## Hollow Hope

### Conditionality---Short---2NC

### ---AT: Advocacy---2NC

### ---AT: Real World---2NC

### ---AT: Skew---2NC

### ---AT: CI---Dispo---2NC

### ---AT: CI---X Condo---2NC

### ---AT: CI---Pre-Round Condo---2NC

### MUST READ

## Injunctions

## Distinguish

## Batille

## Hollow Hope

## Humphreys

### !---OV

#### Blackouts directly kill more than the “worst Cold War nuclear exchanges,” which outweighs the aff on magnitude.

Guterl 12 (finishing in Red) – Executive editor, Scientific American

Fred Guterl, Armageddon 2.0, Bulletin of the Atomic Scientists, 2012

The consequences of going without power for months, across a large swath of the United States, would be devastating. Backup electrical generators in hospitals and other vulnerable facilities would have to rely on fuel that would be in high demand. Diabetics would go without their insulin; heart attack victims would not have their defibrillators; and sick people would have no place to go. Businesses would run out of inventory and extra capacity. Grocery stores would run out of food, and deliveries of all sorts would virtually cease (no gasoline for trucks and airplanes, trains would be down). As we saw with the blackouts caused by Hurricane Sandy, gas stations couldn't pump gas from their tanks, and fuel-carrying trucks wouldn't be able to fill up at refueling stations. Without power, the economy would virtually cease, and if power failed over a large enough portion of the country, simply trucking in supplies from elsewhere would not be adequate to cover the needs of hundreds of millions of people. People would start to die by the thousands, then by the tens of thousands, and eventually the millions. The loss of the power grid would put nuclear plants on backup, but how many of those systems would fail, causing meltdowns, as we saw at Fukushima? The loss in human life would quickly reach, and perhaps exceed, the worst of the Cold War nuclear-exchange scenarios. After eight to 10 days, about 72 percent of all economic activity, as measured by GDP, would shut down, according to an analysis by Scott Borg, a cybersecurity expert.

#### Extinction.

Huff 14 – Staff writer

Ethan A. Huff, “Nuclear power + grid down event = global extinction for humanity,” 12 August 2014, http://www.naturalnews.com/046429\_nuclear\_power\_electric\_grid\_global\_extinction.html

If you think the Fukushima situation is bad, consider the fact that the United States is vulnerable to the exact same meltdown situation, except at 124 separate nuclear reactors throughout the country. If anything should happen to our nation's poorly protected electric power grid, these reactors have a high likelihood of failure, say experts, a catastrophic scenario that would most likely lead to the destruction of all life on our planet, including humans.

Though they obviously generate power themselves, nuclear power plants also rely on an extensive system of power backups that ensure the constant flow of cooling water to reactor cores. In the event of an electromagnetic pulse (EMP), for instance, diesel-powered backup generators are designed to immediately engage, ensuring that fuel rods and reactor cores don't overheat and melt, causing unmitigated destruction.

But most of these generators were only designed to operate for a maximum period of about 24 hours or less, meaning they are exceptionally temporary in nature. In a real emergency situation, such as one that might be caused by a systematic attack on the power grid, it could take days or even weeks to bring control systems back online. At this point, all those backup generators would have already run out of fuel, leaving nuclear reactors everywhere prone to meltdowns.

#### Outweighs on magnitude. It’s a risk magnifier that turns every other ex-threat.

Denkenberger et al. 21 – \*Professor of Mechanical Engineering from the University of Canterbury, PhD in Civil Engineering from University of Colorado at Boulder, M.S.E. in Mechanical and Aerospace Engineering from Princeton University; \*\*Senior Research Fellow at the Futures of Humanity Institute, PhD in Computational Neuroscience from Stockholm University; \*\*\*PhD Candidate in the Fenner School of Environment and Society and M.A. in Applied Cybernetics from the Australian National University; \*\*\*\*Professor of Electrical and Civil Engineering at the University of Western Ontario, PhD in Materials Engineering from The Pennsylvania State University.

\*David Denkenberger, \*\*Anders Sandberg, \*\*\*Ross John Tieman, and \*\*\*\*Joshua M. Pearce, “Long-term cost-effectiveness of interventions for loss of electricity/industry compared to artificial general intelligence safety,” European Journal of Futures Research, 09-20-2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8451736/

Extreme solar storms, high-altitude electromagnetic pulses, and coordinated cyber attacks could disrupt regional/global electricity. Since electricity basically drives industry, industrial civilization could collapse without it. This could cause anthropological civilization (cities) to collapse, from which humanity might not recover, having long-term consequences. Previous work analyzed technical solutions to save nearly everyone despite industrial loss globally, including transition to animals powering farming and transportation. The present work estimates cost-effectiveness for the long-term future with a Monte Carlo (probabilistic) model. Model 1, partly based on a poll of Effective Altruism conference participants, finds a confidence that industrial loss preparation is more cost-effective than artificial general intelligence safety of ~ 88% and ~ 99+% for the 30 millionth dollar spent on industrial loss interventions and the margin now, respectively. Model 2 populated by one of the authors produces ~ 50% and ~ 99% confidence, respectively. These confidences are likely to be reduced by model and theory uncertainty, but the conclusion of industrial loss interventions being more cost-effective was robust to changing the most important 4–7 variables simultaneously to their pessimistic ends. Both cause areas save expected lives cheaply in the present generation and funding to preparation for industrial loss is particularly urgent.

Civilization relies on a network of highly interdependent critical infrastructure (CI) to provide basic necessities (water, food, shelter, basic goods), as well as complex items (computers, cars, space shuttles) and services (the internet, cloud computing, global supply chains), henceforth referred to as industry. Electricity and the electrical infrastructure that distributes it plays an important role within industry, providing a convenient means to distribute energy able to be converted into various forms of useful work. Electricity is one component of industry albeit a critical one. Industry provides the means to sustain advanced civilization structures and the citizens that inhabit them. These structures play a critical role in realizing various futures by allowing humanity to discover and utilize new resources, adapt to various environments, and resist natural stressors.

Though industry is capable of resisting small stressors, a sufficiently large event can precipitate cascading failure of CI systems, resulting in a collapse of industry. If one does not temporally discount the value of future people, the long-term future (thousands, millions, or even billions of years) could contain an astronomically large amount of value [18]. Events capable of curtailing the potential of civilization (existential risks, such as human extinction or an unrecoverable collapse) would prevent such futures from being achieved, implying reducing the likelihood of such events is of the utmost importance [100]. Reducing the prevalence of existential risks factors; events, systemic structures, or biases which increase the likelihood of extinction but do not cause extinction by themselves is also highly valuable. Complete collapse or degraded function of industry would drastically reduce humanity’s capacity to coordinate and deploy technology to prevent existential risks, representing an existential risk factor. Consequently, interventions preventing loss of industry, reducing the magnitude of impacts, or increasing speed of recovery could be extremely valuable.

