance strategies; hostile employer resistance—and the legal framework that permits it—is a significant barrier to union organizing at the federal level. As discussed earlier, public sector employers face pressures that discourage such vehement resistance and lack many of the tools, like employment-at-will, that private sector employers use to resist union organizing. If given national collective bargaining rights, and with a more amicable organizing environment, public sector unions would be able to make inroads into anti-union states. Instead, government unions are limited in their growth by lack of collective bargaining rights in anti-union states and renewed attacks in previously safe states; their geographic concentration and vulnerability mean the entire labor movement is smaller and less secure than it could be and unlikely to change without labor law reform. Thus, while the public sector union density spike in the 1960s–1970s slowed the decline of overall union density, this trend is unlikely to continue because government unions have reached the limits of state-level innovation.

What about private sector unions? Would they benefit from private sector labor law devolving to the state and local levels in order to end the national stalemate, as Richard Freeman (2006) and other have suggested? In the short run, private sector union density might increase as employees’ collective bargaining rights would be strengthened in union-friendly states. Ulti- mately, however, this would leave private sector employees just as vulnerable as their public sector counterparts to retrenchment of their fundamental collective bargaining rights. The example of the one aspect of private sector labor law that has been left up to the states, Section 14(b) of Taft-Hartley, is a sobering reminder. Although Taft-Hartley is a national-level law, Section 14(b) does not mandate or outlaw right-to-work but instead gives states the option to become right-to-work states. In other words, 14(b) is a federalism provision within a national law. Leaving the decision of right-to-work up to the states has resulted in the same variability as seen in public sector labor laws at the state level: Michigan passed a right-to-work law in 2011, Wisconsin in 2015, West Virginia in 2016, and Missouri in 2017 (Missouri voters overturned the law in July 2018). All of this suggests that a national law protecting both public and private sector collective bargaining rights would offer the most protection for American labor unions and the best possibility for expansion.

Organized labor’s political success depends on geographically diverse union density. A high-density labor movement translates into economic and political leverage, and if labor is geographically diverse, this leverage can reach a filibuster-proof level in the Senate. While union-friendly states with generous laws have provided a safe haven for union strength, they are not sufficient to create a large, geographically diverse union movement. The extension of collective bargaining rights has been crucial to the growth of union density, both private and public. However, most public sector unions continue to be concentrated in union-friendly states that have passed collective bargaining statutes. These unions have, in turn, responded by focusing a disproportionate share of their political resources at the state and local levels. Until a floor of protection exists for all public sector employees, we are unlikely to see dramatic growth in union densityd akin to what we saw in the 1930s and 1940s for the private sector and the 1960s and 1970s for the public sector. Thus, the experimentation within federalism does not benefit the labor movement despite the generous public sector provisions in some states, because these union-friendly states do not make up for the states where public sector employees lack few or any collective bargaining rights, nor do they promote a geographically diverse, nationally focused, strong, unified labor movement.

Divided Unions

This project set out to understand organized labor’s current political weakness and the seemingly divergent paths of private and public sector unions over time. In doing so, this work has focused on explaining why public sector union density rose dramatically in the 1960s and 1970s and then plateaued at the very time private sector union density began declining precipitously, as well as on the consequences of these separate development paths and the resulting public sector union ascendency for organized labor’s political activities. The separate density patterns displayed in Figure 1 are neither natural nor inevitable. Instead, this project has focused our attention on the timing and sequencing of when public and private sector employees gained collective bargaining rights and where they obtained these rights. The United States stands apart for the divided nature of its labor law with private sector labor law firmly entrenched at the national level and public sector labor law relegated to the states and localities. Divided labor law is a crucial link in explaining the weakness of organized labor in American politics today.

The passage of the Wagner Act in 1935 consolidated private sector labor law at the national level, whereas public sector labor law remained unconsolidated, leaving the institutional environment of the public sector unstable. Federalized labor law is problematic because public sector collective bargaining rights remained unresolved and the state and local levels do not offer rights equivalent to those at the national level; public sector unions could never achieve the same rights and results at the state and local levels that they could if they had applied equal organizing effort under a national law.

In the long run, federalism has not done organized labor any favors. Federalism enabled public sector innovation at the state and local levels, but this innovation is also a vulnerability because federalism, as a governing concept, allows and even encourages experimentation at lower levels of government. Absent a floor of protection and pressure for uniform treatment across jurisdictions, public sector collective bargaining rights have been unequal and under continual change, including retrenchment, at the state and local levels. Government unions’ legislative successes ultimately have been limited. They have been limited to union-friendly states, reinforcing the geographic concentration of labor. As Jerry Wurf explained, AFSCME preferred “a federal law governing state and local government labor-management relations, than to dribble out our lives trying to convince 50 state legislatures, 5,000 city councils, 10,000 school boards and who knows how many other public bodies to devise an impartial mechanism at the lower level” (quoted in Flynn 1975, 83). Absent a national law, “dribbling out” their time pursuing stateand local-level collective bargaining rights was the only option for public sec- tor employees and unions, and they were doing just that in the 1940s and 1950s at the very moment the private sector labor movement reached its peak of power and influence.

The separation of public sector labor law from private sector labor law prevented a large unified union movement in the aftermath of the Wagner Act that could have pressed for more generous New Deal policies. The exclusion of government employees from the Wagner Act and the lack of their own national statute meant public sector union growth was delayed, fundamentally altering the labor movement as public and private sector unions’ development was thrown out of alignment. In other words, the timing and sequencing of when public and private sector employees gained collective bargaining rights discouraged cooperation and a strong, unified labor movement. Private sector unions thrived in the 1940s and 1950s, while public sector unions were only managing handshake agreements with some employers, devoting significant time and resources to fights in every state and locality for basic recognition.

It wasn’t until the 1960s that government unions found legislative success at the state level and grew precipitously. Public sector unions’ legislative success was limited, however, because economic crises and conservative backlash at the end of the 1970s closed the window of opportunity for public sector union rights legislation at the national level. The brief moment when high private sector union density overlapped with a strong public sector— the 1970s—was one of missed opportunities as the public sector unions, delayed in their growth because of divided labor law, encountered an already entrenched private sector labor leadership rather than an ally. The cultural, economic, and political crises of the decade magnified labor’s differences, making a strong public-private labor movement in the 1970s difficult.

Tracing the separate development trajectories of public and private sector unions leaves us with one fundamental question: “What would have happened if the most political unions [the public sector unions] had been larger and more influential in the labor movement’s formative years, or when labor was larger and more influential within society as a whole?” (Slater 2004, 200). The conclusions reached in this project emphasize the overwhelmingly negative effects of divided labor law. Public sector union growth came after the peak of private sector union strength, too late to have a significant effect on New Deal politics, assist in the opposition to Taft-Hartley in 1947, or help exert pressure for national labor law overhaul before the window of opportunity closed at the end of the 1970s. Further, public sector unions were forced to fight their way into an already established labor movement, meaning their politicized, social justice outlook was derided instead of welcomed, and labor eschewed rather than joined forces with the New Politics movements that the public sector unions were associated with. The labor movement that emerged at the end of the 1970s was divided, overly complacent, and ill prepared to deal with the challenges of deindustrialization and the growing hostility of employers and the state to unionization. Now that government unions have become such a dominant force in the labor movement, their legal vulnerability has made them ready targets for anti-union forces.

The timing and sequencing of when public sector employees gained their collective bargaining rights compared to their private sector counterparts is also crucial because labor unions’ power and influence comes not just from the sum of the individual unions but also through their organization into a larger federation, the AFL-CIO. The timing of public sector union growth meant private sector unions peaked when almost all public sector employees still lacked collective bargaining rights. The delayed growth of public sector unions meant the AFL-CIO was never comprised of a unified union movement representing private and public sector unions, both at their peak of power and membership.

Looking toward the future, the volatility surrounding public sector collective bargaining rights will persist as long as states and localities remain sites where the basic tenets of public sector unionism can be contested. Without major partisan shifts in the United States, government unions are unlikely to dramatically increase their density. In states where public sector unions have had success, their enduring high density has made them glaring targets as private sector union density continues to drop. Absent something drastic that enables an overhaul of private sector labor law or a federal guarantee for public sector collective bargaining rights, the American labor movement must confront an uphill battle to retain existing membership levels and political relevance. Organized labor faces an uncertain future in part because of the constraints placed on it by public policies, which have molded and patterned the labor movement’s development. Divided labor law shaped the development trajectory of public sector unions—including their more unequal and vulnerable collective bargaining rights—as well as contributed to today’s declining, geographically concentrated labor movement. Ultimately, divided labor law has weakened organized labor as a force in American poli- tics with potentially important ramifications for the representation of the working class in our democracy.

Policy Consequences

This project is a powerful illustration of the potent role public policies—in this case divided labor law—can play in shaping the internal dynamics and external fortunes of a seemingly private organization: organized labor. Policies may play a significant role in shaping other private organizations, including corporations, nonprofits, and PACs. Thus policymakers should be fully aware of the impact policies can have on organizations and the environment they operate within, two things that are often thought of as external to politics. Further, the conclusions drawn in this project about federalism should apply to other cases as well. Rights and privileges relegated to the state and local levels, absent a floor of protection, should display the same vulnerability to retrenchment as have public sector collective bargaining rights. Right-to-work laws, consumer protection laws, and election laws (e.g., voter ID laws and primary election rules) should all exhibit this feature of federalism. Lawmakers’ decision to devolve to the state and local levels should not be made without an appreciation of the vulnerability such federalized arrangements entail. The conclusions reached in this project address a larger universe of cases but also contain important lessons for thinking about organized labor’s central and threatened place in American politics today.

During an interview I conducted with a local labor leader in Wisconsin in 2012, he was visibly upset and distracted, having just met with a police officer before our meeting. At the end of our conversation, he revealed that he had arrived at the office that morning to find their American flag had been stolen from the flagpole outside. The police officer had told him it was likely just some local vandals, but the labor leader couldn’t help but think that it was something more, that it was someone making a statement about unions, and people like him, being unpatriotic (Interview #25). Today’s attacks and rhetoric against organized labor should not make this leader or the public doubt the important role labor plays in American politics. Union forces, whether it was the CIO in the 1930s or the public sector unions in the 1960s, have been at the forefront of American progressivism, helping mobilize broad swaths of Americans to become involved in politics and in protecting the interests of working Americans.

In the future, public sector unions, weakened due to their legal vulnerability and the attacks this has allowed, appear unlikely to continue to stave off private sector union decline. Labor’s decline poses a significant threat to the representation of working Americans’ interests in our political system and the rise of economic inequality and insecurity.3 As McCartin notes, “With less than 7 percent of nongovernmental workers unionized, private sector unions no longer have the leverage to improve wages and benefits for those beyond their ranks. Thus, by default, public sector unions have become the single most effective social force capable of speaking out for a just economy that lifts the standards of all workers, public and private” (2011a, 50). Thus, the institutional forces that have contributed to private sector union decline and the unequal and vulnerable collective bargaining rights of public sector workers should be of concern to all Americans.

As a consequence, the importance of national labor law reform, which includes both private and public sector union members, should be recognized as crucially important to ensuring representation of working Americans’ interests in our political system. National-level rights create a floor of protection that is not present in state- and local-level provisions, and this is fundamental to fostering a vibrant, cohesive labor movement. National-level laws also may institute a ceiling, restricting the bounds of rights provision. Labor scholars have rightly pointed out that the Wagner and Taft-Hartley acts, by creating a ceiling, have limited some of the more radical tools in private sector unions’ repertoire like boycotts and wildcat strikes (Tomlins 1985). However, unlike a floor, a rights ceiling is not an inevitable feature of national-level laws and, when we compare national-level rights to state- and local-level rights, national-level rights provide more uniform, stable, durable protections. With decentralized rights, very generous laws in some states are insufficient to make up for the states with no rights provisions.

The content of public sector collective bargaining rights certainly has important ramifications for contract negotiations and other aspects of labor union success, and ceiling provisions can be major stumbling blocks, but the fundamental right to organize must take precedence over the generosity of that right; one must get a foot in the door before negotiations can even begin. After all, once one has a foot in the door with the right to collectively bargain, higher levels of union density foster greater economic and political influence, which public and private sector unions can leverage to lobby for more generous collective bargaining rights. As the “Officers’ Report” of the 1950 United Public Workers of America convention put it at the time: “Civil rights are not academic. They are the means by which all other rights are to be obtained. For years we have pointed out that the rights of public workers and their unions must be protected, or the rights of all workers and their unions would be destroyed” (UPWA 1950, 34). A nationally protected right to form and join unions and collectively bargain was as fundamental in 1950 as it is now for creating the foundation of robust union organizing. Absent that protection, this weakness has been exploited as anti-union opponents have targeted public sector union rights as a first step in taking on the entire labor movement.

What could a national Wagner Act for public sector employees look like? In the 1970s, legislation was proposed that would simply delete the section defining “employer” in the Wagner Act as not including federal, state, or municipal governments (Brown 1974). Such a law would then place public sector workers within the framework of the Wagner Act and under the auspices of the NLRB. In the 1930s, this would have been the obvious choice and dramatically altered the course of labor’s development. However, now that public sector labor relations are established, state laws exist across the country, and there remain key differences between the public and private sector, this straightforward solution may lead to a great deal of conflict and uncertainty over issues like strikes by public safety workers and what happens in states with more generous collective bargaining rights for government employees than the Wagner Act. The more mainstream legislation in the 1970s, the National Public Employees Relations Act, instead proposed a separate law, analogous to the Wagner Act, but with key differences to conform to the unique nature of public sector labor relations. The bill permitted strikes but only after other mediation procedures had been exhausted and included the exception of “clear and present danger to the public health or safety” (Brown 1974, 715). The bill contained more generous collective bargaining rights than the Wagner Act, including not permitting right-to-work, whereby nonmembers can freeride by not paying dues, and allowing supervisors to organize. The bill would preempt weaker state laws, all but guaranteeing that every state collective bargaining law would be replaced by the more generous national law (714–715).

The reality today is that Supreme Court decisions, beginning with National League of Cities in 1976, have made it less clear that the Court would uphold the constitutionality of a single national law that wipes out existing state laws like those introduced in the 1970s. Thus, new legislation introduced in Congress the day after the Supreme Court’s Janus decision in 2018 offers more of a hybrid approach. The bill, known as the Public Service Freedom of Negotiation Act (PSFNA), would guarantee “the rights of public employees to form or join unions, act concertedly for the purpose of collective bargaining or other mutual aid or protection, and bargain collectively with their employers” (PSFNA 2018, Section 2(b)). The bill would create a federal authority that would establish what these basic collective bargaining rights entail and would then assess whether each state meets these minimum standards. States that meet these standards would keep their own laws and procedures. States that do not meet these standards would fall under the authority’s regulations and oversight with the authority acting in much the same way as the NLRB in the private sector (Sections 4 and 5). The bill expressly prohibits strikes by public safety workers (Section 6(a)). While still allowing some state autonomy, this new legislation mandates the floor of protection for public sector employees that has been lacking and so consequential for government unions and organized labor since the Wagner Act in 1935. Given the current partisan makeup, this bill will be dead on arrival in the 116th Congress. However, it does offer a concrete policy option for addressing divided labor law and working to revitalize the labor movement in the future.

Absent national labor law reform, private sector union density is unlikely to bounce back without updates to existing law that rein in hostile employer resistance. Likewise, the instability of public sector collective bargaining rights and the large portion of government employees lacking any rights are likely to continue until government unions receive a national-level law of their own. Jerry Wurf’s declaration at AFSCME’s 1972 convention still holds true today: “The needs of our membership in the fifty states for the rights and protections such as those extended to other workers cannot be met by a law here and a law there” (quoted in Hower 2013, 301). Public sector collective bargaining rights will remain vulnerable; public sector union success will remain limited; and labor will continue to punch below its political weight until a national statute protects public sector employees’ collective bargaining rights.

Ultimately, organized labor wants their members to believe that “what separates us is so little compared to what we share,” but divided labor law has served as a countervailing force sowing division and discord within labor’s ranks (WI AFL-CIO Convention, October 2, 2012). Examining the development of public and private sector unions over the last half century reveals that public policies have influenced the course of organized labor’s development. Divided labor law is not an inconsequential division but rather has acted as solidarity’s wedge, limiting the cohesion, the effectiveness, and ultimately the strength of organized labor in American politics.

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#### Distinguishing fails. The legal justifications result in limited remedies, misapplications, and increased vulnerability.

Angela D Morrison 20 - Associate professor at Texas A&M University School of Law. “Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures,” Winter 2020, Baylor Law Review 72(1), pp. 117-164.

Although unauthorized workers have successfully argued that they are protected under federal antidiscrimination laws, courts have failed to provide full protection to unauthorized workers. Just over a decade after Congress enacted IRCA, the Supreme Court decided Hoffman, in which it found an unauthorized worker was not entitled to backpay because of his unauthorized status.54 Advocates and scholars worked to develop legal justifications to distinguish workers seeking protection under Title VII from workers seeking protection under the NLRA.