#### Turns heg and military readiness---the military is worthless with a collapsed US grid

Alhelou et al. 19 – Senior member of the Institute of Electrical and Electronics Engineers, faculty member in the Department of Electrical and Computer Systems Engineering, Monash University.

Hassan Haes Alhelou, Mohamad Esmail Hamedani-Golshan, Takawira Cuthbert Njenda, and Pierluigi Siano, “A Survey on Power System Blackout and Cascading Events: Research Motivations and Challenges,” *Energies*, vol. 12, no. 4, February 2019, https://www.mdpi.com/1996-1073/12/4/682.

During a blackout, the security systems are disabled, and, if there are no standby power sources, this can be a political threat to a nation [58,165]. Electricity is used to operate military bases where government officials work to support and maintain deployment of weapons and oversee combat forces. The equipment also includes data centers, and outages can cause valuable weaponry and equipment to become useless in the event of an attack [154,166,167]. With non-functioning equipment, military personnel could be left defenseless from attacks. The bases may have also important facilities like airports and hospitals that also require electricity.

#### Also. blows up the economy, even if the Fed is distinguished.

Coates et al. 25 – John F. Cogan Professor of Law and Economics at Harvard Law School, Former General Counsel of the Securities and Exchange Commission; Richard Paul Richman Professor of Law at Columbia Law School, former attorney for the U.S. Department of the Treasury; Harvey J. Goldschmid Professor of Law at Columbia Law School, member of the Financial Stability Task Force; Professor of Law at Columbia Law School, former Senior Adviser to the Deputy Secretary of Treasure, former Economist at the Federal Reserve Bank of New York.

John Coates, Jeffrey Gordon, Kathryn Judge, and Lev Menand, “BRIEF OF AMICI CURIAE LAW PROFESSORS REGARDING THE GOVERNMENT’S ‘APPLICATION TO VACATE THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND REQUEST FOR AN ADMINISTRATIVE STAY’,” Amicus Brief, 02-18-25, https://www.supremecourt.gov/DocketPDF/24/24A790/343033/20250218144147911\_No.%2024A790\_Amicus%20Brief.pdf

Despite the Court’s circumspection, the perception that Humphrey’s Executor— and thus the Federal Reserve’s independence—may be hanging by a thread acquired new plausibility just a few days ago when the Acting Solicitor General sent Senator Richard J. Durbin a letter informing him that the Department of Justice “will no longer defend the constitutionality” of “certain for-cause removal provisions that ap ply to members of multi-member regulatory commissions” and that, “[t]o the extent that Humphrey’s Executor requires otherwise, the Department intends to urge the Supreme Court to overrule that decision[.]”8

The Government’s Application to this Court reiterates the letter’s message and further states that, even if Humphrey’s Executor is not overruled, the “exception” that it creates to the rule of unconstrained presidential removal power “does not apply to multimember agencies that exercise substantial executive power, for instance by promulgating binding rules or issuing final decisions in administrative adjudica tions.”9

The Government’s letter and Application avoid mentioning the Board of the Federal Reserve System by name despite its potentially being one of the “multi-member regulatory commissions” whose constitutionality the Government will no longer defend (the Board promulgates binding rules, for instance—including in the routine conduct of monetary policy). But if the Government’s newly asserted position were to prevail—that is, if the Court were to overrule Humphrey’s Executor and on that basis invalidate statutory removal protections for traditional multimember independent agencies—“the [Federal Reserve] Board would obviously be among the many agencies whose constitutionality would be under a cloud.” Daniel K. Tarullo, The Federal Re serve and the Constitution, 97 S. CAL. L. REV. 1, 45 (2024). Legal observers know this, and so do the markets.

Second, economists agree, and have demonstrated empirically, that there is a critical relationship between economic vibrancy and “central-bank independence”—a topic so important that it has earned its own acronym: CBI. Doubts about the Fed’s constitutional viability and independence may not only roil markets but trigger knock-on effects that are hard to predict and may prove equally hard to contain. The functioning of the Federal Reserve is essential to the stability of the American economy. Concerns (warranted or unwarranted) that its operations could be disrupted could foster financial and political instability and cause lasting harm. Indeed, public belief in the Fed’s independence from political forces is crucial to the Fed’s effectiveness in combating inflation. “[I]f the public believes that the central bank is free from interference and that the law [governing the bank] is unlikely to change swiftly and without debate, it will also lower inflationary expectations, leading to price stability above and beyond the control of the money supply.” Cristina Bodea & Raymond Hicks, Price Stability and Central Bank Independence: Discipline, Credi bility, and Democratic Institutions, 69 INT’L ORGS. 35, 38 (2015) [hereinafter Stability and Independence].

And third, legal observers, the public at large, and even members of the Court itself have come to view at least some of the Court’s so-called “shadow-docket” rulings as presaging the ultimate outcome of its merits rulings.10 With the Government now publicly abandoning its defense of multimember independent agencies similar to the Fed, the public may view any shadow-docket ruling touching on presidential removal powers as a portent of the Fed’s eventual fate.

### 2AC1----AT: DB

### 2AC2---AT: Strike Down

#### Court will mostly preserve Humphrey’s now---it’s in their interest to counteract perceptions of fealty to Trump---the plan takes its place.

Shane 1/2 – Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at Ohio State University and a Distinguished Scholar in Residence at the New York University School of Law.  
Peter Shane, “Save Humphrey’s Executor. Save the Supreme Court (Sort Of)”, 1/2/26, Washington Monthly, https://washingtonmonthly.com/2026/01/02/save-humphreys-executor-supreme-court-independent-agencies/

But overturning or limiting Humphrey’s Executor would be a missed opportunity, not only for sound constitutionalism, but also for the Court itself. As of August, the public’s view of the Court remains at an all-time low. Public opinion of the Court has become highly polarized, a bad sign for its legitimacy. In a recent Pew Research Center poll, just 26 percent of Democrats and Democratic-leaning independents view the Supreme Court favorably. Before the Court overturned Roe v. Wade, nearly two-thirds of Democratic respondents had a favorable impression of the court. An important new paper by the constitutional scholar Bruce Ackerman argues that the quality of the Court’s reasoning in Slaughter will be crucial to restoring the Court’s public reputation. Over the last 11 months, the Court has repeatedly enabled some of Trump’s worst power grabs by issuing emergency orders without careful argument and, most often, without detailed (or any) majority analysis. Now that the justices must face a central issue of presidential power, judicial reasoning that meets the moment would buttress the prestige of an institution that, in Alexander Hamilton’s words, can rely on “neither FORCE nor WILL, but merely judgment.” An opinion upholding Humphrey’s Executor would help to counteract the impression that the current Court is handmaiden to a frequently lawless Trump administration.

#### Hesitancy to immediately address the question proves---they don’t want to overrule.

Erksine and Vladeck 25 – Editor of SCOTUSblog; Professor of law at Georgetown University, J.D. from Yale University.