Title VII of the Civil Rights Act of 1964,55 prohibits employers from discriminating against workers on the basis of sex, race, national origin, color, or religion.56 Those protections include prohibitions on subjecting an employee to a hostile work environment or harassment, disciplining an employee, terminating an employee, or subjecting an employee to different terms or conditions of employment. 57 Title VII similarly prohibits employers from retaliating against employees who exercise their rights under Title VII. 58 Other federal antidiscrimination statutes protect employees from discrimination on the basis of disability or age.59

The Supreme Court has not addressed directly whether IRCA bars unauthorized workers from seeking relief under federal antidiscrimination laws. But the Supreme Court's 2002 decision in Hoffman Plastic Compounds v. NLRB did address whether unauthorized workers could obtain relief for their employers' violations of the National Labor Relations Act. 60 In Hoffman Plastic Compounds, a group of workers had participated in a union organizing campaign at the company's production plant. 61 The company subsequently laid off the workers who participated in the campaign.62 The NLRB eventually determined that the company had laid off the workers because of their union organizing activities, a violation of the NLRA.63 The NLRB ordered the company to remedy the violation, including that the company reinstate and provide backpay to the workers it unlawfully laid off. 64

An administrative law judge held hearings to determine the amount of backpay the company owed to each worker.65 During the hearings, one worker testified that he lacked immigration status and admitted that he used someone else's birth certificate to obtain the documents he needed to work in the United States. 66 The NLRB awarded the worker backpay, reversing the ALJ's decision to deny backpay, for the period from when the company laid off the worker to when it discovered the worker lacked immigration status.67 When the case reached the Supreme Court, the Court held the National Labor Relations Board lacked authority under the National Labor Relations Act to award backpay to an unauthorized worker. 68 The Court pointed to IRCA to support its decision, writing "allowing the Board to award backpay to [unauthorized noncitizens] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." 69

Subsequent to the Court's decision in Hoffman, employers argued that federal antidiscrimination laws either do not apply to unauthorized workers because the employment relationship was not valid in the first instance 7 or that Hoffman limits the remedy to which workers are entitled." For the most part, employers have been unsuccessful with the former argument7 and successful with the latter.7 Given the success of the latter argument, employers use the reasoning in Hoffman to argue that because the decision limits the remedies to which unauthorized workers are entitled, discovery into workers' immigration status is warranted.7 4

When courts have determined workplace laws extend their protections to unauthorized workers, they have relied on two justifications.75 The first justification, the "proxy" justification, is that to ensure the protection of authorized workers, that is, United States citizens and noncitizens with authorization, in the workplace, workplace protections must extend to unauthorized workers. 76 The second justification, the "deterrence and accountability" justification, looks at the impact on employers' overall compliance with federal workplace laws. 77 Under this justification, courts protect unauthorized workers because to do otherwise would allow employers to evade accountability and would fail to deter employers from engaging in discrimination in the future.78

But the justifications do not provide full protection to workers, as described below. 79 First, the justifications can increase vulnerability in the workplace because they reinforce harmful stereotypes about unauthorized workers as either subservient or criminal. Second, the justifications result in limited access to remedies because the proxy justification only extends protections to unauthorized workers to the extent necessary to protect authorized workers.

A. The Proxy Justification

There are two strands to the proxy justification. First, failing to protect unauthorized workers from discrimination in a specific workplace will deteriorate employment conditions for all workers in that workplace. As Hiroshi Motomura has noted, "courts sometimes recognize that unauthorized workers have workplace rights and remedies because any other outcome will harm citizens and noncitizens who are working lawfully in the same workplace." 8 0

Similarly, courts and advocates sometimes assert that allowing unauthorized workers to assert workplace claims protects citizen and authorized workers because it reduces unauthorized immigration over the long term.81 According to proponents of this justification, reducing unauthorized migration will result in more jobs for the authorized workforce. 82

Second, barring unauthorized employees from bringing claims would also chill others' claims under federal antidiscrimination laws. This undermines all workers' employment rights because federal workplace laws rely on workers to act as private attorney generals for enforcement. 83 The court in EEOC. v. Restaurant, Co., relied, in part, on this justification when it determined that the plaintiff had standing to pursue her Title VII claim even though she was unauthorized. 84 There, the employee alleged that her supervisor subjected her to a hostile work environment based on her sex and that her employer failed to promote her after she complained about her supervisor's harassment.85 The employer argued that the employee was not entitled to bring a Title VII claim because she "may be" unauthorized.8 In holding that unauthorized workers have standing to bring Title VII claims, the court wrote, "Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII.. . . [A] ruling that undocumented workers could not pursue civil rights claims on their own behalf would likely chill these important actions.",8

Courts rely on similar reasoning to bar discovery into employees' immigration status.88 In Rivera v. NIBCO, Inc., the Ninth Circuit affirmed the district court's grant of a protective order that prohibited the employer from conducting discovery about the employees' immigration status. 89 The workers in Rivera were Latina and Southeast Asian women who had limited English proficiency.90 The employer required the women to take a basic job skills exam administered only in English, even though the women's job duties did not require English proficiency. 9 1 When the women did not perform well on the test, the employer demoted or transferred them to undesirable jobs, and eventually the employer fired them. 92 During a deposition, the employer asked one of the women where she was married and born.93 Her attorney instructed her not to answer and requested a protective order to prevent inquiry into the women's immigration status and into information likely to lead to discovery of the women's immigration status.94

When the court granted the protective order, it emphasized the chilling effect that allowing discovery would have on not just unauthorized workers, but also on authorized workers: "[e]ven documented workers may be chilled by the type of discovery at issue here."9 5 It concluded that allowing discovery into immigration status would "unacceptabl[y] burden the public interest" in light of Title VII's "dependence on private enforcement[.]"96 The U.S. district court for the District of Columbia adopted similar reasoning when it granted a protective order that barred the employer from discovery into the employee's immigration status, writing the "chilling effect disadvantages all workers as it makes it less likely that discriminatory practices will come to light and be appropriately dealt with in a court of law." 97

B. The Deterrence and Accountability Justification

Deterrence and accountability as a justification stems from the idea that protecting unauthorized workers from unlawful discrimination is necessary to hold employers fully accountable under both antidiscrimination laws and IRCA. 98 Moreover, accountability is important because it deters future violations of the law.99 In EEOC v. Restaurant Co., the court relied on deterrence and accountability when it found that unauthorized workers may bring Title VII claims, "[t]he Court also considers the need to reduce employer incentives to hire undocumented workers because of their inability to enforce their rights." 0 0 The Rivera court also highlighted accountability and deterrence as justifications for protecting unauthorized workers: "Congress has armed Title VII plaintiffs with remedies designed to punish employer who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers."'1

Other courts have relied on the deterrence and accountability justification. In EEOC v. Maritime Autowash, Inc., the EEOC applied to enforce its administrative subpoena that sought information from an employer alleged to have discriminated against an unauthorized worker based on his national origin.0 The employee alleged that after he was hired, his manager told him that his name did not match his social security number.' 03 So the employee said that the manager told him to get new documents with a new name. 4 The employee did.10 5 After a DHS audit, the employee claimed the company owner and a manager gave all of the Hispanic employees $150 for a one-time bonus and said that they should use them to get new documents with new names.10 6 The employer rehired the employees.10 7 Subsequently, the employees complained to the employer that Hispanic employees faced "longer working hours, shorter breaks, lack of proper equipment, additional duties, and lower wages."' 08 The employer fired them.1 09

When the employer resisted the subpoena and the EEOC sought enforcement, the employer argued that the EEOC had no basis to issue the subpoena because an unauthorized worker had no "standing or right to seek remedies under Title VII[.]"" 0 The court rejected that argument writing, the employer "is asking the court for carte blanche to both hire [unauthorized workers] and then unlawfully discriminate against those it unlawfully hired. [The employer] would privilege employers who break the law above those who follow the law.""

Officials at the agencies that enforce antidiscrimination laws, also rely on this justification to refrain from asking workers about their immigration status. Shannon Gleeson interviewed government officials at state and federal agencies that enforce workplace rights, including the EEOC.n2 When Gleeson asked an EEOC official why the agency did not ask claimants about their immigration status, he asserted that allowing employers to evade workplace laws would create incentives for employers to evade immigration laws: "if his agency were not allowed to enforce the rights of all workers, employers would be emboldened to hire undocumented workers solely 'with the intent of exploiting them.""' 3 And this would "reinforce the demand for undocumented labor." 1 4

Relying on the proxy justification and the accountability/deterrence arguments has meant that advocates have been successful in arguing that federal antidiscrimination laws include in their protection unauthorized workers."1 1 Although these justifications lead to some workplace protections for unauthorized workers, they also limit the workers' exercise of their rights. As the next section shows, these justifications ultimately harm the rights of unauthorized workers. They reinforce notions that unauthorized workers are less morally deserving of the court's protection than authorized workers and subject unauthorized workers to scrutiny not faced by authorized workers seeking to assert their workplace rights.

C. The Limits of Current Justifications for Protecting Unauthorized Workers

Viewing unauthorized workers as proxies for United States citizen workers and authorized workers, may provide some protection for workers but it also makes unauthorized workers more vulnerable. Likewise, focusing on employer accountability and deterrence also results in unauthorized workers receiving less protection than authorized workers. First, the deterrence and accountability justification reinforces stereotypes about immigrant workers, and, unauthorized workers, in particular. It casts the unauthorized worker in either the role of the subservient and exploited worker, or as a criminal. Second, the proxy justification shifts the focus from the protected worker part of the employee's identity to the unauthorized part of the employee's identity. It emphasizes how unauthorized employees are different from authorized employees, that is, in the legality of their employment relationship in the first place. The result is more vulnerability in the workplace and limited access to remedies.

1. More Vulnerability in the Workplace

The narratives that flow from the accountability/deterrence justification result in more workplace vulnerability for unauthorizes workers. The narrative frames the harm as the employer's failure to obey immigration laws not employment laws. Relying on a narrative that "focuses on immigrant workers as victims of criminal employers who fail to obey the rule of law"116 can create "stereotypes and classes of outsiders, resulting in disfavoring immigrant workers who do not fit the role of the 'good immigrant'-the iconic hard worker or victim."" 7

Three problems flow from this framing." 8 First, it provides an incentive for employers to show that an employee is not a "good immigrant" because the employee violated criminal laws. It thereby emphasizes the viewpoint that unauthorized workers are criminals who broke the law to obtain employment.! 19 As described below,120 that can lead to limited remedies in antidiscrimination claims, it also, as Lee notes, feeds into the general "criminalization hysteria" surrounding immigrants.12 1 This results in a cycle in which immigrant workers are targeted for enforcement actions rather than employers.12 2 Second, unauthorized workers "may have to act the part of the powerless victim to achieve results, although that may be contrary to their personal empowerment. It can also mean that the abuse must be egregious enough that the workers can cast themselves as powerless victims.

Third, casting unauthorized workers solely as victims of unscrupulous employers makes them into "essentialized workers who are divorced from their individual characteristics as human beings[.]"12 4 This plays into the stereotype of the subservient immigrant worker who will take the jobs that authorized workers will not-for lower wages and under more dangerous conditions.12 5 Employers, then, can take advantage of the stereotype and use it to justify their treatment of unauthorized workers, casting unauthorized workers as freely consenting to the conditions and lower wages. 126 This narrative regularly appears in media reports about workplace raids. 'For example, in 2018, ICE conducted a raid on a worksite in Mount Pleasant, Iowa.127 ICE arrested thirty-two employees, but not the employer. NPR interviewed an employer in the town about unauthorized workers and the employer responded that businesses needed immigrant workers because businesses had difficulty filling jobs with authorized workers, "It is so hard to get people in the door just to sit down and interview . . . You're afraid you're going to scare them off. Any little thing that you do, they won't show up for the first day of work." 12 9 Other recent media reports reflect the same narrative. A New York Times article had the following lede: "As a tight labor market raises costs, employers say the need for low-wage help can't be met by the declining ranks of the native-born."' 30 And after workplace raids in poultry processing plants in Mississippi in 2019, people in the towns affected by the raids reported that they didn't believe that workers who were U.S. citizens would remain in the jobs because "of the simple fact that the jobs are hard . . . [i]t's something they didn't see themselves doing growing up. Something they don't want to do" and "American-born residents 'didn't want to work, period.""3 ' These narratives reinforce the stereotype that unauthorized workers will take jobs that authorized workers will not-at lower wages and under more dangerous conditions.

In short, the justifications play into stereotypes about unauthorized workers. Because of their unauthorized status, they are viewed as lawbreakers, on the one hand, but because of their employers' actions they are viewed as exploitable victims, on the other hand. The stereotypes work to shore up the employer-created narratives that unauthorized workers consent to unequal work conditions, including harassment, low wages, and unsafe work environments.

2. Limited Access to Remedies

The proxy justification has led to limited access to remedies. It has resulted in the misapplication of the after acquired evidence doctrine and the mixed motive defense. And that misapplication matters because it has chilled employees from pursuing their workplace rights in the first instance or in foregoing full remedy for their employers' violations. The misapplication of doctrines in the Title VII context stands in contrast to how courts apply similar doctrines in the FLSA context.

The difference between authorized workers and unauthorized workers has resulted in courts misapplying legal doctrines, such as the after-acquired evidence doctrine and Title VII's mixed motive defense. In Title VII litigation, employers may assert a defense to limit liability for illegally terminating an employee when they subsequently learn that an employee engaged in employment-related misconduct.1 32 Normally, an employer must prove "by a preponderance of the evidence" that it would have terminated the employee had it known about the misconduct.13 3 When an employer successfully proves that it would have fired the employee, front pay and reinstatement become unavailable to the employee, and backpay is limited to the period prior to the employer discovering the misconduct.13 4 But some courts have used the doctrine to limit recovery despite the difficulty of proving that the worker's unauthorized status would have resulted in the worker's termination or to bar a plaintiff's claims entirely because the employee lacked work authorization.'35 Thus, courts' focus on the unauthorized status of the workers short-circuits the burden of proof that the court would require if the employee were authorized.

Another doctrine that courts misapply to unauthorized workers is the mixed motive defense. If an employer's actions were motivated both by a discriminatory reason and another non-discriminatory reason, an employer is still liable under Title VII.1 36 However, an employer may avoid damages and some equitable relief if the employer proves that it would have taken the unlawful employment action anyways because of the nondiscriminatory reason:

(B) On a claim in which an individual proves a violation .. and [an employer] demonstrates that the [employer] would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim ... ; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [backpay]. 13

Under this doctrine, then, the employer should be required to show that it took the action, in part, because of the worker's unauthorized status.

But some courts have not required that employers show they took the action because of the employee's status, and instead have determined that the unauthorized status, itself, forecloses backpay. For example, although the court in Escobar v. Spartan Security Service' 38 held that Title VII applied to an employee who was unauthorized when he worked for the employer, 139 the court determined the employee could not recover backpay for the period during which he was not authorized to work. 140 Other cases similarly have found that the EEOC may not seek backpay or reinstatement when the employee is unauthorized.141 In these cases, the court did not require the employer to prove that it would have taken the action because of the workers' immigration status or that it was motivated, in part, by the workers' status. 4 2 Moreover, because the cases involve hostile work environments, it would be difficult if not impossible, for the employers to make that showing.

The misapplication is significant because it disincentivizes workers from bringing claims. Lack of immigration status chills workers from bringing claims in the first place, 143 but the lack of remedy further deters workers. As Kati L. Griffith and Shannon M. Gleeson note "unauthorized employees are also disincentivized from claiming because there is little clarity about whether they have the same rights to monetary remedies . .. as compared to their authorized counterparts." 144 It matters that courts have prevented unauthorized workers from achieving full remedy because it prevents them from bringing claims.

In other cases, the EEOC or the worker pre-emptively decide not to pursue remedies to avoid discovery into the worker's immigration status. 14 5 In EEOC v. DiMare Ruskin, the EEOC alleged that supervisors subjected two female farmworkers to a hostile work environment because of sex. 146 The conduct included one supervisor telling one of the women that he wanted to kiss her all over, including her breasts, and that he would never stop pursuing her; it also included one supervisor forcing one of the woman's hand to his crotch. 147 The EEOC moved for a protective order to bar the employer from asking about the employees' immigration status. 148 The court granted it. 149 As part of its reasoning, the court wrote, "ft]his case deals with sexual harassment and unlawful termination for refusing to comply with a supervisor's sexual advances. All individuals, both citizens and immigrants, are protected from unlawful employment discrimination under Title VII." 150 But the court premised its grant on the workers' foregoing their right to backpay, reinstatement, or front pay, concluding "since [the workers] are not seeking backpay, front pay, or reinstatement, the [workers'] immigration status is irrelevant as to damages calculations." 15' Thus, plaintiffs often do not seek the full array of available remedies when they do bring claims. They forego seeking backpay, front pay, and reinstatement;' 5 2 all of which are remedies to which successful Title VII plaintiffs are entitled. 53

#### Hoffman makes immigration status relevant at an earlier stage of litigation, which uniquely chills claimants.

Kati L Griffith 09 - Jean McKelvey-Alice Grant Professor and Senior Associate Dean for Academic Affairs, Diversity, and Faculty Development at Cornell's ILR School, associate member of the Cornell Law Faculty, Research Fellow affiliated with NYU’s Center for Labor & Employment Law. “U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law,” Fall 2009, Comparative Labor Law & Policy Journal 31(1), pp. 125-162.

While a growing number of courts have generally limited the reach of the U.S. Supreme Court’s Hoffman decision, Hoffman undoubtedly affects undocumented workers’ incentives to bring lawsuits and enforce their workplace rights.188 For instance, the U.S. Court of Appeals for the Ninth Circuit reasoned that probing immigration status during litigation may dissuade both undocumented and documented workers from bringing legal actions against their employers.189 Undocumented workers may fear detention or deportation and documented workers may fear that the immigration status of their friends and family may be called into question or that their own recently-acquired immigration authorization may be jeopardized in the lawsuit.190 Suggesting that such a probe would damage the efficacy of Title VII’s main enforcer, the employee, the Ninth Circuit Court of Appeals stated that “Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII.”191

The ambiguity about the full effect of the Supreme Court’s Hoffman decision allows the fight over the relevance of immigration status to play a role in earlier stages of the litigation, before remedies are awarded. During the discovery phase of litigation, when the parties exchange relevant documents, request answers to interrogatories, and conduct depositions, many employers argue that they have a right to know the immigration status of the plaintiff. The Hoffman decision, they contend, made immigration status relevant to the question of which remedies are available and therefore relevant to the litigation. Undocumented worker legal advocates have successfully countered these arguments on a number of occasions. So far “[c]ourts have overwhelmingly decided to prohibit the disclosure of immigration status in the context of employment-related civil litigation, often citing the highly prejudicial impact of the disclosure compared to its relatively small probative value.”192 Nonetheless, the threat of Hoffman during these earlier stages of litigation has a profound effect on the process and can limit the assurances that plaintiff attorneys can provide to their clients. It can dissuade workers from making complaints even in the face of some of “the strongest claims for workplace violations.”193

#### NLRB prosecutors won’t pursue cases to certify bargaining units with undocumented workers. Courts use IRCA’s precedence as a justification to refuse bargaining orders.

Michael C. Duff 09 - Associate Professor of Law at University of Wyoming College of Law. “Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace,” 2009, Berkeley Journal of Employment and Labor Law 30(1), pp. 133-192.

The third problem generated by Hoffman arises from underdeterrence. Employers presently have absolutely no disincentive under the NLRA to discharge unauthorized workers. While this problem is most immediately experienced by the individual victims of discrimination, there are less obvious structural consequences that the NLRB must confront.

A. Standard Model of Structural Integrity

Given the problems inherent in cases involving unauthorized workers, it seems unlikely that prosecutorial policy makers would exhibit zeal in pursuing the cases if the fruit of those efforts are fragile, unstable bargaining units. The NLRB's overarching policy of industrial stability2 54 would be ill-served by the certification of collective bargaining units255 containing significant numbers of unauthorized workers, if those units could be easily nullified by the strategic discharge of unauthorized workers who support the union. 256 The NLRA confers bargaining rights only upon labor organizations able to garner the support of a majority of employees in an appropriate bargaining unit.25 7 Thus, any union failing to achieve and sustain majority employee support in an appropriate bargaining unit, whether of authorized or of unauthorized workers, will simply lack the right under the NLRA to bargain for improvements to working conditions. Unit majority support is the touchstone of the entire NLRA statutory scheme.258 Assuming that the NLRB certifies a unit comprised of a substantial number of unauthorized workers, the certification may not mean much if union supporters can be fired until the union no longer enjoys majority support.2 59

B. An Employer's Obligation to Bargain with Unauthorized Workers

While the question of whether unauthorized workers are employees under the NLRA appears resolved, 260 an employer's obligation to bargain with a unit consisting substantially of such workers was until recently an open question. In Agri Processor, the NLRB firmly imposed such a requirement, and a divided panel of the D.C. Circuit Court of Appeals upheld the NLRB determination.2"6' The facts of the case are fairly straightforward.

The Agri Processor Company was a wholesaler of kosher meat products in Brooklyn, New York.26 2 In September 2005, the company's employees voted to join the United Food and Commercial Workers union.263 When the company refused to bargain, the union filed an unfair labor practice charge with the National Labor Relations Board.264 In a subsequent hearing before an administrative law judge, the employer claimed that after the election it processed the Social Security numbers previously given to it by all of the voting employees into the Social Security Administration's online database and discovered that "most"265 of the numbers were either nonexistent or belonged to other people. 66 Based on this development, Agri Processor maintained that most of the workers who had voted in the election were "aliens unauthorized to work in the United States." Agri Processor argued that unauthorized workers were not employees protected by the NLRA and that the NLRB representation election was invalid. The company also argued that a bargaining unit consisting of authorized and unauthorized workers-as the facts eventually showed was the case-was inappropriate. 67

The administrative law judge hearing the case disagreed with the employer's arguments and found that it had violated the NLRA by refusing to bargain with the union. 68 In a terse footnote, the NLRB upheld the judge and unequivocally found that an employer had an obligation to bargain with a unit comprised substantially of unauthorized workers:

With respect to the separate view of our colleague, we note that, unless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees of the Respondent, they remain employees under the Act, they lawfully voted in the election that the Union won, and since the Union lawfully represents the bargaining unit, we do not think it "peculiar" to require the [employer] to bargain with the Union.269

The allusion to peculiarity stemmed from the remarks of concurring NLRB member Peter Kirsanow who observed, later in the same footnote, that:

[A]n order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act... may reasonably be seen as somewhat peculiar by the average person.270

Member Kirsanow was not alone in finding the outcome peculiar. Concurring in the D.C. Circuit's subsequent agreement with the NLRB's determination that the employer was obligated to bargain with a bargaining unit in which "most" of the employees were unauthorized, Circuit Judge Henderson, echoing Member Kirsanow, opined that the situation was "'somewhat peculiar' indeed."2'71 The sense of the peculiarity experienced by these jurists is not articulated beyond an almost casual acknowledgment of the evident conflict between immigration and labor law, which counterintuitively and simultaneously confer and forbid employee status to unauthorized workers. Leaving to one side, however, the issue of employee status, there are additional peculiarities to consider arising from Hoffman's denial of a practical discharge remedy.

C. Consequences of an Employer's Refusal to Bargain with a Union Representing a Bargaining Unit in which "Most" Employees are Unauthorized

Consider the situation of the Agri Processor bargaining unit following the D.C. Circuit's order to bargain.272 Imagine that, subsequent to the order, the employer promptly discharged its unauthorized workers, claiming that it was obligated to do so under the IRCA. Imagine that it then hires new employees to replace the discharged employees. It then withdraws recognition273 from the union because unauthorized workers were a substantial part of the bargaining unit and without them it lost majority support. In such circumstances the NLRB's remedial tool kit would be hard pressed to respond.

First, assuming the NLRB found that the discharges were unlawfully motivated, it is far from clear at this point in the law's development that the employer would not have a perfectly valid affirmative defense for its actions. In other words, it is possible that the employer could simply argue that it discharged the unauthorized workers because they were unauthorized and that even assuming the discharge was also motivated by the workers' protected activity, the primary immigration-related motive barred the finding of a violation.274 Second, even in the absence of a valid defense, the union's majority will have been lost, thus compelling the NLRB to argue that the withdrawal of recognition was tainted,275 and that the bargaining relationship therefore continued to exist as a matter of law. If the employer did not agree, lengthy litigation would ensue as the NLRB attempted to reimpose the bargaining obligation.

In sufficiently egregious circumstances the NLRB would be authorized to expedite the reestablishment of the bargaining obligation by seeking immediate reinstatement of discharged employees through the injunctive relief afforded by Section 10(j) of the NLRA.27 6 Since unauthorized workers have no reinstatement rights, however, the most the NLRB could reasonably seek from a federal district court would be a cease and desist order running to the benefit of the bargaining unit, not to the discharged employees. If the NLRB sought such an injunction, it is quite likely that an employer would voluntarily agree to resolve the matter. It would have effectively destroyed the union's majority and would have no backpay or reinstatement liability to consider. Assuming that the employer was not recidivist,277 the NLRB would be hard pressed to justify injunctive proceedings in a federal court.278 Whether a bargaining order were voluntarily and promptly agreed to at the administrative level, or litigated in a 10(j) court case, it would in either event be a designation for the benefit of future employees,279 whose union sentiments cannot be known.28°

In the unlikely event such a case made its way to a 10(j) proceeding, a court's reaction to the situation would be difficult to predict. Various federal circuits articulate standards for granting a 10(j) injunction differently, but the Seventh Circuit's formulation is reasonably representative of the standard the NLRB often finds most difficult to meet.28'

Like all the circuits, the Seventh Circuit holds that "the district court should issue an injunction before the Board has adjudicated a case where such equitable relief is 'just and proper.' "282 This simply tracks the statutory language. In formulating the definition of when relief is just and proper, however, the Circuit holds that a federal district court should "evaluate the propriety of the Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry. ' "283

The circuit has "outlined the four traditional criteria that a party must demonstrate in order to obtain injunctive relief: (1) no adequate remedy at law, (2) irreparable harm absent an injunction that exceeds the harm suffered by the other party as a result of the injunction, (3) a reasonable likelihood of success on the merits, and (4) 'harm to the public interest stemming from the injunction that is tolerable in light of the benefits achieved by the relief.' ",284 This explicit emphasis on traditional equitable criteria is important because it requires the NLRB to make a showing and indeed to prevail on the traditional "balance of the harms" question.285

It is the fourth criterion of this standard-harm to the public interest-that presents a difficult problem for cases involving an employer's unlawful discharge of unauthorized workers, even if the case arrives at court with no party disputing the discharged workers' entitlement to the NLRB's reinstatement and backpay remedy. Typically the NLRB is confronted, under this "just and proper" standard, with a situation in which a sole public interest-enforcement of the NLRA-is balanced against the private interest implicated in contended interference with the operation of an employer's business.286 In cases involving unauthorized workers, however, the situation becomes more difficult because the public interest policy supporting collective bargaining is in tension with the public interest represented by congressional immigration policy.287

This balance of interests problem would probably be amplified if the majority of unauthorized workers were no longer available for employment in the bargaining unit; a court would have difficulty divining the purpose for which it was providing relief, or even understanding the precise nature of the relief sought. There may be an attenuated public interest in demonstrating to future workers of an employer that prior workers of that employer, who were discharged in violation of the NLRA, would have been reinstated but for their unauthorized immigration status. It seems unlikely, however, that a court would find such an interest injunction-worthy. 88

Suppose a second scenario in which Agri Processor, upon receiving "no match" information,28 9 simply advised the union that while it recognized it as the exclusive bargaining representative of the bargaining unit, and was willing to bargain in good faith, it would not agree to discuss or bargain over any subject relating to known unauthorized workers because the subject would be illegal, 9 ° in light of the IRCA's prohibition of employment of any worker "knowing the alien is (or has become) an unauthorized alien with respect to such employment. "291 Such a position would not reject the employee status of unauthorized workers, which was the ineffective position asserted by the employer in Agri Processor, but rather call into question the efficacy of bargaining with the union over unit employees that are unauthorized workers.2 92 If the number of unauthorized unit employees were large, as in Agri Processor, the employer would have a substantial argument that bargaining would be pointless because, the argument would go, any resulting agreement would be rife with illegal provisions.2 93

The NLRB is familiar with the courts' reaction to mandated bargaining that cannot bear fruit. The Supreme Court, for example, has stated that employers have an obligation to bargain only over subjects that are "amenable to the bargaining process. ' 94 Because an employer has no obligation to bargain over an illegal subject,295 there is low likelihood that any provision the employer can couch as inuring to the benefit of unauthorized workers could become incorporated in a collective bargaining agreement. 296 A bargaining unit comprised of a majority of unauthorized workers would increase the potential for these tactics, and increase the possibility that some courts would simply refuse to enforce an NLRB bargaining order because of the low likelihood of the parties ever reaching a collective bargaining agreement.297

Parsing some additional language from the Supreme Court in Hoffman anticipates another large problem potentially awaiting the NLRB in the courts. The Court found it troubling that the backpay award acted as an inducement for the worker to remain and work in the country unlawfully because an unlawfully discharged, unauthorized worker was required to mitigate backpay losses by seeking and if possible obtaining post-discharge employment. 298 The same could be said of unauthorized workers' inclusion in union-represented bargaining units whose sole aim is to improve the working conditions of bargaining unit members. While not "condon[ing] and encourag[ing] future violations, ' "299 courts might conclude that any benefit flowing from unauthorized workers' inclusion in a bargaining unit would encourage the workers' continued unlawful presence in the country and on that theory refuse to order bargaining. This is yet another reason why employers may experience only limited consequences if refusing to bargain with unions representing bargaining units comprised substantially of unauthorized workers.

### CP – Employment Law – 2AC

### AT: Legalization

## Courts Ptx

### AT: Court Capital – 2AC

#### Courts will rule for Trump AND can’t swing---the opinion’s already written.

Victor Reklaitis 1/14, Washington Correspondent at MarketWatch, previously served in London and New York newsrooms, worked at Investor's Business Daily, worked for newspapers in Virginia, "The Wait for a Tariff Ruling Could Signal a Trump Win — or a Refund Headache," MarketWatch, 01/14/2026, https://www.marketwatch.com/story/the-wait-for-a-tariff-ruling-could-signal-a-trump-win-or-a-refund-headache-e1d55605

Some analysts have said it’s a good omen for Trump if the Supreme Court keeps holding off on releasing its decision. It’s possible that there is significant debate among the justices, rather than a widespread view that lower courts were right to rule in favor of the importers challenging a wide swath of Trump’s tariffs.

“We agree that a long wait for the tariff decision is probably a better sign for the Trump administration than it is for importers, but it is no guarantee of the outcome,” said Kelsey Christensen, a trade attorney at law firm Clark Hill, in an email to MarketWatch on Wednesday. She added that court watchers are “not in long-wait territory yet,” given the court’s track record and the fact that it heard oral arguments in the case just two months ago.

“November to January is lightning speed for the court to hear and publish a major opinion,” Christensen said. “As the wait continues, we suspect that the justices are navigating and fine-tuning a majority opinion in addition to one or more dissents or concurrences.”

#### Plan in June.

Namrata Sen 1/16, Staff Writer at Benzinga, "Supreme Court's Delay In Tariff Ruling A Sign Of Potential Victory For Trump?" Yahoo Finance, 01/16/2026, https://finance.yahoo.com/news/supreme-courts-delay-tariff-ruling-143108123.html

The analysts noted that historically, the Supreme Court saves its most consequential rulings for the end of its term in June, allowing for extended deliberation.

#### SCOTUS just sided with the Democrats on immigration law.

Amy Howe 25 – Winner of National Press Club Journalism Award, counsel in over two dozen Supreme Court cases. “Supreme Court rebuffs Trump administration’s request in dispute over immigration judges,” 12/19/2025, SCOTUS Blog, https://www.scotusblog.com/2025/12/supreme-courts-rejects-trump-administrations-request-in-dispute-over-immigration-judges/

The Supreme Court on Friday turned down a request from the Trump administration in a dispute over a policy limiting speaking engagements by immigration judges. A federal appeals court had sent the challenge by a group representing the judges back to a federal trial court for more fact-finding on the independence of the administrative scheme set up to deal with claims by federal employees, and – in a brief unsigned order – the justices left that ruling in place. However, the court also left open the possibility that the government could return to the Supreme Court to seek relief “if the District Court commences discovery proceedings” before the justices rule on the government’s petition for review of the lower court’s decision. Law professor Stephen Vladeck, who closely tracks cases on the court’s docket, stated on social media that Friday’s order was the Trump administration’s “first real loss” at the Supreme Court since April of this year.

At the center of the dispute is a policy that the National Association of Immigration Judges describes as barring its members “from speaking in their personal capacities about immigration and about the agency that employs them.” The NAIJ went to federal court in Alexandria, Virginia, to challenge the policy on behalf of their members, arguing that it violates the First Amendment.

U.S. District Judge Leonie Brinkema threw out the group’s case, holding that under the Civil Service Reform Act the NAIJ was required to pursue its claims through the administrative process.

The NAIJ went to the U.S. Court of Appeals for the 4th Circuit, which sent the case back to Brinkema. It pointed to recent actions by President Donald Trump that, in the court’s view, “call into question” whether the administrative scheme for claims by federal employees remains independent of the president – for example, Trump’s firing of both the Special Counsel, who would initially consider the group’s claims in the administrative process, and the chair of the Merit Systems Protection Board, to which the Special Counsel could refer the claims. And if the administrative process is not independent, the court of appeals suggested, Congress may not want to require claims by federal employees to proceed through that scheme. The 4th Circuit therefore directed Brinkema to find the additional facts necessary to consider “the continued vitality of the adjudicatory scheme.”

U.S. Solicitor General D. John Sauer came to the Supreme Court on Dec. 5, asking the justices to block the 4th Circuit’s ruling from going into effect after that court refused to do so. Sauer told the court that “‘unelected judges’ do not get ‘to update the intent of unchanged statutes if the court believes recent political events … alter the operation of a statute the way Congress intended.” Moreover, Sauer added, the 4th Circuit’s ruling had already created “destabilizing uncertainty” that could “extend beyond federal personnel actions” to other “administrative-review schemes that preclude district-court jurisdiction” – for example, the Federal Trade Commission.

Sauer urged the court to issue an administrative stay – a temporary order that would pause the 4th Circuit order to give the justices time to consider the Trump administration’s request. Chief Justice John Roberts, who handles emergency appeals from the 4th Circuit, granted that request on the same day that the government made it.

Opposing the government’s request, the NAIJ told the justices that the “carefully calibrated system of review” established by Congress “has been called into question. If the administrative process for federal employees is not independent from the president’s control, the group wrote, “the inference that Congress intended to withdraw district-court jurisdiction over federal employment claims may no longer be appropriate.” And in any event, the group noted, there is no harm to the government from allowing the fact-finding to go forward.

In its order declining to intervene, issued eight days after the case was fully briefed, the justices agreed with the NAIJ that “the Government has not demonstrated that it will suffer irreparable harm without a stay.” But at the same time, the court indicated that although it would not intervene at this stage, its denial would not bar the government from returning to the court if the district court moved ahead with fact-finding before the court rules on the government’s as-yet-unfiled petition for review.