Ellena Erskine interviewing Stephen Vladeck, “Will the court overturn a 1930s precedent to expand presidential power, again?,” SCOTUSblog, 04-10-25, https://www.scotusblog.com/2025/04/will-the-court-overturn-a-1930s-precedent-to-expand-presidential-power-again/

EE: So back to where Humphrey’s Executor sits today, how narrow are those protections?

SV: One of the tricky things about Humphrey’s Executor is that, even though the Supreme Court hasn’t overruled it, it has to at least some degree reconceptualized it. Humphrey’s Executor itself, if you read Justice Sutherland’s opinion, spends a lot of time talking about how what the FTC does is not purely executive power. Instead, he talks about the quasi-judicial role that the FTC plays and even in some respects, the quasi-legislative role that the FTC plays.

Even though the modern court has not overruled Humphrey’s Executor, it has really, I think, heavily watered down that understanding. Indeed, it has increasingly come to treat Humphrey’s Executor as this extreme outlier — as one of two Supreme Court precedents that are at least superficially inconsistent with the broad view of the unitary executive toward which the court has otherwise gravitated, Morrison v. Olson being the other.

So the Supreme Court today basically takes the view that there’s Morrison, there’s Humphrey’s Executor and there’s nothing else. And that was the basis for the court’s 2020 ruling in Seila Law that Congress could not insulate the head of the Consumer Financial Protection Bureau from presidential removal because, unlike the head of these multi-member commissions, the head of the CFPB is a single person.

In a world in which we were being faithful to the analysis of Humphrey’s Executor and not just the result, it shouldn’t make a difference whether the head was a single person or a multimember board; all that would matter is the type of power that the agency was wielding. But in a world in which Humphrey’s Executor and Morrison are nothing more than exceptions to the rule, then all of the litigation tends to reduce to whether the agency structure at issue is just like the exceptions or not.

EE: You mentioned the Fed before, where does the Fed stand?

Part of why I believe that even this court has been reluctant to overrule Humphrey’s Executor, and it’s had chances, is because I think there is an unspoken but widely shared view that the independence of the Fed (and no other agency) is really important. I don’t think the court has yet been provided with a coherent rationale for a way in which it could overrule Humphrey’s Executor without also undermining the independence of the Fed, and thereby risking yet further harm to the stability of our economic system.

Of course, these cases are not just about the FTC and the Fed — there are a bunch of multimember-headed agencies, the SEC, the FCC, the Merit Systems Protection Board, etc., that are implicated by Humphrey’s Executor. But I think the real 800-pound gorilla is the Fed. Maybe it’s enough to just assert that the Fed is different, but at least to this point, there’s been no persuasive explanation for why, legally, that’s so.

EE: But given how the court has handled what’s come to them so far from the Trump administration, is the field wide open for them to take on Humphrey’s Executor?

SV: I think two things can be true. One, I think the court would rather not have to decide one way or the other. And two, I think the Wilcox and Harris cases were always going to force the court to take up the question.

EE: Do you have a sense of where the justices stand individually on this?

SV: I don’t doubt that there are more than two votes to overrule Humphrey’s Executor. But, to me, the most important data point here is that the court has thus far resisted invitations to do so. And if the court were in a hurry to overrule Humphrey’s Executor, I think it would have already.

#### Vote count---all of the liberals, Roberts, and Barrett vote to save it currently.

Blackman 25 – Professor of Constitutional Law at the South Texas College of Law.

Josh Blackman, “The Hughes Court Repudiated FDR In Humphrey's Executor, and the Roberts Court Will Repudiate Trump by Maintaining Humphrey's Executor,” Reason, 02-05-2025, https://reason.com/volokh/2025/02/05/the-hughes-court-repudiated-fdr-in-humphreys-executor-and-the-roberts-court-will-repudiate-trump-by-maintaining-humphreys-executor/

Students always have difficulty reconciling Myers v. United States (1926) with Humphrey's Executor v. United States (1935). In Myers, Chief Justice Taft forcefully held that the President has an absolute removal power of a postmaster. But Humphrey's Executor held that the President could not remove a member of the Federal Trade Commission without showing cause. Superficially, at least, there are ways to line up the precedents. The postmaster only exercised executive power, while the FTC member exercised "quasi-judicial" and "quasi-legislative" powers, whatever those are. But there is another explanation I usually tell students.

Humphrey's Executor was argued on May 1, 1935, and decided on May 27, 1935. Schechter Poultry v. United States was argued on May 2 and 3, 1935, and decided on May 27, 1935. Coincidence? I think not. Both of these cases were repudiations of President Roosevelt's powers. Humphrey's Executor unanimously upheld the so-called independent regulatory agencies, and Schechter Poultry unanimously halted the National Industrial Recovery Act. This was not a good day for President Roosevelt. Both cases were largely seen as repudiations of FDR's overreaching powers.

Of course, if Roosevelt lost the battle on May 27, 1935, he would win the war in 1937. Even though there was no actual "Switch in Time that Saved Nine," West Coast Hotel v. Parrish (1937) signaled that the Supreme Court would no longer stand in Roosevelt's way. And, over time, Roosevelt would make nine appointments to the Supreme Court. The rest is history. In a fairly short period, Roosevelt radically altered the Constitution, the Supreme Court, and our republic.

Over the decades, Humphrey's Executor became a conservative bête noire. But when the opportunity arose in Morrison v. Olson to scale back Humphrey's Executor, Chief Justice Rehnquist more-or-less reaffirmed the precedent. Only Justice Scalia, in dissent, was willing to highlight the problems with Humphrey's Executor. Over the ensuing decades, Scalia's Morrison dissent became gospel, and Rehnquist's Morrison majority aged quite poorly.

Fast forward to the Roberts Court. In a series of cases, stretching from Free Enterprise Fund (2010) to Seila Law v. CFPB (2020), the Court chipped away at Humphrey's Executor, but did not overrule the precedent. In the wake of Seila Law, the Court has not ventured further, finding various ways to avoid the issue. But that avoidance is no longer possible.

President Trump fired a member of the National Labor Relations Board without showing cause. Trump argued that the removal protections in the National Labor Relations Act are "inconsistent with the vesting of the executive Power in the President." The fired member, Gwynne Wilcox, has challenged her removal. This case allows Trump to directly challenge Humphrey's Executor. The District Court (Judge Howell) and the inevitable D.C. Circuit panel will be bound by that precedent, so there will be no surprises below.

What happens at First Street? The Supreme Court could simply deny review, given that there is a binding, on-point precedent. I am reasonably confident that Justices Thomas, Alito, and Gorsuch will vote to grant cert. For reasons I'll explain below, Chief Justice Roberts and Justice Barrett will want nothing to do with this case. Who will be the fourth vote for cert? Justice Kavanaugh.