### AT: Turn – AT: Fed Independence – 2NC

1. **Fed independence resilient. Humprey’s is rock solid.**
2. Noel **Maurer 9/4**, Prof of international affairs and international business at George Washington University, "Saving the Federal Reserve from the unitary executive," The Power and the Money, 9/04/2025, https://www.noelmaurer.com/p/saving-the-federal-reserve-from-the
3. The “unitary executive theory” is one of the most misrepresented legal theories in America. It does not state that the President has the power to do whatever she wants to do, although Vice is a very entertaining movie regardless:
4. Rather, the theory states that the President has complete control over the executive branch. So Congress cannot create executive agencies outside presidential control or limit the President’s ability to remove executive branch officials.
5. The rationale behind that interpretation lies in the first line of Article 2 of the Constitution: “The executive power shall be vested in a President of the United States of America.”
6. There is also an ideological defense of the idea that is neither liberal nor conservative in the current American sense. The President is directly elected; the officials and panels appointed to head independent agencies are not. So a unitary executive increases democratic accountability.
7. That seems pretty clear?
8. The unitary executive in American history
9. Well, no. There is little evidence that the Constitutional Convention intended to make the President the sole authority in the executive branch. For example, here are the first two lines of Federalist #77, by Alexander Hamilton:
10. IT HAS been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. [Italics mine.]1
11. In this view, the first line of Article 2 is just saying the obvious: the President has executive power, but Congress can obviously limit it or assign new ones to new agencies. You can certainly read the text of the Constitution that way. Article 1 starts by saying, “All legislative powers herein granted shall be vested in a Congress of the United States.” Article 2, conversely, does not start by saying “All the executive power herein granted shall be vested in a President of the United States.”
12. Why, runs this line of reasoning, would the Founding Fathers have put an “all” and “herein granted” in Article 1 and left it out of Article 2 if they didn’t think it had meaning?2 Article 1 unambiguously hands every single legislative power to Congress and only Congress. Article 2 just says that the President has executive authority, with nothing there about its scope.
13. And as with unitary executive theory, there is a good nonpartisan ideological defense of independent agencies. The U.S. is all about limited government. What’s more limiting than a limit on the power of the President? Independent agencies limit the authority of an overweening executive that could otherwise use the powerful federation to profit friends and punish foes.
14. But there is indirect evidence pointing the other way. James Madison (after the Constitutional Convention) argued that he thought the document implied that the president could fire cabinet members. Congress agreed in the Decision of 1789, when it created the Department of Foreign Affairs with a Madison-inspired proviso that outlined what would happen after a Secretary “shall be removed from office by the President of the United States,” but it did not bother to give the President that explicit power.3 Rather, the law just assumed that he had it. And that Congressional decision gave us the view that the Decision of 1789 implied that there was a consensus that Article 2 gave the President control over executive officials, making him the decider.
15. Thus far, the U.S. has played it both ways. The President has been given the power to fire officials except when Congress says otherwise.4 In general, then, we have assumed that our executive isn’t unitary — a win for the Alexander Hamilton who wrote Federalist #77.
16. Until recently.
17. The Lisa Cook case
18. The current Supreme Court leans pretty strongly towards the unitary executive. All six conservative justices have signed onto decisions that uphold it in one way or another.
19. President Trump’s attempt to fire Fed Governor Lisa Cook will likely drag the structure of the Federal Reserve into this debate. 12 U.S.C. § 242 gives Fed governors 14-year terms and says they can be removed only for cause. Governor Cook is accused of listing two homes as her primary residence on two mortgage applications.
20. President Trump says that the allegation (backed by some evidence) is egregious enough to count as cause. But Governor Cook has indicated that she will not step down. Her case, then, will have two parts to it. Is her offense grave enough to activate the “for cause” clause? If not, is effective prohibition on removing Fed governors consistent with Article 2 of the Constitution?
21. If SCOTUS accepts an appeal it could decide “yes” to the first question. I am very hesitant to opine on that, although to be frank, the alleged offense is crazily minor. I searched and found at least two cases: one in 1981 and one in 2004 where federal agencies fired civil servants for mortgage fraud. The employee in 1981 had lied about her income and job title and the one in 2004 gave a friend nonpublic information about a HUD-owned property in Philadelphia.5
22. But those were civil servants. And both infractions were much more serious than the allegations against Governor Cook. If I had to bet, SCOTUS will rule on the constitutional issue.6
23. And it may want to, anyway!
24. The declaration of Federal Reserve independence
25. As many observers have pointed out, a ruling that President Trump could fire Fed governors at-will could cause serious problems.7 Politicians have an interest in re-election. Sometimes keeping interest rates low will serve that second interest at the expense of the first. Which means that monetary policy might not prioritize low inflation or financial stability. Hand the central bank over to elected officials and they will set interest rates too low in election years. Eventually, goes the logic, inflation will spiral upwards until voters get angry enough to punish governments.
26. But the logic here is the opposite of ironclad. Why should decisions made by politicians be worse than decisions made by technocrats? After all, politicians have an interest in financial stability! When there’s inflation, the voters toss them out. That’s a pretty big incentive to avoid playing games with interest rates. I stand unconvinced by the correlation between lower inflation and the spread of independent central banks since the 1970s. What elected government wants to risk the fate of Jimmy Carter or James Callaghan or, heck, Kamala Harris?
27. Well, since you ask …
28. President Trump has made it clear that he wants lower interest rates, regardless of what that might do to the economy. Whatever you might think about the proposition that central bank independence in general is a great and wonderful thing that has brought us puppies and rainbows, there is a case to be made that right now it would be a bad thing for America to abandon.8
29. Central bank independence is not a new idea: Congress began insulating the Federal Reserve from presidential politics as early as 1935. But those restrictions depend on the executive of the United States not being unitary! Either the Court will have to back off the unitary executive theory or it will have to put the American central bank under democratic Presidential control.
30. But maybe there is a way for the six unitarian judges on SCOTUS to have their unitary executive and eat it too, at least as far as the central bank is concerned. It would even have precedent. It would involve an unprecedented stripping the Fed of some of its Congressionally-delegated powers—while SCOTUS has stripped the office of the President of powers, it hasn’t before ripped away part of an agency’s authority.
31. Still, maybe the idea has legs. So let me make it public. But first, let’s ask …
32. Is the Federal Reserve an executive agency?
33. Congress can create Article I agencies to carry out its constitutional power as long as they are not executive agencies: thus we have the Congressional Budget Office and the Government Accountability Office, but also Article I courts, like the U.S. Tax Court and the U.S. Court of Federal Claims. But separation of powers must be maintained. In the words of a 1995 U.S. Court of Appeals decision: “The Supreme Court has indicated that delegations of rulemaking authority to Article I agencies may implicate separation of powers concerns.”
34. So let’s look at the Federal Reserve system. It consists of three elements:
35. The twelve regional Federal Reserve Banks;
36. The Federal Open Market Committee;
37. The Board of Governors.
38. The Federal Reserve Banks are chartered by Congress, but they are not executive agencies. They are owned by their member banks. They cannot force anybody to do anything. No fines, no guns. They have privileges that regular banks do not, but Congress is constitutionally allowed to establish monopolies if it wants to.
39. So their legal status is kosher even under the unitary executive theory.
40. The Federal Open Market Committee (FOMC) sets interest rates. That’s not an executive function, since the FOMC does this by buying and selling bonds in the market or by altering the interest rate it pays on the deposit accounts that banks hold at the Federal Reserve. Anyone can still make a loan at any interest rate that they want to charge, no one is at risk of having someone with a badge point a gun at them. So it’s also not an executive agency.
41. So far so good! We have no problems. SCOTUS can stop President Trump from firing Lisa Cook while still upholding — or at least not jeopardizing — the principle that he is the unconstrained head of the executive branch. That could get a seven vote SCOTUS majority, maybe more. It would not, however, be a borough majority.
42. The Board of Governors is a unitary problem
43. Which brings us to the Board of Governors. If it carries out executive functions then we have a problem, not least because its seven members make up a majority of the FOMC. (The other five consisting of the president of the New York Fed and a rotating group of four of the heads of the regional Federal Reserve Banks.)
44. So under unitary executive theory, if the Board is an executive agency, then the President can fire at will a member of the Board of Governors, which also means the President can also fire at will seven of the twelve members of the FOMC. Poof, no more independent Fed!
45. So what does the Board do? Well it can:
46. Set reserve requirements and discount rates.9
47. Regulate national banks chartered under federal law.10 State-chartered banks may choose to become members.
48. Set rules for financial institutions that maintain accounts at a Federal Reserve Bank or use Fedwire, the Fed’s payment system.
49. Regulate banks owned by a holding company.11
50. Regulate other creditors and depository institutions under various Congressional acts, including “systemically important financial institutions” (SIFIs) that are so big that their collapse could bring down the national economy under the Wall Street Reform Act of 2010.12
51. Having your central bank and eating it too: justifying Fed independence under a unitary executive
52. Which of these are problems under the unitary executive theory?
53. (1) Setting reserve requirements and discount rates:
54. These are core functions related to the issuance of money, which Article 1 gives to Congress. These are not executive functions, unless the Supreme Court wants to overturn McCulloch v. Maryland. Justice Kavanaugh, in particular, has already averred that he will accept this argument.
55. (2) Regulating national banks chartered under federal law:
56. National charters are a federal franchise under Article 1. Congress attached mandatory Federal Reserve membership to federal banking charters. But banking is not like flying, where you just cannot send something into the sky without FAA approval. Rather, banks can operate under state charters and simply not join the Federal Reserve System.13 Not only can state banks engage in the same kind of financial operations as national banks, but since the Interstate Banking Act of 1994 (aka “Riegle-Neal”) there have been no federal restrictions on their ability to branch across state lines.
57. Since banks voluntarily choose to subject themselves to regulation by the Board of Governors, then the Board is not an executive agency. After all, if you could choose to operate an airplane under state law instead of federal law — and fly that airplane over the state line as long as the other states approved — then it would be hard to argue that the FAA had executive authority over you.14
58. But we will return to this point about voluntary association, because it’s more complicated.
59. (3) Setting rules for institutions that use Fed services
60. This is a trickier, since it is pretty hard to be a bank and avoid the Federal Reserve’s payments system entirely. But it can be done! For example, there is the Clearing House Interbank Payments System (CHIPS) and it is pretty widely used by large banks instead of Fedwire. Smaller state banks could in theory band together and set up a CHIPS for the little guy, although this would be costly. A skeptical SCOTUS justice could reasonably decide that this meant that Board of Governors’ regulation was basically inescapable and therefore the Fed is an executive agency.
61. But SCOTUS could also decide that it wasn’t the Fed’s fault that no private agency had replicated its functions. The fact that a private agency could legally do so — or that a bank could, I dunno, use Bitcoin or schlep bills across the country or something — means that banks voluntarily subject themselves to Fed oversight and that does not make the Board of Governors into an executive agency.
62. The Fed itself says “operating circulars are contracts between a Reserve Bank and a financial institution that govern the provision of Reserve Bank services. Consistent with longstanding practice for all other operating circulars issued by the Reserve Banks, the Board does not believe those contractual documents need to be issued for public comment.” In 1983, the courts ratified this interpretation. Later courts cited Continental Illinois National Bank & Trust Co. v. Sterling National Bank & Trust Company as concluding “that operating circulars do not create any substantive rights.”
63. But remember that I told you we would return to the point about voluntary association? We’re there.
64. (4 & 5) The rub, there’s always a rub
65. And here we have the problem! The Federal Reserve does issue “system-wide” regulations that apply to all financial institutions, not just banks affiliated with the system. A comprehensive list (in legalese, I’m sorry) is here. Here’re the four biggies:
66. Regulation B: operationalizes the requirements of the Equal Credit Opportunity Act of 1974. It applies to all creditors. I guess I should have filed more paperwork when I lent my sister that money back in the day? Anyway, this is pretty clearly an exercise of executive authority.
67. Regulation D: under the Federal Reserve Act and the International Banking Act of 1978, this puts reserve requirements on any deposit-taking financial institution that does business with the public. Now, I guess you could say that since deposit-taking by definition creates money, then it could be an Article 1 function. It is a reach, but I can imagine Kavanaugh making the stretch and Roberts and the three liberals writing concurrent decisions.
68. Regulation E: governs electronic fund transfers. But all transfers, not just ones using the Fed’s infrastructure: “Any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account.” Yeah, that looks pretty executive.
69. Regulation J: in 1987, Congress handed the Fed the authority to govern check clearing for all depository institutions. The Check Clearing Act of 2004 expanded this authority. Now, the regulation is enforced via operating circulars and applies mostly to transactions that go through the Federal Reserve Banks at some point, so maybe it could be called an Article 1 function?
70. So the first and third of these are clearly executive functions and the other two require some creative interpretation to be kosher. Now add Fed regulation of bank holding companies and “systemically important financial institutions,” i.e., any big financial institution.
71. Yeah, the Board of Governors looks like an executive agency. I guess you either have to admit that the unitary executive theory is horseshit or hand keys to the Federal Reserve over to President Trump.
72. But maybe not!
73. Severance, without the chip in the head
74. The Court could save the Fed by declaring it sui generis, but that would be too tidy, like calling Staten Island part of “the city.” The Court used to lack only a justice from Staten Island. But we no longer have representation for Brooklyn and Queens.
75. There are problems with just declaring that the Fed is a special federal snowflake. It would invite future Congresses to create more “Article 1” agencies disguised as voluntary associations while they actually exercise executive power. It also makes the unitary executive look like a made-up doctrine, the Calvinball of constitutional theory. Both consequences kind of bely the purpose if you believe in unitary executive theory.
76. A cleaner option is to follow the spirit of Panama Refining Co. v. Ryan, decided in 1935. The National Industrial Recovery Act of 1933 (NIRA) handed President Roosevelt the power to prohibit the interstate transportation of oil produced in violation of state quotas. Congress can set such limits, the Court noted, but also stated that “nowhere in the statute has Congress declared or indicated any policy or standard to guide or limit the President when acting under such delegation.” Giving total discretion to the President violated the separation of powers. So it severed that grant of power from the Presidency but left the rest of NIRA intact.
77. SCOTUS could solve its Fed dilemma similarly. The Fed’s monetary and franchise powers are fine under Article 1 but its consumer credit and electronic transfer rules are not. The Court could strike those delegations and leave the Fed with its monetary core, forcing Congress to reassign the rest. (Or maybe Congress just leaves the banking system unregulated. I don’t know. It’s 2025, we might annex Panama or build Skynet or let federal agents run around in masks without badges. Who knows?)
78. The immediate objection is that this would be unprecedented. The Roberts Court has severed structures while leaving agency powers intact, as in 2010, when Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB) removed the PCAOB’s complex governing structure but left its authority unchanged. It did it again in Seila Law LLC v. CFPB.15 But it has never stripped substantive regulatory powers while leaving an agency’s governance structure intact. Critics would argue that only Congress can decide where those powers go.
79. The deeper objection would be that the unitary executive theory itself is wrong. When George Mason warned at the Convention that Article 2 grants the executive too much power — “We are not forming a Government by which the few are to govern the many,” he thundered — nobody countered by claiming, “Well, no, we just want to make sure that Congress will place no limits on the President’s control over executive officers!” After all, both in 2025 and in 1787, American states divide up executive authority, as do most other presidential republics.16
80. But the evidence is that this Court believes in the unitary executive theory. And it’s not crazy, just something with which I happen to disagree. Pretending that Court will change its mind when the arguments are not clear cut is not a useful exercise.
81. I do have to give one warning, however. The regulation is a powerful thing. There are legal remedies against capricious and unfair regulation, but they are often slow and expensive. The Trump administration has shown that it is willing to use its power against institutions that it does not like, so politicizing bank regulation could have its own deleterious consequences. But if you believe in unitary executive theory, as a SCOTUS majority seems to believe, then that is the potential price you will pay.
82. Here’s to eating that unitary, unsliced, delicious cake
83. The Roberts Court has shown an appetite for severance. If it wants to preserve the Fed while keeping faith with unitary executive theory, a Panama Refining solution presents a path. I personally think that a unitary executive is a terrible idea, regardless of the legal merits. But if you’re going to have a unitary executive, better it keeps monetary policy outside direct presidential control.

#### Totally thumped. Rhetoric alone kills independence.

1. Rugaber, 12/5 – Federal Reserve Reporter @Time citing Oliver Blanchard, former top economist. (Christopher Rugaber. (11-13-2024). Why Trump and the Federal Reserve Could Clash. TIME. https://time.com/7199944/why-trump-and-the-federal-reserve-could-clash/; Neo)
2. OK, so Trump fights with Powell — so what?
3. Occasional or rare criticism of the Fed chair isn't necessarily a problem for the economy, so long as the central bank continues to set policy as it sees fit.
4. But persistent attacks would tend to undermine the Fed's political independence, which is critically important to keeping inflation in check. To fight inflation, a central bank often must take steps that can be highly unpopular, notably by raising interest rates to slow borrowing and spending.
5. Political leaders have typically wanted central banks to do the opposite: Keep rates low to support the economy and the job market, especially before an election. Research has found that countries with independent central banks generally enjoy lower inflation.
6. Even if Trump doesn't technically force the Fed to do anything, his persistent criticism could still cause problems. If markets, economists and business leaders no longer think the Fed is operating independently and instead is being pushed around by the president, they'll lose confidence in the Fed's ability to control inflation.
7. And once consumers and businesses anticipate higher inflation, they usually act in ways that fuel higher prices — accelerating their purchases, for example, before prices rise further, or raising their own prices if they expect their expenses to increase.
8. “The markets need to feel confident that the Fed is responding to the data, not to political pressure," said Scott Alvarez, a former general counsel at the Fed.

## AFL

### AT: CP – AFL– MSU – 2AC

### AT: DA – Movements – 2AC

#### Collective labor advocacy depends on immigrant workers who actually participate. That requires overturning Hoffman.

Bill Ong Hing 21 - Professor of Law and Migration Studies at the University of San Francisco. “Attacking Democracy through Immigration Workplace Raids,” revised 06/30/2021, University of San Francisco School of Law, https://ssrn.com/abstract=3810236

At the height of the American labor movement in the 1950s, more than a third of American workers were union members (Figueroa 2019). However, today only 10.5 percent of workers are union members—the lowest unionization rate among wealthy nations.

Federal actions contributed to the decline. For example, the Taft-Hartley Act of 1947 restricted unions and hampered organizing efforts by facilitating state right-to-work laws allowing nonunion members to enjoy union benefits without paying dues. President Reagan sharpened the assault with new regulations. In 1981, he fired 11,000 striking air traffic controllers who refused his back-to-work order after they walked out to protest poor working conditions and low pay. A 2018, Supreme Court case created a major hurdle ruling that state governments cannot force public employees who do not join unions to pay fees that support collective bargaining.3 More than 20 states had required these fair-share fees (Figueroa 2019).

Besides those real challenges, some labor leaders understand that the tough work of organizing, convincing members to expand ranks, and putting more resources toward those efforts have been neglected. One union that understands, the Service Employees International Union (SEIU), now spends 20 percent of its budget to bring in workers who are not already union members. (Figueroa 2019) Its strategy has paid off, as its membership increased by adding immigrant workers. (Figueroa 2019)

The key to SEIU’s growth—and that of other expanding unions—is a focus on immigrant workers, including those workers without employment authorization. Historically, many rankand-file union members had problems with undocumented workers, perhaps with good reason. Developers and construction companies often turned to an undocumented workforce to undercut union costs. A stark example is Donald Trump’s real-estate company that, in 1980, recruited 200 undocumented Polish workers to demolish the Bonwit Teller building to clear ground for the 58- story Trump Tower. The workers—some of whom were only paid $4 an hour—worked 12-hour shifts, without basic safety on very dangerous work (Hennelly 2019). Management also exploited racial division and anti-immigrant sentiment in this arena. The tactic pitted one group against another, often establishing a “certain color hierarchy and class pecking order” (Hennelly 2019).

Many labor activists recognize that the future of their movement depends on incorporating immigrants. For them, this is about survival—not just about social justice on behalf of workers. They are relying on the basic tenet of the labor movement—a collective effort to empower workers irrespective of background. Often, union members are placed on job sites to work alongside undocumented workers. The unions realize that aside from safety concerns, the immigrant workers face other challenges, such as immigration, housing, and health. Those are matters that the union can help address.

Labor leaders increasingly see alignment with immigrant workers as an opportunity. When Trump unveiled a plan to penalize noncitizens for using government assistance, New York Attorney General Letitia James filed a lawsuit opposing the move. A big part of a crowd cheering her on were members of 1199 SEIU, the nation’s largest health care union (Hennelly 2019).

Low-wage workers from Mexico and Central America are at the center of the efforts to rebuild the U.S. labor movement. Not only have they been the focus of this dynamic effort, but the immigrant workers themselves are on the front lines of worker center organizing and advocacy efforts. This has occurred in parallel with a vibrant immigrant rights movement, which combines civil rights and labor rights elements. The work has infused the U.S. labor movement with new energy, new tactics, and new ideas (Milkman 2009).

The mutual attraction between labor and migrant workers is obvious. Low-wage and working-class immigrants come to the United States with dreams of economic advancement, but they arrive with few resources. They are often confined to the bottom of the labor market, where wages are low, working conditions poor, benefits are limited, and chances for promotion extremely restricted. Many immigrants are concentrated in job segments where wage theft and other labor law violations are prevalent. This abuse and lack of resources makes the labor movement appealing to low-wage immigrants. And even though many such workers lack legal status, much of the wider public is sympathetic when their abuse is highlighted. (Milkman 2009)

Foreign-born workers make up 17.5 percent (29 million) of the nation's 165 million workers (Budiman 2020). Many are high-wage earners, including professionals and entrepreneurs. More than a quarter (7.6 million) are not authorized to work, most of them Latinx (Budiman 2020). They typically hold low-wage jobs in agriculture, construction, food and garment manufacturing, hotels and restaurants, and low-wage service industries. Many noncitizens with lawful permanent or refugee status are also employed at or near the bottom of the labor market. Others hold jobs with better pay and conditions. That possibility motivates many at the low end to join the new immigrant labor movement (Milkman 2009).

Traditional trade unionism is important to the immigrant labor movement today. In spite of the fact that many unions supported restrictive immigration policies historically, beginning in the 1980s, several leading unions began to organize Latinx immigrants employed in low-wage sectors, including janitorial, retail, hospitality, residential construction, and manufacturing. In 2000, the AFL-CIO supported legislation that would have granted legalization to undocumented workers. Although immigrant union organizing is uneven across industries and occupations, today virtually all U.S. labor unions offer at least some support for immigrant workers (Milkman 2009).

When labor organizers first began recruiting more immigrant workers in the 1980s, many movement officials were skeptical that the workers would be receptive. Why would workers who intended to return home after earning a certain amount invest time and effort into organizing? Furthermore, the low wages here were still probably better than what the workers made back home. Would they really be concerned about raising U.S. labor standards? Organizers assumed that immigrants unauthorized to work would worry about apprehension and deportation if they became active in unionization (Milkman 2009).

However, countervailing factors actually made organizing Latinx immigrant workers easier than expected. Immigrant social networks that help newcomers adjust and find jobs can be strong. Those social networks become a resource for union organizing. Latinx immigrants also have a sophisticated worldview of how their individual fate is tied to that of their community as a whole. Collective action is viewed as an opportunity for community advancement. And some of the workers also have backgrounds in political and/or union activism in their home countries (Milkman 2009). The communal experience that many Latinx workers endure in being subordinated for lacking immigration documents creates an open-mindedness toward organizing efforts. The shared stigmatization creates a natural comradery. Also, any fear related to participating in unionization efforts pales in comparison with crossing borders or living under threat of immigration enforcement. Still, like most American workers, the vast majority of immigrant workers are not part of organized labor (Milkman 2009). 4

The matter of organizing immigrant workers invariably raises the effect of the 2002 U.S. Supreme Court's ruling in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board. 5 In an earlier case, Sure-Tan, Inc. v. National Labor Relations Board, the Supreme Court held that immigrant workers without work authorization are still protected by the National Labor Relations Act.6 It is an unfair labor practice for an employer to report such workers to immigration authorities in retaliation for engaging in union activities. But in Hoffman, the Court held that if unauthorized immigrant workers are fired improperly for organizing activities, they are not entitled to back pay or reinstatement (the legal remedies available to workers under the NLRA). However, the impact of Hoffman may be less significant than originally feared because remedies all workers under the NLRA have been curbed (Garcia 2012: 669-70).

In spite of the Hoffman decision and the fact that workers without immigrant documents are denied many basic civil rights, in principle they still are protected by nearly all laws covering wages, hours, and union representation. The basic principles of the earlier Sure-Tan decision still stand. Since all workers regardless of immigration status are protected under the NLRA, the broader purpose of the labor movement to have all workers represented remains legitimate (Milkman 2009).

Of course, serious challenges persist for immigrant workers. All workers have witnessed an erosion of employment and labor laws over the past few decades. At the same time, punitive immigration laws have increased along with enforcement strategies like the workplace raids. Low-wage immigrant workers are more vulnerable, as deportation enforcement renders employment and labor law meaningless for those who are removed (Milkman 2009).

After 9/11, the prospects for immigration reform that would include legalization for undocumented immigrants faded. President Bush tried to get immigration reform talks started again by putting forward a large guest worker plan. But the plan got push back from both the right and the left (Hing 2006). So the Bush administration turned its enforcement attention to a new strategy.

The tragic events of 9/11 led to the profiling of Arabs, Muslims, and Sikhs in America. But anti-immigrant forces took advantage of the events to focus on other noncitizens as well. In response to those pressures and perhaps also in response to the huge immigrant rights marches in the spring of 2006, the Bush ICE began to orchestrate the series of high-profile workplace raids discussed above (Milkman 2009). Immigration raids and deportations were by no means a new phenomenon, but the scale was unprecedented.

The raids created a climate of fear. As a result, immigrants without documents who experienced labor and employment law violations were even less likely to pursue whatever legal remedies that might be available, chilling participation in the labor movement (Milkman 2009).

#### Labor movements are gaining momentum now. Scrapping the NLRB kills it.

Glass '24 – Policy Analyst for the Inclusive Economy. (Aurelia Glass. (6-20-2024). "Project 2025 Would Undo the NLRB's Progress on Protecting Workers' Right to Organize." Center for American Progress. https://www.americanprogress.org/article/project-2025-would-undo-the-nlrbs-progress-on-protecting-workers-right-to-organize/; Neo)

As autoworkers, baristas, package carriers, Hollywood writers and actors, and thousands of other workers fight for and win new unions and new union contracts, Biden administration appointees to the nation’s front-line labor law enforcement agency—the National Labor Relations Board (NLRB)—are helping prevent anti-union employers from undermining worker organizing. Workers in the United States face an uphill battle in their fight to unionize and bargain, as broken federal labor laws and rampant lawbreaking undermine their efforts, but workers today are organizing and winning union elections at a growing rate.

New analysis from the Center for American Progress shows that the NLRB is helping ensure that workers can exercise their legal right to come together in unions, with more workers winning their elections and more workers getting help to get back on the job when fired illegally for protected organizing activity. However, these gains are under threat from The Heritage Foundation’s Project 2025—a playbook with strategies for eroding checks and balances across the government that offers instructions for gutting the NLRB’s enforcement capacity. This would threaten workers’ ability to come together in unions to bargain for better wages and working conditions.

According to CAP analysis of NLRB elections data, workers today have a better chance of winning their union representation election than at any point in the past 15 years, with a win rate of more than 70 percent. After a decline in the number of elections under the Trump administration, workers are back to holding more than 1,700 elections for union representation every year, and 115,000 workers voted in union elections in 2023, the largest number in a decade. As workers have pushed to form new unions, the NLRB has pursued a vigorous agenda of going after lawbreakers: It has won 54 percent more reinstatement offers for illegally fired workers since 2021 than during all four years of the previous administration, while instituting new rules that make it easier for workers to exercise their right to join a union.

The trend for the past several decades has been a weakening of labor law, stacking the deck in favor of corporations trying to bust unions. Businesses can use a range of legal tactics to persuade workers to vote against unionizing, and can even resort to illegally firing workers who try to organize their colleagues, since monetary penalties for breaking the law are nonexistent. Corporations are served by a cottage industry of professional “union avoidance” consultants, with law firms and consultants charging top dollar. One boutique consultant offers to potential clients to “show you how not only to win your election but also teach your staff advanced techniques for union avoidance to ensure your company never goes through a union election again.” And the Project 2025 policy playbook offers instructions for future administrations to neuter the NLRB’s enforcement capacity and turn it against unions by firing key agency leaders, making it easier to decertify unions, and closing off established ways of forming unions. However, under the leadership of Biden administration appointees, the NLRB has taken steps to advance, rather than stop, worker organizing. The NLRB is developing new rules that make it easier to form a union and win a contract, while actively protecting workers trying to organize.

In 2023, the union win rate in NLRB elections broke 70 percent for the first time in 15 years. As shown in Figure 1, the percentage of elections in which workers voted for a union in NLRB-overseen representation elections has generally been around 64 percent since 2008. The rate has climbed from 65.2 percent in 2020 to 72.1 percent in 2023 and 73.8 percent so far in 2024, meaning that workers filing for a union election today are winning a greater percentage of elections than at any point since 2009.

The win rate has been consistently higher under the Biden administration than under the previous administration. As shown in Figure 2, while workers won 66.1 percent of their union elections from 2017 to 2020, workers have won 70.3 percent of all elections since 2021.

Not only are workers more likely to win their union election, but there are also more elections today than at any time since 2015. Figure 3 shows how the number of union representation elections decreased from 2017 to 2020; however, in the past two years, the number of elections held each year shot up past prepandemic levels, reaching 1,777 total elections in 2023.

The means that more workers are participating in union elections, with 2023 marking the first year in which more than 100,000 workers voted in a union election since 2017. Although the number of workers voting in representation elections began trending down in 2017 and reached a low of 59,763 during the COVID-19 pandemic in 2021, the number of workers who voted in a representation election reached 115,472 in 2023—a 10-year high and a 93 percent increase since the Biden administration took office in 2021. During this same year, workers participated in some of the largest labor actions in recent decades: 60,000 workers in the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) went on strike in the summer; 46,000 members of United Auto Workers (UAW) went on strike at Ford, Stellantis, and General Motors to achieve their new contract; and 300,000 Teamsters were covered by a new United Parcel Service (UPS) contract.

The number of workers participating in union elections has increased as the NLRB has expanded the range of workers eligible to join a union. During the previous administration, the NLRB nearly succeeded in finalizing a rule that would have prevented student workers at private colleges and universities from unionizing. The NLRB withdrew the rule during the Biden administration—and a recent report from the Economic Policy Institute found that since 2022, nearly 45,000 student workers at private colleges and universities have unionized. The NLRB also changed a standard from 2019 that allowed many workers to be classified as independent contractors—who are unable to unionize—rather than as regular employees. The antiworker Project 2025 advises undoing this change, which would harm workers’ ability to come together in unions.

#### No movements. No coordination & it’s shut down with more repression.

Leo Casey 25, Executive Director Emeritus of the Albert Shanker Institute, and an Assistant to Randi Weingarten, President of the AFT, "Charting Labor's Path in Hard Times: A Call For Grounded Strategy," Convergence, 06/02/2025, https://convergencemag.com/articles/charting-labors-path-in-hard-times-a-call-for-grounded-strategy/

The romance of a general strike

The syndicalist idea of organizing a general strike has come up in left labor circles, as part of discussions of a proposal by Shawn Fain and the UAW. Fain wants unions to align contract expiration dates in 2028, with the objective of facilitating collaboration and creating synergy among different workplaces engaged in contract renewal fights. Organizing such an undertaking on the scale Fain envisions will be challenging, but to the extent that it can be accomplished, it would be a positive development that can build cross-union solidarity. But vaulting from solidarity in cross-union contract fights to a general strike is a different matter.

Historically, the idea of a general strike loomed large in the political imaginations of revolutionary syndicalists such as the Wobblies: it functioned as a trope for their vision of ending the system of “wage slavery” and removing themselves from the existing economic and political order. Georges Sorel, the preeminent theorist of syndicalism who was read among the Wobblies, described the general strike as the vehicle for achieving total, revolutionary change: it would put “the forces of production in the hands of free men, i.e., men who are capable of running the workshop created by capitalism without any need for masters.” Since the struggle for the political power to govern was not addressed by syndicalists such as Sorel, the actual mechanisms for accomplishing this radical transformation were undefined, even mysterious.

Indeed, Sorel would insist that the general strike was not just a literal action, but also a “myth” that animated a grand historical drama of working-class salvation; he compared it to the idea of the Second Coming of Christ, which he saw as the organizing myth of the early Christian church. It was a fitting analogy, because the syndicalist idea of a general strike is embedded in a millenarian approach to politics: the strike is understood as an instrument of revolutionary transcendence which allows the workers who wield it to escape their moment in history, with all of its contradictions and limitations, and usher in a completely new world. Today, advocating for a general strike as an effective way to counter Trumpian authoritarianism requires a leap of syndicalist faith.

The historical reality of general strikes in the US cannot sustain this faith. In close to 200 years of American unionism, there have only been three significant general strikes, all citywide (in Seattle, San Francisco, and Minneapolis); the last of them was in 1934. These strikes were called not to fulfill syndicalist dreams of radical transformation, but in reaction to government repression of private sector strikes; both the San Francisco and Minneapolis general strikes were called after local police attempted to violently crush a strike, firing on workers and killing a number of them.

There has never been a nationwide, political general strike in US, much less one announced four years in advance. Nothing in our history suggests that a general strike along such lines is feasible. A successful general strike that is both national and political in character would require political preparations that have not been undertaken, such as millions of people in the streets in protests, and a most serious and grave casus belli that could only be addressed through such an action: if the January 6th insurrection had been successful in preventing the certification of the 2020 election and the peaceful transfer of power, one could conceive of a necessary and efficacious general strike around the single demand of accepting the election results and installing in office the choice of the voters. Barring such groundwork and extraordinary circumstances, it is little more than a pipedream.

Embarking on such an adventure with unclear objectives and vague justifications would be a political gift to the neo-fascists, allowing them to portray unions in the most negative terms as forces of chaos that were seeking to overthrow a democratically elected government. It would be a ready-made justification for undertaking repressive measures, with unions as the primary target. It would almost certainly damage the Democratic Party candidates in the 2028 elections, and in all likelihood, ensure the re-election of a MAGA Republican ticket. election of a MAGA Republican ticket.

#### Labor federalism is worse. Causes a race to the bottom.

MacDonald '25 – Employment and Labor Law Advisor, Co-chair of the WPI. (Alexander T. MacDonald. (06-02-2025). "Be Careful What You Wish For: The Risks of Competitive Labor Federalism for Pro-Union States". The Federalist Society. https://fedsoc.org/commentary/fedsoc-blog/be-careful-what-you-wish-for-the-risks-of-competitive-labor-federalism-for-pro-union-states; Neo)

Unions have therefore pushed state lawmakers to test the NLRA’s limits. For example, they’ve lobbied blue states to require “labor peace” agreements in select industries, like the cannabis industry. They have also lobbied states to ban “captive audience” meetings—a particularly effective tool employers use to get their message out during union campaigns. And most recently, with California’s AB 288, they have pushed lawmakers to transfer much administrative authority to state officials. If passed, AB 288 would give a California agency authority to conduct union elections, decide unfair labor practices, and police collective bargaining. It would, in effect, transform labor policy into a state-level concern.