This vote would be the most consequential cert vote Justice Kavanaugh will ever cast. Way back in 2008, then-Judge Kavanaugh wrote in Free Enterprise Fund v. PCAOB (2008) that the D.C. Circuit should "hold the line and not allow encroachments on the President's removal power beyond what Humphrey's Executor and Morrison already permit." He repeated that same line in PHH Corporation v. CFPB (2018).

I have to imagine that overruling Humphrey's Executor is something Justice Kavanaugh has thought about for some time. In 2018, the WSJ wrote, "Judge Brett Kavanaugh, now President Trump's nominee to the Supreme Court, has signaled he would like to overturn the precedent set in the case, Humphrey's Executor v. U.S." By contrast, Chris Walker thought Kavanaugh would not overrule the precedent. Then again, Walker suggested that Kavanaugh would be solicitous to Chevron, and we all know how that turned out in Loper Bright. Kavanaugh's chance to overrule Humphrey's Executor will come soon enough.

But Justice Kavanaugh only gets us to four votes. What about Chief Justice Roberts and Justice Barrett? Let's start with the Chief.

Roberts, like Kavanaugh, came of age after Morrison v. Olson. Humphrey's Executor, much like Roe v. Wade, was the sort of precedent that Reagan wunderkinds dreamed about overruling. Roberts did not need to overrule Humphrey's Executor in Seila Law, so he didn't. But what happened with Dobbs? Roberts blinked. He made up this bizarre fifteen-week test that made a hash out of precedent. It was such a weak opinion that we won't even bother including it in the next edition of the casebook. Roberts thought he was avoiding controversy, but in the process put out a totally forgettable concurrence. Certainly not a ruling for the ages.

I suspect Roberts would do much the same in Wilcox v. Trump. When presented with the opportunity to catch his white whale, he won't. If there was any other Republican president, Roberts would not hesitate to overrule Humphrey's Executor. While overruling Roe created something of a backlash, most Americans don't know the NLRB from the YMCA. Gutting the for-cause protections would make no appreciable difference in people's lives. It would be a freebie! But not with Trump. Roberts will not be seen as surrendering to Donald Trump's hostile takeover of the federal government. The Chief Justice will not save DOGE as a tax. My prediction is that Roberts will vote to reaffirm Humphrey's Executor, and in the process say some meaningless things about the separation of powers.

What about Justice Barrett? I think she will see the stare decisis value of Humphrey's Executor as too strong. She will say that as a matter of first impression, she might decide the case differently (with a cf. footnote citing all of the anti-removal scholarship), but given nine decades of precedent, the reliance interests are too weighty. And by a 5-4 vote, the Roberts Court will save independent agencies.

The Hughes Court repudiated FDR in Humphrey's Executor, and the Roberts Court will repudiate Trump by maintaining Humphrey's Executor. This case will not be based on the separation of powers, but an attempt to separate the Court from politics.

### AT: Agencies Fine

#### Strong *Humphrey’s* overturn obliterates FERC---it’s a death knell for stability.

Phillips 25 – JD from Howard University School of Law.  
Willie L. Phillips Jr., Ronan J. Gulstone, Mark C. Kalpin, Paul F. Forshay, Brendan H. Connors, Nic Martell, “What Supreme Court Oral Arguments Could Mean for FERC Independence”, 12/11/25, Holland & Knight, https://www.hklaw.com/en/insights/publications/2025/12/what-supreme-court-oral-arguments-could-mean-for-ferc-independence

Several justices appeared ready to limit or overrule a 90-year-old precedent in Humphrey's Executor v. United States (1935), which has historically limited the president from removing commissioners of multimember independent agencies without cause. FERC commissioners serve staggered five-year terms, with no more than three coming from one political party, and commissioners have an equal vote on regulatory matters. A ruling against Humphrey's Executor could allow the president to remove FERC commissioners at will, replacing them with appointees more directly aligned with the administration's priorities.

Key Takeaways and Implications

It is often noted that FERC independence, anchored by its technical and engineering expertise, insulates FERC decisions from political pressure. In contrast, removing "for cause" protections may potentially place FERC commissioners under closer presidential control. This shift may introduce regulatory uncertainty with each new administration, whereas FERC traditionally has provided long-term stability. That includes, for example, decisions on energy infrastructure, natural gas and liquified natural gas (LNG) projects, wholesale markets, transmission tariffs and rulemakings.

#### Any attempts at a carveout won’t satisfy markets AND guarantee massive uncertainty.

Dinovelli 25 – Research Fellow at Vanderbilt University Law Center, J.D. from Harvard Law School.

Benjamin Dinovelli, “The Federal Reserve Exception,” Vanderbilt Law Research Paper No. 5277476, 08-26-2025, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=5277476

The Federal Reserve is arguably the most powerful administrative agency that has ever existed. Its administrative actions influence every facet of life: The cost to buy a home or car, attend school, and build factories and infrastructure. Given its significant powers and responsibilities, the Federal Reserve has long had policy independence from the Executive branch—mainly because the Federal Reserve Act prevents the President from firing officers at will. But President Trump has fired officers with similar statutory removal protections across the government. His Administration argues that these protections are unconstitutional. And it appears the Court may agree based on its view of Article II of the Constitution. If the Court does so, it raises a natural followup question: What about the Federal Reserve and its independence?

In response, many argue that such concerns are overblown: The Court can create an exception for the Federal Reserve. Indeed, the Court in Trump v. Wilcox recently indicated that it may do so. It claimed that the Federal Reserve was “a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.” This Article argues that such an exception is illogical. No historical basis exists: The Federal Reserve is not sufficiently analogous to any Founding-era entity, including the First or Second Banks of the United States or the Sinking Fund Commission. None of them conducted discretionary monetary policy. No functional basis exists either: The Federal Reserve exercises executive power. And no other constitutional provision clearly justifies its independence. It is ultimately not sufficiently unique from any other administrative agency. The Court should tread carefully before expanding the removal power. Reducing agency independence exposes the Federal Reserve to material risk.

INTRODUCTION

“When it comes to our Government’s structure,” Justice Clarence Thomas once warned, “we simply cannot compromise.”1 Several judges, including a majority of the Supreme Court, appear to support a unitary view of the Executive Branch. 2 In particular, they have opposed limiting the President’s ability to remove officers of independent agencies except for “cause,” arguing that it violates Article II of the Constitution. In 1935, in Humphrey’s Executor v. United States, 3 the Court had unanimously held that such restrictions were constitutional. 4 But in recent years, the Court has narrowed the scope of the Humphrey’s “exception” to Presidential removal materially, 5 so much so that one judge, Justin Walker, claims that it now applies only to an agency that “is the identical twin of the 1935 FTC (as Humphrey’s understood the 1935 FTC).”6

Yet, despite this rhetoric, such proponents face a thorny question that still remains to be adequately answered: What about the Federal Reserve (“Fed”), the nation’s central bank that conducts its monetary policy? 7 In fact, given the Court’s recent cases, if we view the Fed like any other administrative agency,8 it may already conflict: Beyond the members of the Fed’s Board of Governors, who each have “for cause” removal protection, 9 several members who sit on the Federal Open Market Committee (FOMC)—responsible for open market operations policy—are neither Presidentially appointed nor removable. 10 Nor are members of the Board of Governors, FOMC, or Reserve Banks “balanced along partisan lines.”11 Any attempt by the Court to narrow or overturn the holding of Humphrey’s risks exposing the Fed to significant uncertainty.

### AT: Not Intrinsic

#### The plan disrupts that balancing act by draining them of remaining capital.

Lithwick and Stern 23 – Labor Lawyer and Journalist, J.D. from Stanford University; Senior Legal Writer for Slate.

Dahlia Lithwick and Mark Stern, “John Roberts Is Winning. The Rest of Us Are Losing,” Slate, 07-03-2023, https://slate.com/news-and-politics/2023/07/supreme-court-john-roberts-winning-americans-losing.html]

As the Supreme Court term crashed to a close last week, in a string of stinging defeats to progressives, a familiar narrative began shaping up in the public discourse: The court had, on balance, remained largely loyal to the conservative legal project while delivering just enough compromises to quell any meaningful challenge to its power and legitimacy. That story is the one Chief Justice John Roberts would probably like to have you tell; it is both descriptively accurate and superficial to the point of distortion. The court did, indeed, refuse an invitation to clobber several liberal precedents and policies, which had the effect of leaving the law in place, a set of status quo decisions dressed up as liberal “wins.” It then used the resulting good press as cover to pulverize laws that directly improved the lives of tens of millions of Americans, including the most vulnerable and underprivileged among us. And it achieved these goals largely through the invisible hand of docket manipulation, a trick that’s unique to the modern Supreme Court.

What does that all mean? Nothing too lofty. Justices Brett Kavanaugh and Amy Coney Barrett have finally embraced the chief justice’s tried-and-true formula of years past, joining a series of decisions rebuffing some of the most radical Republicans’ most cynical efforts to yank the law far rightward. The sloppiest, least defensible big swings—pushed by Alabama, Texas, and North Carolina—were rebuffed. Slightly less sloppy big swings were embraced joyfully and written into law, including a case that had no facts and a case that ignored the record below. In swinging at only some of the worst pitches served up, Barrett, Kavanaugh, and the chief justice got a chance to tick off a bunch of policy agenda items that are too unpopular and misery-inducing to pass via the democratic process. After last term’s eruption of molten, cruel conservatism, the 6–3 majority has sought safer political ground without sacrificing any of its most cherished goals.

#### The Court perceives a limited bandwidth for controversial decisions and will seek to balance decisions within issues.

HLR 11 – Harvard Law Review, “ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING”, June, 124 Harv. L. Rev. 2064, Lexis

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream, n55 it will face consequences that undermine its constitutional [\*2076] vision even more than would the upholding of a disfavored statute. n56 The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision. n57 And, as a distinct matter, most [\*2077] Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints. n58 This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching.

[FOOTNOTE]

n57. Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: R = B / C, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as R > 1.

A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also increase its prestige - its institutional capital - by exercising judicial review, which has been the effect of Marbury and Brown, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (Marbury was a refusal to make the countermajoritarian decision, see Friedman, supra note 53, at 60-62, and Brown jeopardized rather than solidified the Court's power over the years immediately following the decision, see Klarman, supra note 53, at 312-43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that counts for the current Justices: the fact that Brown is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" - and thus the Court's countermajoritarian capacity - is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

### AT: Grid Thump

#### Successful attacks trigger a ‘black start’ scenario---that take years to resolve and causes societal collapse

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Benjamin, “Black Start: The Risk of Grid Failure from a Cyber Attack and the Policies Needed to Prepare for It,” Journal of Energy & Natural Resources Law, vol. 38, no. 2, Routledge, 04/02/2020, pp. 131–160

In the industrial world, when a switch is flipped, we take for granted that it will produce light, boot a computer, illuminate a stadium or activate a power plant. We know, of course, that power losses can and do occur. Many of us have lit candles during a thunderstorm or brought out extra blankets when a blizzard takes down transmission lines. As of this writing, the most populated state in the United States, California, is experiencing rolling blackouts.1 Yet even in prolonged power outages, we expect that electricity will be restored and, consequently, life will return to normal. Perhaps we need ask, however, what if power cannot be restored in a timely manner? Concern is growing that in the not-too-distant future our electricity supply could be irreparably compromised by a cyber attack. The issue when considering a systemic grid failure of this nature is twofold: how did we reach a point where something so critical to routine life now presents an existential threat, and what can we do to mitigate the risk of a catastrophic grid attack?

This article posits that the emergence of cyber attacks on industrial control systems, as a means of war or criminal menace, have reached a level of sophistication capable of crippling those systems. This article argues that a new grid security policy paradigm is required to thwart catastrophic grid failure – a paradigm that recognises the inextricable link between commercial power generation and national security. In section 5, seven policy recommendations are outlined that may, in part, mitigate a future where grid attacks pose existential risk to nations and their citizenry. Those recommendations are: first, develop a comprehensive insurance programme to minimise the financial risk of grid disruption; second, train more cybersecurity professionals with particular expertise in industrial control systems; third, institute a federally mandated information-sharing programme that is centralised under United States Cyber Command; fourth, subsidise and/or incentivise cybersecurity protections for small to mid-size utilities; fifth, provide university grants for grid security research; sixth, integrate new technologies with an eye towards securing the grid; and, lastly, formulate clear rules of engagement for a military response to grid disruption.

The purpose of this article is to provide the reader with an introduction to this complex topic. It is the aim of the author to give orientation to this issue and its many branches in the hope that better understanding will animate further curiosity and, ultimately, positive action on the part of the reader. Although many skilled and earnest people work tirelessly to prevent a grid failure scenario, it is essential that more be added to their ranks each day. Advisors, engineers, regulators, private counsel to power generators, and many others who play roles in electric power production are crucial to this subject. So, while this article provides entrée to the topic of grid security, its long-term objective is to spur action by the entire energy-related community. In the end, no one is immune to consequences of grid failure and, therefore, everyone is responsible, in part, for promoting grid integrity.2 In this regard, lawyers who represent various actors in the energy sector are going to be faced with questions and potential legal risks of a magnitude that they have never experienced before.

1.2. Turning the power back on in a powerless world

‘Black start’, not to be confused with the term ‘blackout’, is the name given to the process of restoring an electric grid to operation without relying on the external electric power transmission network to recover from a total or partial shutdown.3 At first glance, this description is unremarkable, but it implies a disturbing catch-22 – how might one restore power if the entire external transmission network is compromised?