Under the traditional view, all of these laws would be preempted. They all deal with matters regulated by the NLRA and overseen by the Board. They involve union organizing, the treatment of union supporters, and bargaining with union representatives. They are not just “arguably” under the Board’s jurisdiction; they sit at the core of Board’s administrative responsibility.

Yet states have begun to argue that the traditional view—the one set out in Garmon—is perhaps wrong. For one, the NLRA itself doesn’t mention preemption. So maybe we’ve been reading the statute wrong all this time. Besides, even if we have been reading it correctly, Garmon presupposed a functioning Board. But today, the Board cannot function. It currently lacks a quorum, which leaves it legally inert. And in fact, even when the Board had a quorum, it had increasingly shown itself too slow and too weak to protect workers’ rights. So Garmon’s premises have been eroded on the ground, leaving a space for the states to step in.

A Race to the Bottom—and to the Top

That view is almost certainly wrong. To start, it treats preemption doctrine like a light switch, toggling on or off depending on how many seats are filled at the Board. But preemption doesn’t work like that; it displaces state policy regardless of the operative status of one federal agency at one moment in time. Nor does preemption depend on whether a state agrees with federal law. States cannot opt out of a federal law just because they think the law doesn’t go far enough. If they could, preemption would be effectively meaningless: states could adopt their own policies whenever they disagreed with the federal solution.

Assume, however, that these states have it right. Let’s say that a state could opt out of the NLRA whenever it thought the Board was failing to protect worker rights. Even if true, that principle would not solve organized labor’s woes. To the contrary, it would probably make them worse.

The reason is competitive federalism. Competitive federalism means that when states have leeway to set their own policies, they can compete with one another for business. A state can experiment with taxes, regulations, and subsidies to attract new residents and investments. The state that finds the best policy mix becomes a magnet for people and companies. The state with the worst mix becomes a desert.

Today, competitive federalism is often tempered by federal law, which sets minimum standards in some policy arenas. States can’t fully compete in those arenas because the most important rules are set at the national level. One such arena used to be labor policy. But if California is right that states can adopt their own labor rules, then the doors to competition are now open. And they are open not only for pro-labor blue states, but also for more conservative states with dimmer views of organized labor.

It’s not difficult to predict how the resulting competition would play out. We already have decades of evidence under “right to work” laws. Whether to adopt right-to-work laws is one of the few choices left to states under the NLRA. The NLRA explicitly allows states to decide whether to let unions to bargain for “agency” fees. Agency fees are the fees that non-member employees pay to a union for the union’s bargaining services. Those fees are controversial, and today, more than half the states have banned them.

The results of those bans are unmistakable. Multiple studies have shown that right-to-work laws not only boost overall employment, but also increase real wages. By one count, employment growth in right-to-work states has been more than twice as fast as in their non-right-to-work counterparts. Real wages have been higher too—as much as $2,900 per person in 2023. And the share of manufacturing employment has been significantly higher—by some estimates, nearly 30%.

More broadly, heavily unionized states have performed poorly in the national competition for people. In 2024, the states with the highest union densities were Hawaii (26.5%), New York (20.6%), Alaska (19.5%), and California (16.3%). But the same year, those states lost more residents than any others. Among the biggest gainers of residents were the states with the lowest union densities—North Carolina (2.4%) and South Carolina (2.7%). In fact, the five states with the biggest population increases from domestic migration all had below-average unionization rates. And all but Delaware had a right-to-work law.

Those numbers are daunting for the supporters of independent state labor policies. These supporters tend to be pro-labor advocates who want to strengthen union rights. But the numbers say that pro-union laws chase jobs into other jurisdictions. That leakage is already happening; businesses have been fleeing New York and California for years. And those states are unlikely to stem the tide by making their laws even less friendly to businesses.

Indeed, other states will no doubt seize the same opportunity to make their own laws even less union friendly. If businesses were already eager to decamp for Texas, one can only imagine their excitement when Texas bans card checks and dues checkoffs. The lesson for pro-union states is clear: be careful what you wish for.

## Curbing

### AT: Curbing – 2AC

#### No court stripping – Congress doesn’t follow through without bipartisan consensus. Links about controversy prove immigration is not an area for stripping.

Reece Edward Kirkpatrick 25 – Yale University. “Jurisdiction Stripping: A Forgotten Check and Balance?,” 04/18/2025, Yale University Department of Political Science, https://politicalscience.yale.edu/sites/default/files/kirkpatrick\_reece.pdf

Perhaps the most common use of jurisdiction-stripping legislation in the modern era is not as a tool of policy reform, but as a form of political signaling. These performative and failed efforts aim less to constrain the judiciary and more to dramatize disagreement with controversial judicial rulings. As Professor David Mayhew said, “politicians often get credit for taking positions rather than achieving effects.”70 One prominent wave of such proposals emerged in the 1980s and early 1990s, when socially conservative legislators introduced bills to strip federal courts of jurisdiction over matters such as school prayer, 71 abortion restrictions,72 and busing.73

These proposals, often introduced by lawmakers such as Representative Philip Crane74 and Senator Jesse Helms,75 were rhetorically powerful but procedurally hollow. They lacked broad legislative support, rarely advanced beyond committee, and were never accompanied by serious efforts to build bipartisan coalitions.76 Their primary function was symbolic: to rally base voters, raise campaign funds, and communicate fidelity to conservative causes during the Reagan and Bush eras. While such actions may occasionally pass the House, passage through the higher bar of the Senate is rare.77

This occurred during the backlash to the warren court as well, as scholars Neal Devins and Louis Fisher comment that “[f]rom 1953 to 1968, more than sixty bills were introduced in Congress to limit the jurisdiction of the federal courts over school desegregation, national security, criminal confessions, and a variety of other subjects.”78 These all saw extensive debate, but ultimately failure to make any passage. As Mayhew states, “The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements. The position itself is the political commodity.”79

This is the case for both conservatives and liberals, as more recent examples can be seen in the aftermath of Dobbs v. Jackson Women’s Health Organization (2022).80 Progressive lawmakers floated proposals to remove the Supreme Court’s jurisdiction over abortion-related legislation.81 These measures—such as proposed statutory restrictions on federal court review of reproductive rights claims—gained media attention but were not seriously advanced through the legislative process.82 Like their conservative predecessors, they functioned more as acts of protest than of governance.

These examples clearly fall within the category of symbolic jurisdiction stripping. They share key traits:

● Intent: Lacked serious legislative strategy; introduced for rhetorical or electoral gain

● Political Context: Appeared during moments of heightened polarization and institutional gridlock.

● Institutional Follow-through: Minimal; often reintroduced without modification or coordination

● Public Salience: High; issues like abortion and school prayer attracted intense partisan interest but little legislative consensus.

As political scientist Frances Lee has argued, the rise of “partisan messaging bills” reflects Congress’s shift from lawmaking to symbolic representation.83 Jurisdiction stripping, in this environment, has been repurposed into a tool of political theater—signaling discontent without producing structural change. Instead, “Party messaging undercuts the prospects for legislative success because it is aimed at defining ‘us versus them’ rather than finding common ground.”84

And why do legislators do this? Because it works. As scholar Tom Clark finds “that periods of Court curbing are followed by marked periods of judicial deference to legislative preferences and posit[s] that the risk of actual changes to the Court’s institutional power—through jurisdiction stripping, Court packing, or other legislative means—will create an incentive for sophisticated decision making by the Court.”85

v. Quiet Successes: Low-Salience, Nonpartisan Jurisdiction Stripping

As we have seen, many of the most visible jurisdiction-stripping efforts have often been symbolic or unsuccessful, but Congress has also enacted low-salience, nonpartisan forms of jurisdiction stripping that have quietly succeeded. These actions typically occur outside the spotlight of ideological conflict and often aim to streamline judicial administration, resolve inter-branch conflicts, or insulate specific statutory regimes from protracted litigation. Although these measures may seem modest, they demonstrate that Congress is still capable of using its Exceptions Clause power when political stakes are low and institutional incentives align.

A prominent example can be found in federal tax law, where Congress has enacted provisions restricting judicial review in certain circumstances. Under the Anti-Injunction Act, for instance, courts are barred from hearing suits intended to restrain the assessment or collection of taxes, thereby channeling disputes through specific administrative procedures before judicial review is available.86 This jurisdictional limitation reflects a legislative judgment that tax administration requires procedural insulation from premature judicial interference.

The area that arguably sees the most jurisdiction stripping is around the regulations of agencies. As Pamela McCann et al. found that 36% of “Major Delegating Laws” contained “at least one section that specifies whether judicial review of agency actions is precluded, limited, or allowed.”87 That is, about one-third of laws governing agency behavior interrupt standard jurisdictional norms—and this is often uncontroversial. Other examples include provisions removing judicial review over decisions by specific federal or state officials—for instance, “any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a state administrative agency” with respect to the Mountain Valley Pipeline in Virginia.88

What unites these examples is their low visibility and technical framing. Rather than being advanced as partisan weapons, these jurisdictional reforms are often negotiated as part of broader administrative legislation and passed with minimal fanfare. They do not challenge major constitutional doctrines or high-profile judicial decisions, but instead represent Congress using its structural powers to adjust the scope and timing of judicial review in more mundane domains.

In this way, they show that jurisdiction stripping is not inherently obsolete—only that its most dramatic invocations are politically untenable. Where incentives align, Congress can and does act to structure judicial access in deliberate and effective ways.

E. What Jurisdiction Stripping Tells Us About Congress

Taken together, the preceding case studies reveal a consistent pattern in the use—and non-use—of jurisdiction stripping. While the Constitution grants Congress broad authority under the Exceptions Clause to limit the appellate jurisdiction of the federal courts, the political and institutional conditions required to exercise this power effectively are rare. Most significantly, jurisdiction stripping has evolved from a potentially robust legislative tool into a largely symbolic instrument, deployed more for messaging than for meaningful institutional rebalancing.

Successful jurisdiction-stripping efforts, such as those seen in Ex parte McCardle, national security legislation, or administrative law, have occurred primarily when political salience is low, partisan polarization is minimal, and executive-legislative coordination is strong. These conditions allow Congress to act in a technocratic or institutionally focused mode, rather than a partisan or performative one. By contrast, the more visible and controversial jurisdiction-stripping proposals—those involving abortion, school prayer, or challenges to judicial supremacy—tend to fail. They are often introduced without a serious path to enactment, used instead to signal political identity, dramatize constitutional conflict, or mobilize electoral bases. These efforts are not designed to succeed legislatively, and indeed, their sponsors often benefit more from failure than from success.89

This typological approach—distinguishing sincere from symbolic uses of jurisdiction stripping—helps explain why a constitutionally valid power has so little traction in modern politics. It is not that jurisdiction stripping is doctrinally obsolete; rather, it is strategically unattractive. The same polarization that fuels demands to “rein in” the courts also makes coordinated institutional responses nearly impossible. Congress remains divided not just by party, but by diverging incentives, legislative dysfunction, and a broader cultural deference to judicial authority. Jurisdiction stripping is best understood not simply as a dormant constitutional provision, but as a mirror of Congress itself. Where political conditions support institutional assertiveness, Congress can and has used its power deliberately and successfully. Where those conditions are absent, the Exceptions Clause becomes yet another stage for partisan performance. Understanding this dynamic is key to any serious conversation about constitutional checks and balances in the modern era.

#### Threats to courts and judicial independence short of stripping non-unique. Curbing includes even individual congressional criticism of decisions. Miller and other advisors already backlashed versus rulings on National Guard deployment for immigration enforcement.

#### Court curbing is issue-specific, not docket-wide.

Lee Elton Dionne 25 – Director of Prelaw Program at University of Detroit Mercy. “Correcting the Record: Congressional Efforts to Curb the Supreme Court, 1989–2008,” 07/28/2025, Political Research Quarterly 78(4).

A more complete view of court curbing between 1989 and 2008 underscores how little we know about this common phenomenon. Court curbing may well be important, perhaps very important, and its importance could well be rooted in the information these bills convey about flagging public support for the Supreme Court. But we do not yet know if that is the case. We must work harder to understand court curbing before we rush into causal inference. It is unclear, and seems unlikely, that all court curbing bills are equal in the eyes of the Court, but that is what the literature implicitly assumes when it advances measures describing the total number of court curbing bills and their ideological distribution. Even if these are the best measures to use, and they might be, the exclusion of so many relevant court curbing bills from across the ideological spectrum makes current measurements unreliable. No inference of Supreme Court responsiveness to court curbing signals is presently justified. However, more comprehensive data such as that presented here will make it possible to revisit many claims.

In summary, more complete data reveal that the bulk of court curbing activity between 1989 and 2008 was narrow, or issue-specific. Moreover, members generally reintroduced their court curbing bills in later congresses, usually in the first session. These facts challenge the conventional narrative that court curbing bills are generally broad, such that they cannot be related back to specific issues, or that contemporaneous evaluations of the Supreme Court’s performance motivate court curbing. They suggest instead that members of Congress hope to mobilize political activity around specific issues and decisions. Given the narrow nature of most court curbing, it is not clear that the Supreme Court can respond to it by moderating its decisions across the rest of its docket. Such behavior, if detected, might even undermine responsiveness by insulating controversial decisions from political interference. Stronger evidence for Supreme Court sensitivity to court curbing in Congress would be evidence that individual Justices alter their behavior in response to court curbing signals in different issue areas. By conveying information about the issues and decisions that court curbing bills attack, the more comprehensive data presented here make it possible to launch such an investigation.

Although this article is limited to a discussion of the period between 1989 and 2008, over which these and Clark’s data overlap, the new data are complete through the end of 2022. Future work will describe narrow and broad court curbing efforts between 2009 and 2022 in a comprehensive manner for the first time. This work will highlight a dramatic change in the ideological composition of court curbing bills in more recent congresses, with liberal bills taking a clear and commanding lead since 2009. If court curbing before 2009 bolstered the idea that conservatives viewed the Supreme Court as an entrenched liberal institution (Clark 2011, 46-7; Teles 2008), the liberal predominance in more recent court curbing suggests times have changed. Extending the data through 2022 will shed new light on the shifting politics of the Supreme Court. These future efforts will improve our understanding of the annual count and ideological distribution of court curbing bills, as well as introduce other measures that take account of subject matter, distinct approaches to court curbing, and bill complexity. It will be possible to evaluate the relationship between these measures and outcomes of interest, like individual and collective decision-making on the part of the Justices, with new confidence.

#### Courts defeat stripping attempts – many options for review will remain.

Daniel Epps & Alan M Trammell 23 - Howard and Caroline Cayne Distinguished Professor of Law at Washington University Law School & Professor of Law and Washington and Lee. “The False Promise of Jurisdiction Stripping,” November 2023, Columbia Law Review 123(7), pp. 2077-2152.

We have gamed out various scenarios based on the traditional theory of jurisdiction stripping (plenary power, subject to external constraints) not because we think it reflects the best reading of Article III but because the Supreme Court consistently has subscribed to it. That's what matters most when trying to figure out how a Court hostile to a substantive law will respond to jurisdictional hardball. One could argue that external constraints should be narrowly defined (as a normative matter). But the limited precedent from the Supreme Court and lower federal courts suggests a broad understanding of external constraints (as a descriptive matter). While Sprigman, for example, argues that the external constraints on Congress are vanishingly small,311 the case law strongly suggests that courts would not agree with so bold a reading. 312 Going back as far as McCardle, federal courts often have construed jurisdiction strips narrowly and ensured that some avenue of constitutional review remains available. 313 Courts also have been willing to consider whether a jurisdiction strip attempts to shield an otherwise unconstitutional action (such as a potential due process violation) from review.314

To crystallize the point: The Supreme Court has never acquiesced in a jurisdiction strip of the Court's power of constitutional review without either engaging in constitutional review in the case at hand or pointing to another readily available avenue for such review in a future case. And if Congress perceives the Court as so hostile that jurisdiction stripping is necessary, there is no particular reason to expect that the Court would embrace a sweeping understanding of jurisdiction stripping going well beyond precedent and the scholarly mainstream. In short, if the Court wants to decide a matter, particularly a constitutional question, it has numerous options at its disposal. Jurisdiction stripping might be a speed bump along the way; it isn't an insurmountable wall.

External constraints aren't the only reason jurisdiction stripping may fail. Even if the judiciary does not interpret external constraints broadly, Congress may not be able to effectuate its goals over the long term, at least if it is trying to enshrine federal rights. Much of what Congress wants to accomplish will ultimately require the judiciary's active participation. If the Court thinks Congress has exceeded its constitutional powers (say, by codifying a right to abortion in federal law), believing that that same Court will willingly enforce that law simply because Congress has stripped the Court of jurisdiction over constitutional challenges is naive. Getting courts out of the way is-at best-a temporary solution.

#### Immigration curbing not unique and no impact because filibuster blocks stripping.

Douglas C. Youvan 25 – Associate Professor at MIT. “Trump, DeSantis, and the Battle Over Judicial Authority: Congress, Impeachment, and the Limits of Power,” 03/19/2025, https://www.researchgate.net/profile/Douglas-Youvan/publication/389987018\_Trump\_DeSantis\_and\_the\_Battle\_Over\_Judicial\_Authority\_Congress\_Impeachment\_and\_the\_Limits\_of\_Power/links/67db2c53e62c604a0ddf3e9f/Trump-DeSantis-and-the-Battle-Over-Judicial-Authority-Congress-Impeachment-and-the-Limits-of-Power.pdf

As part of his broader push to counter judicial intervention in Trump’s agenda, Governor Ron DeSantis has suggested using legislative maneuvers to limit the power of federal courts. Specifically, he has proposed that Congress attach jurisdiction-stripping provisions to “must-pass” bills—essential pieces of legislation that lawmakers are compelled to approve, such as government funding bills or national defense measures. This strategy would force opponents, particularly Senate Democrats, into a difficult position: either accept restrictions on judicial authority or risk shutting down essential government functions.