If an electric disruption occurs at a household level, some homes may be equipped with a modest gasoline generator to temporarily restore power. If a hospital loses power, it will almost invariably be resupplied by automatic, industrial-scale generators. These micro considerations hardly give anyone pause; they are hiccups on a stormy night or a snowy day. In other words, their ‘black start’ is a quick and effective process for restoring power. But what happens, at a macro level, when an electric grid supplying power to large portions of the United States goes black, or worse, what happens if all of the United States’ electric grids go down simultaneously?4 In that scenario, how might enough non-grid power be harnessed and transmitted to turn the United States’ lights back on? Moreover, how might such a catastrophe occur in the first place? Perhaps the more ominous question is not how, but whether or not we can survive such circumstances if they persist in the long term.

The United States electric grid (‘the grid’) is the ‘largest interconnected machine’ in the world.5 It consists of more than 7000 power plants, 55,000 substations, 160,000 miles of high-voltage transmission lines and millions of low-voltage distribution lines.6 The scale and complexity of the grid in the context of the modern digital world are beyond comprehension because within it are innumerable industrial control systems; incalculable connections to digital networks; millions, if not billions, of analogue or digital sensors; many thousands of human actors; and trillions of lines of programming code.7 Further complexifying the grid is that it is comprised of generations of technologies, stitched together in ways that are not inherently secure in a world of cyber threats.8 The vastness of the grid makes security of it challenging. Likewise, the vastness of the grid makes the opportunities for intrusion seemingly infinite.

By any measure, grid failure will unleash a parade of horrors. Stores would close, food scarcity would follow, communication would cease, garbage would pile up, planes would be grounded, clean water would become a luxury, service stations would yield no fuel, hospitals would eventually go dark, financial transactions would stop, and this is only the tip of the iceberg – in a prolonged grid failure social chaos would reign, once-eradicated diseases would re-emerge and, increasingly, hope of returning to a normal life would fade.9 The notion of complete grid failure, once relegated to science fiction comics or James Bond movies, is now not only possible but also one of the most pressing national security threats today.10

Attacks on electric facilities are already occurring. In 2017, Duke Energy Corporation, one of the United States’ largest electricity producers, recorded more than 650 million cyber attempts to breach its utility systems.11 Duke Energy provides electricity to 7.6 million customers in six states.12 Aside from the obvious risk that a successful breach poses to Duke Energy, the effort to combat these attacks is costing the company hundreds of millions of dollars in security upgrades.13 Duke Energy is not alone; according to a recent study conducted by the cybersecurity firm BitSight, about ten per cent of electric utility companies are infected by malware.14 Perhaps one the most worrisome instances of a cyber intrusion came recently when a Kansas nuclear facility was hacked – the perceived purpose of the hack remains either unknown or undisclosed.15

Thus far, intrusions into United States grid assets have not resulted in damage to such facilities (or, at least, such an event has not been disclosed). These events are often classified as ‘surveillance’ tactics, not disruptive.16 However, evidence abounds of utility hacks that have resulted in real-world, negative impacts. In 2015, a ‘Russian intelligence unit shut off power to hundreds of thousands of people in western Ukraine’.17 Although the power was only off for a few hours, American investigators discovered similarities between the Ukraine disruption and surveillance of comparable United States utilities.18 A year later, in 2016, Ukraine was attacked again, and the results were similar to those of the 2015 attack.19 However, the sophistication of the reconnaissance and the attack method had improved noticeably.20 Events like this are not unique to Ukraine; for example, a petrochemical plant in Saudi Arabia was attacked in 2017.21 That breach focused on the safety control system of the plant, which could have resulted in wide-scale destruction and/or deaths of plant workers.22 In the past several weeks, reports of Iranian attacks on United States grid operations have been disclosed.23 These are just a few publicised incidents, and they illustrate the breadth of the threat and the potential consequences facing industrial nations. Should an attack akin to the Ukraine intrusion come to fruition in the United States, the results could be catastrophic in scope.

In light of the severity of this risk and the ever-growing likelihood of attack success, nations must take immediate action to both prevent a blackout scenario and, if needed, be prepared to confront a black start. Blackouts are troubling in their own right, but the crux of this entire topic rests on one overarching concern – when faced with a black start, how will power be restored and how long will it take? A blackout lasting a few hours is very different from a blackout that lasts weeks or months. Thus, the lynchpin in thinking about grid security is how to prevent a failure so that we may avoid the immense challenges that would surely follow.

In the coming sections, this article will explain why we find ourselves faced with this troublesome challenge. It will also delve into some of the technical aspects of grid security as well as offer a step-by-step look at how an attack occurs. Finally, this article will provide solutions aimed reducing the peril of a black start reality.

2. A brief history of the grid and what threatens it

2.1. How the United States produces and distributes power

The power transmission grid of the United States at its most expansive level is known as the North American Reliability Councils and Interconnections (or, as it is commonly called, the ‘North American Grid’).24 The North American Electric Reliability Corporation (NERC) governs the North American Grid.25 The North American Grid includes two major and three minor NERC interconnections, which extend as far north as Alaska and as far south as Baja California near Mexico.26 In effect, the United States and Canada share power through various interconnection networks.27

The contiguous United States grid is generally comprised of three distinct grid systems.28 The Eastern Interconnection grid comprises most of the Great Plains eastward to the Atlantic coast (excluding Texas).29 The Western Interconnection includes the Rocky Mountain States, portions of the Great Plains, and all states westward to the Pacific Ocean (excluding Texas).30 Finally, the Electric Reliability Council of Texas (ERCOT) covers most of Texas.31 These interconnections make up the electric power system of the contiguous United States.32 For purposes of considering grid failure, it is critical to note that the three interconnections discussed here function as largely independent systems with limited exchanges of power between them. Thus, when the phrase ‘grid failure’ is used, it could refer to the failure of one of these interconnections, all of these interconnections or some combination of them.

Each of the aforementioned interconnections has a grid architecture that is similar and is generally divided into two categories: the ‘bulk power system, often referred to as the “transmission grid,”’ and the smaller distribution grids.33 The bulk power system is the backbone of the grid. ‘It connects high-capacity power plants, transmission wires and substations that collectively generate and transport huge quantities of electricity over hundreds or thousands of miles’.34 At this macro level of power generation and transmission, regulatory standards are at their most uniform and strongest. Moreover, at the bulk power system level, most security regulations are mandatory, which yields consistent safeguards across large swathes of the grid.35 Collaboration among utility companies at the bulk power system level is often proficient, and their cybersecurity practices are often cutting edge. This is not to suggest, however, that the bulk power system is impervious to disruption.

The bulk power system has three fundamental weaknesses. First, even with the most advanced cybersecurity monitoring technology and personnel resources to prevent an attack, it can still be hacked.36 Second, an attack on the bulk power system could have systemic ramifications given its overall importance to power generation and transmission throughout the United States. Third, the bulk power system is integrated with smaller distribution grids that are far less secure. This characteristic creates a weak link in even the best cyber defence of the bulk power system because the smaller distribution grids are less secure against cyber intrusion.37

The smaller distribution grids (ie the non bulk power system) that are connected to the transmission grid are key in delivering electricity to homes and businesses. Additionally, smaller utility companies, as opposed to the corporations that manage the bulk power system, readily manage these smaller distribution networks.38 To put this in some context, the United States has approximately 3000 utilities, and many of those oversee small portions of the overall grid.39 With fewer resources than large public utilities as well as fewer regulatory safeguards, small utilities companies are less equipped to thwart cyber attacks.40 Hackers, notably those connected with Russia, have taken notice of this fact and have exploited smaller, weaker utilities.41 These utilities ‘have trouble finding sufficiently skilled workers who understand how the computerized and physical components of the grid work together and how to protect them’.42 Although bigger utility companies often establish best cyber defence practices, smaller utility companies either cannot afford or are not inclined to adopt those protections.43 The only upside when assessing the vulnerabilities of smaller distribution grids is that if an attack is limited to a single, minor grid, then the attack will likely have fewer negative consequences.

While efforts are underway to promote better cyber defence management across the entire grid, small or large, another element of power generation and distribution poses a risk: the grid component supply chain. All utilities rely on complex, global supply chains for equipment and software.44 It is not easy nor is it customary to ensure the integrity of each component of grid technology. For instance, an industrial control system in a safety component of a power planet may have software developed in Germany and hardware developed in China. Unbeknownst to the utility, the Chinese hardware may be equipped to provide Chinese hackers with backdoor access to the device because of an undetected bug in the German software. This scenario could, in effect, give Chinese hackers direct and surreptitious control of the safety equipment. This type of intrusion is known as ‘phoning home’.45 The burden and cost that would be inflicted upon utility companies to inspect integrity at each step of their supply chains is significant.46

Thankfully, the federal government has recognised the supply chain dilemma and has taken steps to mitigate this danger. The Committee on Foreign Investment in the United States (CFIUS), which is an inter-agency committee of the federal government, promotes national security by regulating foreign commercial efforts to influence United States business.47 In 2018, Congress expanded CFIUS’ authority by passing the Foreign Investment Risk Review Modernization Act (FIRRMA).48 Among many expansions of authority, FIRRMA equipped CFIUS to review transactions that may impact ‘critical infrastructure’ such as the grid.49 While this is an improvement, the change does not go so far as to give CFIUS authority over vendor relationships that lack an investment component.50 Thus, utility companies, large and small, continue to rely on technology from third-party vendors that may contain exploitive features that permit grid disruption.

In effect, the United States grid is a patchwork quilt of digital and physical technology from innumerable sources. To provide absolute cyber defence of this system would require surveillance and analysis of every single component of the grid, yet it is impossible to even properly inventory every single component of the grid let alone monitor it perfectly.

To add further complexity to the grid, new technology is emerging each day that expands the vectors of potential cyber attacks. The phrase ‘Internet of Things’ is used to describe physical devices that are linked to Internet communication systems.51 An example of an Internet of Things device would be a refrigerator that automatically orders more avocadoes from Amazon when only one avocado remains within it.52 This may seem like an innocuous and overall convenient approach to modern life, but such devices pose immense security challenges.

In the world of electricity distribution, Internet of Things instruments often come in the form of so-called ‘smart meters’.53 A smart meter is a device that monitors electricity consumption in real time and relays that information back to consumers and/or utilities.54 This is done through a two-way communication system, much like the download/upload function of a smart television.55 Smart meters also have the ability to decrease or increase energy supply based on real-time energy-demand monitoring.56 It is expected that 588 million smart meters will be installed worldwide by 2022.57

The problem here is the vast amount of infrastructure needed to support such a setup. Any smart electric grid needs a parallel telecommunications network to collect and harness the volumes of data it will generate, and that makes every connected thermostat or smart refrigerator a potential entry point for cyber intruders.58

The bottom line is that Internet of Things devices have the potential to transform the ‘largest interconnected machine in the world’ into a machine that is infinitely more complex and more vulnerable that it is presently. That being said, if smart grid technology is developed with grid security as a fundamental objective then it may afford greater security, rather than less.59

Finally, no understanding of the grid is complete without a glimpse at its regulator. The US Department of Energy is the principal federal agency responsible for regulating the nation's electricity generation and distribution system. The specific division of the Department of Energy tasked with grid integrity is the Office of Electricity Delivery & Energy Reliability (OEDER).60 The OEDER works in coordination with other federal agencies tasked with cybersecurity matters, but it spearheads the Department of Energy’s planning and implementation of grid security. The OEDER Multiyear Plan for Energy Security Cybersecurity (‘plan’), released in March 2018, details how the federal government will deepen partnerships with energy sector producers – notably, however, the plan states that ‘energy owners and operators have the primary responsibility to protect their systems from all types of risk’.61 The plan states that it has three priorities: first, strengthen energy sector cybersecurity partnerships; second, coordinate cyber incident response and recovery; and, third, accelerate game-changing research and development of resilient energy delivery systems.62

Among the Department of Energy's various grid security concerns, one overarching point of frustration is the high cost that energy providers must absorb to protect their utilities. In 2015, cybercrime attacks generated an average direct cost per company of $27 million per year, which is added on top of the $150 million to $800 million spent by the average utility to protect its assets.63 Moreover, these costs are increasing at approximately 11 per cent per year.64 At the present time, there is little reason to believe that the US federal government will absorb some or all of these costs, although efforts are underway to nationalise grid security protocols.65

The Department of Energy may have the most direct regulatory authority over the electric grid, but as the grid becomes more elemental to broader national security concerns, oversight of the grid will broaden to other federal agencies. In the event of a crippling grid attack, the United States would face three overarching issues: first, there would be a national security issue related to defending the United States from a potential aggressor; second, there would likely be immediate and severe economic disruption; and, lastly, there would be social dislocation and a burden placed on emergency services.66 Due to these concerns, federal management of the grid is likely to expand beyond the purview of the Department of Energy and become more of an interagency concern.67 This is already occurring, but as grid attacks multiply the interest of a wider government role becomes essential. The principal agencies that will likely continue to expand their authority over grid management are the Department of Homeland Security, Department of Defense, Department of Commerce and Department of the Treasury. This underscores the fact that the electric grid is essential to multiple facets of modern life. It is in effect a keystone to national security, and to economic and social normalcy.