This tactic reflects a broader conservative effort to rein in what they see as activist judges, particularly in areas such as immigration policy, executive orders, and election laws. However, while this approach has been used in the past for various policy objectives, its legal and political feasibility remains uncertain.

DeSantis’ Suggestion of Using Budgetary and Legislative Maneuvers

DeSantis' proposal suggests that Congress could attach language restricting federal court jurisdiction to major appropriations bills or other must-pass legislation. This could include:

Blocking federal courts from ruling on specific executive actions (such as deportation policies or border security measures).

Defunding courts that issue rulings perceived as obstructing Trump’s agenda, making it harder for them to function.

Prohibiting the use of federal funds to enforce certain court rulings, effectively nullifying their impact.

This strategy capitalizes on the reality that Congress must pass funding bills to keep the government operational. By tying judicial restrictions to these bills, DeSantis and his allies aim to circumvent normal legislative gridlock and force concessions from their opponents.

However, this tactic is controversial because it blurs the separation of powers by using Congress' spending authority to directly influence judicial operations. While such measures might pass the House of Representatives, their success in the Senate is far less certain, given the need for at least 60 votes to overcome a filibuster.

#### Court has bent the knee to Trump – there is no perception of independence.

Steven GREENHOUSE Former NYT Labor Reporter—Century Foundation Sr. Fellow ‘25 https://www.theguardian.com/commentisfree/2025/oct/06/supreme-court-donald-trump

Two of the world’s best-known authoritarian leaders – Viktor Orbán, Hungary’s prime minister, and Recep Tayyip Erdoğan, Turkey’s president – have each had at least 15 years at their country’s helm to pack the courts with loyalists and to pressure and intimidate judges. And no surprise, judges in those countries have repeatedly done what Orbán and Erdoğan want.

Donald Trump has not had the opportunity to pack the US supreme court to nearly the same degree. Nor has he, despite his brash, bullying ways, done much to pressure or browbeat the court’s nine justices. Nevertheless, the court’s conservative supermajority has ruled time after time in favor of Trump since he returned to office. The six conservative justices have fallen into line much like Hungary’s and Turkey’s judges, even though the supreme court’s justices have life tenure to insulate them from political pressures.

With the court’s new term beginning on Monday, many Americans are dismayed that the conservative justices have been so submissive to Trump, the most authoritarian-minded president in US history. Notwithstanding the US’s celebrated system of checks and balances, the justices have utterly failed to provide the checks on Trump that many legal scholars had expected. In ruling for Trump, the chief justice, John Roberts, and the other conservatives have let him gut the Department of Education, fire Federal Trade Commission and National Labor Relations Board members, and strip temporary protected status from hundreds of thousands of immigrants. The rightwing supermajority has also let Trump halt $4bn in foreign aid, fire tens of thousands of federal employees despite contractual protections and deport people to countries where they have no connection.

In these and other cases, the supermajority has ceded huge power to Trump, for instance, by greatly reducing Congress’s constitutional power over spending as it let Trump unilaterally gut agencies and halt funding approved by Congress. What’s more, the court seems eager to snuff out independent, nonpartisan federal agencies by letting Trump fire agency chairs and commissioners without giving any reason, even though Congress approved laws explicitly saying those officials could only be dismissed for cause. (Pleasing corporate America, the court ordered last Wednesday that Lisa Cook can remain on the Federal Reserve Board, at least temporarily, while litigation proceeds over whether Trump can fire her as part of his effort to end the central bank’s independence.)

“The chief justice is presiding over the end of the rule of law in America,” said J Michael Luttig, a highly regarded conservative former federal appellate judge.

The conservative justices have repeatedly done Trump’s bidding even though they don’t begin to face the intense pressures that Hungary’s and Turkey’s judges face. Erdoğan has sometimes purged and blackballed judges seen as insufficiently loyal, while Orbán’s high-ranking allies have berated less obedient judges as “traitors”.

The US supreme court has ruled for Trump in a startlingly high percentage of cases this year. It has issued 24 decisions from its emergency docket (often without giving any reasons) and ruled in Trump’s favor about 90% of the time.

In doing so, the court has repeatedly vacated injunctions that lower courts had issued after concluding that Trump, with his 209 executive orders, had egregiously broken the law. Adam Bonica, a Stanford political science professor, found that in Trump administration cases decided between 1 May and 23 June, federal district courts ruled against Trump 94.3% of the time (82 out of 87 cases), often after looking closely at the facts. In contrast, the supreme court ruled 93.7% of the time for Trump (15 out of 16 cases), often without taking a close look at the facts.

“The supreme court has pulled the rug out from under the lower federal courts, and it has done so deliberately and knowingly,” Luttig said, adding that the court is “acquiescing in and accommodating the president’s lawlessness”.

With the court siding so often with Trump, a new Gallup poll found that a record high 43% of Americans think the court is too conservative, higher than the 36% who think the court is “about right”. Moreover, the court’s overall approval rating has fallen to its lowest level since Gallup began measuring, dropping below 40% for the first time in August (before climbing slightly) – and down from nearly 60% in the early 2000s.

Steven Levitsky, a political science professor at Harvard and co-author of How Democracies Die, voiced bewilderment that the court has been so obliging toward a president who he says is a clear threat to democracy. According to Levitsky, courts come under the thumb of authoritarian governments in several ways. One way is “ideological agreement”. He said the court’s most rightwing members, Samuel Alito and Clarence Thomas, seem in fundamental agreement with Trump, but he said the other conservatives do not love Trump even if they often rule for him. Levitsky suggested that those justices are so hostile toward liberals and liberal arguments that they gravitate towards Trump’s side in case after case.

Court packing is another way courts fall under an authoritarian’s sway. Orbán, Erdoğan and their legislative allies have appointed the overwhelming majority of their countries’ judges, while Trump has appointed three of the nine justices. With life tenure, the justices should in theory feel free from political pressure and able to rule against Trump. In the past, many justices have ruled against the presidents and parties that appointed them.

Levitsky sees another phenomenon at work: abdication. Pointing to both Congress and the supreme court, he said: “The major institutions that have the authority and responsibility to stand up and stop an authoritarian have declined to do so.”

In his view, the conservative justices may have made a major miscalculation. “They are overconfident about the strength of our institutions,” Levitsky said. “They don’t really think our democracy is in danger. They don’t think it can really happen here. I really think a majority of members of the US establishment are in that camp.”

#### President waging war on judiciary over immigration.

J. Michael LUTTIG Frmr U.S. circuit judge on the United States Court of Appeals for the Fourth Circuit AND Megha CHAKRABARTI Host, On Point ‘25 https://www.wbur.org/onpoint/2025/08/05/judiciary-judge-j-michael-luttig-trump

LUTTIG: There are various definitions of constitutional crisis over the many years. Every constitutional scholar that I'm familiar with would say that when the President of the United States defies an order of the Supreme Court of the United States, America's in a constitutional crisis.

Now this president has already done that. But before he had done that, I had said that actually America is in a constitutional crisis whenever the president of the United States, himself and his government, the United States government, is at war with the federal courts and the rule of law. And that's why in that Atlantic article I said that Donald Trump was at war with the federal judiciary and the rule of law.

And by the way, Meghna, I could never have foreseen when I wrote that article, only, you know, a few months ago, that war would've become what it has become today, which is an all-out confrontation between the president of the United States and the federal judiciary, including the Supreme Court of the United States. We always have to remind our audiences that this is the president of the United States of America, Meghna.

Never before in the almost 250 years of American history has a president of the United States done or said even one single thing that this president has done and said hundreds of times over. About the courts, the individual judges, the Constitution of the United States and the rule of law. Americans have become numbed to this president.

And as long as they remain numbed to all of this, then America will continue in dramatic decline.

CHAKRABARTI: Now when you say that things have occurred since you wrote that Atlantic article and now that you would've never expected, that in your mind prove an all-out war against the judiciary that the Trump administration is waging, are you specifically referring to the attorney general's investigation of U.S. District Judge James Boasberg?

LUTTIG: Not specifically to that, but including that, but 10 or 12 other things that we'll discuss. The overarching point that I'm making is that eight months into this presidency his war on the federal courts and the rule of law has now blossomed into a open civil war.

So let's begin actually with Judge Boasberg.

But not this latest episode spectacle by the Attorney General of the United States, Pam Bondi. Let's start at the beginning with Judge Boasberg. Judge Boasberg was essentially the first federal judge to prevent Donald Trump from deporting persons from the United States without due process of law.

The first time that Judge Boasberg entered an order to that effect, Donald Trump himself called for Judge Boasberg's impeachment, Meghna.

Impeachment. And dutifully, the Republican Congress began to initiate articles of impeachment. That's where this started, effectively. It has gone from there to Donald Trump's refusal to obey many orders of the federal courts.

Below the Supreme Court of the United States, many orders. The president of the United States just doesn't care what the federal courts say. Okay? And all the while, while he is refusing to abide by the law, he is viciously attacking not just the federal courts as a whole, but every individual federal judge who rules against him.

CHAKRABARTI: Yes. And that exactly. And just for people who don't know, as Judge Luttig was saying, this was the origin of the campaign against Judge Boasberg. That he has ruled against the Trump administration and even gone so far as to hold members of the administration in contempt for not complying with court orders.

Part II

CHAKRABARTI: U.S. District Judge John McConnell Jr. of the District of Rhode Island recently shared threats that he's been receiving after he made a ruling against the Trump administration. He said he's received six credible death threats. More than 400 angry voicemails including the one we are about to play.

It is full of expletives, which we have bleeped out. But we still felt it's worth listening to in terms of hearing the kinds of vitriol that's being poured into the offices of federal judges across this country. So here it is.

(VOICEMAIL PLAYS)

CHAKRABARTI: Judge McConnell shared that voicemail at a webinar that was held just last week entitled Judges Break Their Silence: Attacks, Intimidation and Threats to Democracy. And here's what Judge McConnell Jr. himself said in terms of how he felt when he received that voicemail.

McCONNELL JR.: It's daunting. It was frightening. I've never had anyone threaten to put me in prison, threaten to bodily injury, threaten, wishing that I was assassinated. It went beyond just me, the court staff had to listen to this, and our court received over 400 vile, threatening, horrible voicemails.

Not all as bad as that one, but many of them equally as personally attacking. And I've been on the bench almost 15 years and I must say it's the one time that actually shook my faith in the judicial system and the rule of law and the work we do with our Constitution and whatnot.

CHAKRABARTI: Judge Luttig, in your 15 years on the bench, did you ever receive any calls like that?

LUTTIG: No. Of course, not Meghna. And thank you for playing that audio from Judge McConnell. America is weeping right this moment as it hears that tape, I wish you could send it directly to the Supreme Court of the United States, Meghna, because the Supreme Court has no higher obligation than to defend the federal judiciary against this kind of threat and against the threats that are being made today and every day by the president of the United States and his Attorney General.

CHAKRABARTI: And you believe the court has failed in that duty?

LUTTIG: I certainly do.

CHAKRABARTI: Why?

LUTTIG: Because it's done nothing.

CHAKRABARTI: But what is the court to do to defend the judiciary in this manner?

Do you, would you wish the Chief Justice to stand up publicly and give a public address not disavowing, but condemning these actions, what would he do?

LUTTIG: The Chief Justice and the entire Supreme Court of the United States have no higher responsibility than to denounce the threats by the President of the United States and the Attorney General of the United States on the federal courts of the United States and the rule of law in America.

CHAKRABARTI: I wonder, so let's talk about the high court then, more specifically, because many people listening right now, Judge Luttig would say it doesn't matter what the Chief Justice might say publicly or any of the justices for that matter, what really matters is how they ruled. And you know where I'm going to, with Trump v. United States.

Essentially, the Court has said, a slim majority of the justices have said that a president, specifically this one when acting as President of the United States, can basically do anything he wants, and he would be immune from prosecution.

Is that not a signal enough that they are not necessarily interested in standing up to attacks on the judicial branch of government?

LUTTIG: Meghna, first, if I may, I know of no one in America who believes that it would be irrelevant for the Chief Justice of the United States to condemn Donald Trump and the Attorney General's threats on the federal judiciary and the rule of law.

### Daa Protection Impact

#### AI improvements will stop due to diminishing research productivity. Their impact is an extraordinary claim requiring extraordinary proof.

David Thorstad 24, 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, “Against the singularity hypothesis (Part 2: Preliminary doubts),” Reflective Altruism, 1/12/24, https://reflectivealtruism.com/2024/01/12/against-the-singularity-hypothesis-part-2-preliminary-doubts/

3. Extraordinary claims require extraordinary evidence

Part 6 of my series on epistemics discussed the need for extraordinary claims to be supported by extraordinary evidence. Because extraordinary claims are not, on their face, especially plausible, it takes a good deal of evidence to raise them to the level of plausibility, and still more to show that they are likely to be true.

The same discussion also showed that effective altruists have not always held fast to the requirement of providing extraordinary evidence to support extraordinary claims. For example, we saw that Robin Hanson defends his claim that some reported UFO sightings are genuine primarily by telling his readers that if they don’t know why standard explanations for UFO sightings fail, they haven’t been paying attention. Providing scant support for extraordinary claims is not good epistemic practice, and should not be repeated.

The singularity hypothesis makes at least two extraordinary claims. First, it claims that the general intelligence of artificial agents will experience a sustained period of accelerating growth. Second, it claims that the period of accelerating growth will terminate in a fundamental discontinuity of human history after which, on leading views, artificial agents have become at least 2-3 orders of magnitude more intelligent than the average human.

To support these extraordinary claims, it is not enough to show that they are physically possible, to challenge opponents to disprove them, or to provide a few suggestive pieces of evidence in their support. Advocates of the singularity hypothesis owe us many excellent reasons to treat the hypothesis as a live hypothesis deserving of serious consideration. Later in this series, I will show that many leading treatments of the singularity hypothesis fall considerably short of meeting this argumentative burden.

4. Diminishing research productivity

In the 1950s, a billion (inflation-adjusted) dollars invested in research produced over forty FDA-approved drugs. In the 2000s, an inflation-adjusted billion dollars produced fewer than one FDA-approved drug (Scannell et al. 2012).

From 1971 to 1991, developed nations increased their inflation-adjusted expenditures on agricultural research by over sixty percent. Despite this rising expenditure, growth in crop yields per acre dropped by fifteen percent (Alston et al. 2000).

The same story repeats across many sectors of society today (Gordon 2016). The root cause is not that researchers are becoming lazy or incompetent. It is rather that good ideas are becoming harder to find. Pharmaceutical researchers in the 1950s and agricultural researchers in the 1970s plucked much of the low-hanging fruit, leaving their future colleagues to chase more difficult game. In a phrase, good ideas became harder to find.

The underlying dynamic is usually illustrated by comparing the research process to fishing without replacement from a large pond. At the outset, it is easy to catch fish. The easiest fish to catch may fly to your hook as soon as it is cast. But as time goes on, catching fish becomes harder. That’s not because you’ve gotten worse at fishing, but simply because the easiest fish have already been caught. The fish that remain are much harder to catch.

Social scientists think that beyond a point, almost all research processes behave like fishing: as the easy fish are caught and the low-hanging fruit plucked, good ideas become increasingly harder to find (Bloom et al. 2020). A bit more formally, define research productivity to be the amount of research inputs required to yield a fixed research output. The phenomenon at issue is that as fields mature, research productivity tends to decline.

For example, a recent analysis in American Economic Review models a 41-fold drop in research productivity across the US economy since the 1930s.

Source: Bloom et al., “Are ideas getting harder to find?“

Similar results are found by other studies.

Declining research productivity would be a bad thing for the singularity hypothesis. If each doubling of intelligence is harder to bring about than the last, then even if all AI research is eventually done by recursively self-improving AI systems, the pace of doubling will steadily slow. By contrast, the singularity hypothesis says that the pace of doubling should accelerate, not slow.

Some readers might object that diminishing research productivity applies only to human researchers. When artificial agents are doing the research, research productivity will no longer diminish. There is, perhaps, a sliver of truth to this objection. One cause of diminishing research productivity is the cost of maintaining knowledge stocks. As humanity’s knowledge stock grows, we humans must invest ever-increasing fractions of resources in storing accumulated knowledge and transmitting that knowledge to subsequent generations. However, artificial agents find it much easier to store large knowledge stocks, and transferring knowledge to successive artificial agents may be a simple matter of copying and pasting.

However, the main factor driving diminishing research productivity is not the difficulty of maintaining large knowledge stocks. It is instead the fact that as time goes on, low-hanging fruit begins to be used up and good ideas become harder to find.\\ This is a feature of research problems, not a feature of the agents doing the research. As a result, this underlying dynamic should be largely unchanged by letting artificial agents replace humans as researchers. Artificial agents use up low-hanging fruit just like humans do.

Perhaps it might be objected that the problem of improving artificial agents is an exception to the general phenomenon of diminishing research productivity. After all, Moore’s law held for many years, producing a biannual doubling of hardware capacities measured by the number of transistors on a dense integrated circuit. We could hardly have kept up such a consistent and breakneck pace of hardware improvement in the face of diminishing research productivity, right?

Actually, that is exactly the opposite of what economists think. In what is perhaps the best-known recent study of diminishing research productivity, Nicholas Bloom and colleagues (2020) single out Moore’s law as “perhaps the best example” of diminishing research productivity, using a section-length case study of Moore’s law to illustrate the ubiquity of the phenomenon of diminishing research productivity. In their preferred model, they find an 18-fold decrease in hardware research productivity from 1971-2014, and four auxiliary models offer estimates between an 8-fold and a 352-fold drop over the same period.

Source: Bloom et al., “Are ideas getting harder to find?“

How, then, has Moore’s law been sustained? We sustained Moore’s law despite rapidly diminishing research productivity by pumping ever-increasing amounts of money into research. The problem with this approach is that we can’t keep Moore’s law alive indefinitely by throwing money at it: eventually, we will run out of money. The average semiconductor plant already costs over ten billion dollars to build. There isn’t that much more money for us to spend.

Indeed, experts are mostly divided between two views about Moore’s law: the view that Moore’s law will end in this decade, and the view that Moore’s law has already ended (Mack 2011, Shalf 2020, Theis and Wong 2017, Waldrop 2016). At least when we restrict attention to classic forms of hardware progress such as Moore’s law, experts do not think that Moore’s law is an exception to the problem of diminishing research productivity. Moore’s law is rather a prime example of the problem.

The upshot is that we have good theoretical reason to expect diminishing research productivity to take a bite out of progress on many research problems. At best, we have no special reason to think that the problem of improving artificial agents is an exception, and at worst, the recent history of Moore’s law suggests that diminishing research productivity may have set in long ago.

5. Conclusion

This post reviewed two of five preliminary reasons for skepticism about the singularity hypothesis. The first reason for skepticism is that the singularity hypothesis is an extraordinary claim, so it is appropriate to be skeptical unless we are given extraordinary evidence.

## FDI

### LT – Competition – 2AC

#### Hoffman impedes small business competitiveness by arbitrarily advantaging noncompliant employers.

Paul Holdsworth 14 – J.D. Candidate at University of Richmond Law. “America's (Not So) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers,” May 2014, University of Richmond Law Review 48(4), pp. 1369-1418.

Aside from disincentivizing employers from hiring illegal immigrants, awarding full workplace injury recovery also has another key benefit: it provides more protections for employers in the same field who otherwise adhere to IRCA's provisions of verifying immigration status and refrain from hiring illegal labor. In other words, it solves the problem of compliant employers becoming disadvantaged by a competitor's noncompliance. It does so by ensuring that noncompliant employers - those employers who do not affirmatively verify immigration status and do hire illegal immigrants - are not able to profit from their intentional or ignorant complacency.

[\*1403] Undoubtedly this problem has arisen in part because of the lack of widespread enforcement of IRCA's employment verification mandate. 197 In order to facilitate the accomplishment of this verification mandate, an electronic database known as "E-Verify" was created wherein employers can check the work authorization documents an employee presents against government databases in order detect an individual's unauthorized work status. 198 Between 2006 and 2010, fourteen states enacted laws requiring state agencies and contractors to use E-Verify. 199 In four states, all employers within the state were required to use E-Verify. 200 However, notwithstanding these efforts, only four percent of employers were using E-Verify in 2010, and in that year, nearly eighty percent of all hires in the United States were made without verifying employment through E-Verify. 201 Thus, although the E-Verify program has seen an increase in use since its implementation, its potential is far from being realized.

The result of this lack of uniformity across similar sectors of employment means that some employers who are noncompliant with IRCA and E-Verify are able to hire cheaper illegal labor. 202 And because many of the major employers of undocumented workers are in the sectors of the economy that typically provide lower wages and more dangerous conditions, they can profit by not having to pay full damages in cases where an illegal immigrant employee is injured on the job, to the disadvantage of employers who do not hire illegal immigrants. These noncompliant employers can not only potentially save significant amounts of money by paying limited amounts of damages and benefits to the [\*1404] injured employee, 203 but also easily replace cheap labor with other cheap labor as if these undocumented individuals were metal cogs in their business machines. And as E-Verify is currently under-enforced, these noncompliant employers can reasonably do so without any fear that IRCA's required civil sanctions or criminal penalties will be administered. 204

Basic principles of supply and demand dictate that these employers would serve as a magnet to undocumented workers who would not be able to find employment with employers who are compliant with IRCA and E-Verify. 205 With this subsequent pull, the compliant employers face a significant pecuniary disadvantage in being obligated to pay full workers' compensation damages to an employee should that employee suffer any workplace injury. 206

For example, consider the following hypothetical. Suppose Company A and Company B are both employed in road construction in a small rural town near the United States-Mexico border. Both companies are in a state that allows illegal immigrant workers to recover workplace injury compensation, but limits the amount of damages that such individuals may receive due to their inability to "legally mitigate" damages through obtaining lawful employment. Company A is compliant with IRCA and E-Verify, and inquires into each prospective employee's immigration status prior to hire. However, due to certain socio-demographics of this particular town, the supply for authorized labor is very low. The supply for unauthorized labor is very high because the [\*1405] economic production in this town is significantly better than the nearest border town. Nevertheless, Company A hires an authorized United States citizen knowing that should injury befall this employee, Company A would have to compensate the injury in full. To the contrary, Company B is noncompliant with E-Verify and takes advantage of the fact that its state has not vigorously enforced E-Verify compliance for all employers. Thus, not worried about workers' compensation obligations, Company B hires an individual who is unauthorized to work in the United States. Both employees from each company suffer a debilitating work injury in their employment and file for workers' compensation benefits.

Company B is in a better financial situation after the workplace injury, all other things held equal. 207 Company B does not have to pay the same benefits that Company A does to the injured employee. Furthermore, Company B can simply rehire from an already high supply of unauthorized labor and continue in its business venture quickly. On the other hand, Company A is obligated to pay full damages to its injured employee and has a significantly more limited pool of authorized United States citizens to choose from. Due to this scarcity of supply, Company A might experience delays in returning to the level of business output that it had before the employee's injury. Company B subsequently profits from the ability to be noncompliant with E-Verify and from avoiding the obligation to pay full damages. Furthermore, with the extra savings from not being obligated to pay full damages in cases of workplace injury, Company B has lower overhead costs and can reduce the prices of its products and services. The obvious result of this is that Company B can now take advantage of the natural draw to lower prices and attract significantly more clients. With this larger volume of clientele that comes to Company B because of the lower prices, Company A is even further disadvantaged.

Although a hypothetical, this situation is a reality for many small business owners. A strengthened E-Verify system does have its own costs, but compliant small business owners are likely [\*1406] to see these costs to be worth the price in order to prevent their competitors from profiting off of their refusal to "play by the rules." For example, one small business owner who runs a power-washing business in Delaware said, "I am tired of losing work to people who cheat the system and undercut my prices because they don't have the same overhead as I have because I follow the rules … . I am for [a strengthened E-Verify system] simply because in the long run it will help my business." 208 The savings that noncompliant employers could have from avoiding paying full damages could be crippling to competing employers who abide by the law. If states allow courts to limit damage recovery to injured documented workers, this really works to the economic and pecuniary detriment of those employers who do not hire undocumented workers in the first place. Noncompliant employers should not be able to take advantage of this nuance to maximize their profits, especially if doing so will further disadvantage employers who obey the law. 209 Thus, eliminating the arbitrary judicial practice of limiting workplace injury recovery because of one's immigration status encourages more widespread compliance with IRCA and consequently reinforces equality among economic competitors.

In conclusion, awarding full damages to illegal immigrants who are injured in the course of their employment is more supportive of IRCA's purpose than limiting damages. Illegal immigrants do not prominently base their decision to immigrate on the likelihood of workplace injury recovery and thus will not be marginally deterred from immigrating by limiting the amount and type of recovery for workplace injuries. Also, awarding full damages or benefits actually provides more incentives for employers to refrain from hiring illegal immigrants. Lastly, awarding full damages or benefits also ensures that noncompliant employers cannot profit from their noncompliance to the disadvantage of their law-abiding competitors.

### FDI DA – T/L – 2AC

#### 1. FDI Low. Trump chilling effect.

Riley '25 – master’s degree in economics @ University of Southern California. (Bryan Riley. (6-27-2025). "Foreign Investment in U.S. Plummets Amid Trade Uncertainty". National Taxpayers Union. https://www.ntu.org/publications/detail/foreign-investment-in-us-plummets-by-625-amid-trade-uncertainty; Neo)

New foreign investment in U.S. equities plummeted by 62.5% from the final quarter of 2024 to the first quarter of 2025, according to recently released statistics from the Bureau of Economic Analysis (BEA).

New foreign direct investment (FDI)—consisting of foreign ownership of companies in the United States—fell from $88.5 billion in the last quarter of 2024 to $58.7 billion in the first quarter of 2025, a 33.7% decline.

New foreign investment in U.S. equities purchased via the stock market and investment funds fell from $167.8 billion to $23.2 billion, an alarming 86.2% plunge.

Total foreign investment in U.S. equities fell by $174.5 billion, a 62.5% reduction from the fourth quarter of 2024.

Without attempting to draw too many conclusions from a single quarter’s changes, it is reasonable to question whether the administration’s policies are deterring the growth of new foreign investment in the United States.

According to Commerce Secretary Howard Lutnick, “President Donald Trump is committed to bringing in trillions of dollars in new investment into the United States.”

Unfortunately, Trump’s advisors do not seem to share that goal. Peter Navarro, Trump’s senior counselor for trade and manufacturing, says foreign investment in factories like BMW’s in South Carolina is a “scam” that “doesn’t work for America.” Such factories are responsible for more than half of all vehicles assembled in the United States.

If they remain in place, Trump’s tariff hikes will continue to be a big roadblock to foreign investment. Tariffs on raw materials and imported components drive up the cost of producing goods in the United States, discouraging new international investment here.

More fundamentally, U.S. tariffs and quotas that restrict imports leave our trading partners with fewer dollars to invest in our economy and to purchase U.S.-made exports. The more we import, the more dollars our trading partners have available to invest in the United States. The less we import, the less international investment we receive.

As long as the Trump Administration clings to its misguided view that trade deficits are a national security threat, it will deter U.S. businesses and Americans from attracting foreign investment. No one in the Trump Administration seems to understand that, when someone buys a U.S. export, Americans benefit, but if they buy a share of Apple, we also benefit, even though the purchase of Apple stock causes our trade deficit to increase.

The Trump Administration’s unprecedented actions regarding Nippon Steel’s purchase of U.S. Steel will also have a chilling effect on foreign investment. Trump refused to allow Nippon Steel to merge with U.S. Steel without subjecting several business decisions to a presidential veto. For example, there can be no changes to the location of the company’s headquarters, no salary cuts before 2030, and no acquisition of a U.S. business that competes with U.S. Steel or its supplier without the written consent of President Trump or his designee. Reports are already circulating that these moves may scare off future investment.

The Trump Administration’s trade and investment strategy resembles the failed approach utilized by some developing countries in the 1970s: erect high trade barriers in an attempt to force people to make things here if they want to sell things here, and subject new foreign investment to micromanagement by government officials. It is wishful thinking to believe those policies will work any better here than they have in other countries.

#### 2. No uniqueness FDI is for semiconductors. Doesn’t solve.

#### 3. No link. FDI isn’t influenced by US domestic policy.

Pettis '25 – Nonresident Senior Fellow @ Carnegie Endowment for International Peace. (Michael Pettis. (7-7-2025). "Foreign Capital Inflows Don't Lower U.S. Interest Rates." Carnegie Endowment for International Peace. https://carnegieendowment.org/china-financial-markets/2025/07/foreign-capital-inflows-dont-lower-us-interest-rates?lang=en; Neo)

It helps to understand the effect of net capital inflows on domestic interest rates by considering the origins of these capital inflows. According to most mainstream economic understanding, foreign savings are “pulled” into the United States as Americans import capital to fund a domestic shortfall of saving. For those who subscribe to this view, the fact that net foreign inflows are by definition equal to the excess of American investment over American saving can only be explained in one way: net inflows must be pulled into the United States by the need of American businesses to fund investment.

But this denies the agency of foreigners. Countries such as China and Germany are not simply passive victims of American domestic imbalances. On the contrary, the fact that China fully controls its banking system while maintaining strict trade controls and even stricter capital controls—unlike the United States—should suggest that it is more likely to be the originator, rather than the absorber, of global saving imbalances. The reality is that countries such as China and Germany have purposely adopted economic models that suppress domestic consumption in favor of a more rapid expansion of manufacturing. As production grows faster than consumption, the saving rates in these countries automatically rise—leading to, in the case of China, the highest saving rate in history.

But supply needs demand. To avoid the rise in unemployment that would result from being forced to cut back on excess output, these countries must export their production surpluses, acquiring foreign assets in payment for exporting more than they import. Therefore, excess domestic saving in these countries is more likely to be “pushed” abroad by internal policies that boost production relative to consumption than be “pulled” abroad by conditions in deficit economies.

The United States is the main recipient of this exported capital. Foreign governments and investors purchase American Treasury bonds, corporate bonds, equities, factories, real estate, and other assets mainly because the United States has the deepest, most liquid, best-governed, and most open financial markets in the world. Surplus countries export their excess saving to the United States primarily for their own domestic reasons, whether or not U.S. businesses need the inflows to increase productive investment.

The key issue here is the direction of causality. The inflows are not responding to a shortage of saving in the United States. Rather, they are the result of saving surpluses generated abroad by policies that repress household consumption.

#### 4. No investment. 1NC ev says US *should* encourage it not that it *would*.

#### 5. FDI not key, decreases investment, and hurts the economy. Companies choose not to invest.

Pettis '25 – Nonresident Senior Fellow @ Carnegie Endowment for International Peace. (Michael Pettis. (7-7-2025). "Foreign Capital Inflows Don't Lower U.S. Interest Rates." Carnegie Endowment for International Peace. https://carnegieendowment.org/china-financial-markets/2025/07/foreign-capital-inflows-dont-lower-us-interest-rates?lang=en; Neo)

Their view is implicitly based on the premise that U.S. investment suffers from high costs of capital caused by the scarcity of domestic saving. If this premise were correct, it would be logical to argue that net capital inflows from abroad lower American interest rates by relaxing the domestic saving constraint, and that, by extension, any policy that reduces net foreign inflows could raise American interest rates.

But this premise is false. While capital may indeed be scarce in developing countries with high investment needs, it has long stopped being scarce in most advanced economies. In the United States, for example, businesses may refrain from expanding production for many reasons, but rarely is it because they lack access to capital.

This is a crucial difference for at least two reasons. First, if American business investment is not saving-constrained, the American economy will not adjust to net foreign inflows with higher domestic investment, and therefore it must adjust with lower domestic saving.1 As explained below, the most likely adjustments that reduce domestic saving involve either higher unemployment or higher debt. Foreign inflows, in other words, can force the creation of additional U.S. debt so that the overall increased demand for American debt is matched by an overall increased supply—and in which case it will not drive down U.S. interest rates.

And second, if foreign capital inflows are not driven by the inability of American businesses to fund domestic investment, they must be driven by distortions abroad. That is why not only are these inflows unlikely to lower borrowing costs, they may also, paradoxically, force unwanted changes in the structure of the U.S. economy that create the conditions under which more borrowing becomes necessary just to sustain demand. It is not a coincidence, after all, that among advanced economies, those that receive the most amount of net foreign inflows—such as the United States, the United Kingdom, and Canada—are far more likely to be characterized among their peers by higher debt levels than by lower interest rates.

The Fallacy of Scarcity

To understand the conventional misdiagnosis, we need to revisit the classical model from which it arises. In a world where domestic saving is insufficient to finance high-return investment opportunities, foreign capital is a welcome addition. In such a model—applicable, for example, to nineteenth-century America and many developing countries today—external inflows support growth by funding much-needed investment in infrastructure, industry, and productivity-enhancing projects that would otherwise go unfunded.

But this is not the reality of the twenty-first-century U.S. economy, or indeed most advanced economies. American corporations, for example, are not unable to invest because they are short of funds. Not only do they have access domestically to the most liquid and flexible debt and equity markets in the world, but even after using trillions of dollars mainly to buy back shares, pay dividends, or acquire competitors, they still sit on nearly $7 trillion in cash and cash equivalents, equal to nearly a quarter of U.S. GDP. They choose not to invest in new factories or technology.

This is not because they are myopic. It is because they find it difficult to sell their existing production capacity, and thus, increasing the amount of net funding available to them will not cause them to increase investment. Ironically, this weakness in domestic demand is amplified by the very capital inflows that are presumed to help because, by pushing up the value of the dollar, these inflows make foreign imports more competitive than products produced domestically. In other words, rather than drive American investment in domestic production facilities, net inflows can actually make this investment less desirable.

### Africa War – AT: Oil – 1NC

#### No Africa oil war

Lloyd Thrall 15, Associate at RAND corporation, M.A. in international studies and diplomacy at SOAS, University of London, PhD in War Studies at King's College London, "China's Expanding African Relations Implications for U.S. National Security," 2015, http://www.rand.org/content/dam/rand/pubs/research\_reports/RR900/RR905/RAND\_RR905.pdf

There is little credible potential for a Sino-American conflict over resources in Africa. Contrary to popular and perennial assumptions about resource wars, industry and energy analysis sources project adequate supply of conventional hydrocarbons beyond 2035.6 Given reservoir depletion curves, any tightening of supply would be gradual. The adequacy of supply is further augmented when tertiary production and unconventional sources are considered (such as shale and tar sands). U.S. strength in unconventional sources, and potential energy independence, further reduces the likelihood of a conflict. Even in a future with vastly inflated hydrocarbon prices, these costs pale in comparison to those associated with a Sino-American war, the economic costs of which likely fall more heavily on China than the United States.7 Global hydrocarbon resources are distributed via a fungible global market, with many stakeholders and moderate diversity of supply. This enables importing states to buy a predictable supply of hydrocarbons at reasonable and competing prices over long contracts. African sources do not constitute a majority of this supply chain, and supposed victory in a theoretical great-power resource war would not guarantee security of resource supply. In sum, the potential for either China or the United States to be willing to enter war with a nuclear adversary over African oil, let alone other, less valuable resources, is extraordinarily small.8