2.2. What are cyber attacks, and how do they impact the grid?

Cyber attacks manifest in numerous ways, from credit-card-data heists to physical destruction of uranium enrichment facilities.68 Because of this feature, it is often challenging to sufficiently define a cyber attack, but Merriam-Webster defines it as ‘an attempt to gain illegal access to a computer or computer system for the purpose of causing damage or harm’.69 It is in the nature of the damage or harm inflicted that cyber attacks take on so many forms. Generally, cyber attacks come in two varieties, either cybercrime or cyber warfare.70

Cybercrime includes financial fraud, identify theft, corporate espionage, hacktivism and a myriad of other forms that are notable for their lack of national security implications.71 Frequently, the tools of the trade used in cyber aggression are developed and honed in the cybercrime domain. In cybercrime, the individual or entity initiating an attack may go up against a secure system, but one that is not as well equipped to respond as the United States military or other branches of the government. Russian hackers in the Heartland Payment Systems data breach, although ultimately caught and sentenced to time in a federal prison, gained valuable training in the cyber attack field when they stole 130 million credit card numbers.72 Similarly, ongoing acts of Chinese cyber espionage, known as ‘Titan Rain’, have resulted in extensive data collection from federal government systems (including, but not exclusive to, the United States Department of Defense).73 Cybercrime, not to be discounted in its severity and destructive capacity, can be thought of as a precursor for the more sophisticated and existential threats posed by cyber warfare. The data collected through cybercrime, along with the tools and tactics that are honed, in effect sharpen the sword that can be used in cyber war.

Cyber war, much as the name suggests, is the execution of war strategies through cyber attacks.74 Unlike cybercrime, cyber war is often the result of state action as opposed to non-state actors, and it often carries higher stakes than cybercrime. A caveat to this point, however, is that state actors may rely on non-state actors to administer cyber attacks as a means of making attribution more difficult.75 In its most direct form, cyber warfare involves attacks on military assets. However, the National Intelligence Council Report Global Trends 2025 made a distressing comment that suggests cyber attacks could extend beyond the battlefield of traditional military targets: ‘Cyber and sabotage attacks on critical US economic, energy, and transportation infrastructure might be viewed by some adversaries as a way to circumvent [United States] strengths on the battlefield and attack directly [United States] interests at home’.76

For purposes of this article, it is the National Intelligence Council's reference to critical infrastructure that is most relevant. Properly functioning transportation systems, energy production, Internet services and financial markets are essential to modern life, but among the various forms of critical infrastructure none is perhaps more essential than electricity production and distribution. Without a functioning grid, the aforementioned elements of society are all diminished. This fact makes grid security a leading concern in any discussion of cyber attack risk. In other words, we have entered a phase in modern life where war strategy may, and likely will, include tactics designed to disrupt or disable an essential element of our civilisation – our ability to produce and distribute electricity to our population. At the risk of hyperbole, this feature of 21st century war-making turns a cyber threat into a potential existential threat.

3. The current situation

3.1. Global order vs global mayhem

It is fair to question whether our electric grid is truly at risk of a major attack and subsequent disruption. After all, it is a premise that supports billions of dollars of private security expenses, animates fear among the public and could prompt elected officials to over-react and over-regulate, and it may be used by military institutions to justify expanded powers into everyday life. Therefore, we must ask ourselves if catastrophic grid failure as a result of a cyber attack is really the risk that it might appear to be in modern life. Put differently, are we in a pre-September-11 moment or are we simply dabbling in apocalyptic paranoia?

The topic of nation state hacking often leads to Russia because few countries have demonstrated both the will and the acumen needed to execute large-scale cyber attacks.77 To answer the question of whether electric grid hacking is a figment of science fiction or a tangible threat, we start with Ukraine.

The first wave of Ukrainian grid attacks occurred on 23 December 2015, when a third party successfully gained entry into and control over electricity distribution substations (the systems of a distribution network essential to transmit electric power to end consumers).78 The outages lasted several hours, shut off power for approximately 225,000 individuals, and occurred through discrete attacks about every half hour.79 Switching to manual override systems eventually restored power, which is an essential component of attack mitigation. To add insult to injury, the responsible party also jammed call centres to prevent affected customers from reporting power outages.80

Robert Lee, a former cyber warfare operations officer for the United States Air Force and co-founder of Dragos Security, said the Ukraine attack was ‘brilliant’.81 He went on to highlight that the attack was sophisticated in terms of logistics, operations and the malware tools used.82 Lee also suggests that the attack was likely coordinated among various actors, including but not exclusive to cybercriminals and nation states.83 Lee is reluctant to attribute the hack to any one actor, including Russia; however, that has not stopped Ukraine from blaming their former Soviet master.84 This highlights a recurring problem with cyber attacks: namely, that it is often difficult, if not impossible, to attribute blame to the responsible party.85

It may be that the 2015 Ukrainian grid attack was simply a harbinger of things to come, because the Ukrainian grid was struck again almost a year later, in 2016.86 The 2016 attack impacted fewer electric customers, but demonstrated improved sophistication compared with the 2015 shut down.87 Marina Krotofil, a Ukrainian researcher for Honeywell Industrial Cyber Security Lab, surmised that the 2016 hack was more of a ‘demonstration of capabilities’ than an attack meant to cripple Ukraine's grid.88

In the end, Ukraine emerged from these attacks mostly unscathed, but the events marked a far more troubling revelation: that Ukraine is merely a testing ground for cyber warfare tools and tactics.89 Since 2016, Ukraine has become ground zero for cyber war shows of force:

‘Ukraine is [a] live-fire space’, says Kenneth Geers, a veteran cybersecurity expert and senior fellow at the Atlantic Council who advises NATO's Tallinn cyber center and spent time on the ground in Ukraine to study the country's cyber conflict. Much like global powers [that] fought proxy wars in the Middle East or Africa during the Cold War, Ukraine has become a battleground in a cyberwar arms race for global influence.90

While it may at first seem desirable to other nations for Ukraine to bear the burden of being a proverbial testing ground, what happens in Ukraine is not staying in Ukraine. Rather, Ukraine is simply a sharpening stone for the swords that are likely to be used against stronger adversaries like the United States and its NATO allies.

Contemporaneous with the Ukraine attacks, US grid systems were suffering similar intrusions. Unlike the Ukraine hacks, the US grid intrusion did not result in a lights-out scenario; however, Jonathan Homer, chief of industrial-control-system analysis for the Department of Homeland Security, said that attacks ‘got to the point where they could have thrown switches’.91 To this day, the grid is still under frequent attack.92 Many grid security experts suspect Russia is involved in the bulk of the grid intrusion efforts, but also express concern that Iran and North Korea are probing weaknesses in grid defence.93 Attempts to infiltrate and possibly disrupt power distribution has extended to attacks on nuclear power plants.94 The plant in question – the Wolf Creek Generating Station in Burlington, Kansas – suffered intrusions into its business network, which suggests that hackers were probing for possible ways to access industrial control systems within the plant.95 Fortunately, the intrusion did not result in an operational impact. However, the incident proves that efforts are underway to exploit even the most sensitive and dangerous components of the grid.

The testing of cyber weaponry abroad and the discoveries of foreign reconnaissance at home all raise the same alarming question: if these are the means, what is the end? In part, foreign actors likely see cyber warfare as a way of asymmetrically confronting the vast power of the United States military (and its NATO allies).96 It remains merely speculative at this time whether a large-scale grid disruption is the goal of foreign actors engaged in these activities. Nonetheless, it is evident that the will is present and the methods are growing more sophisticated; thus, it is reasonable to conclude that under certain geopolitical circumstances a massive grid attack in the United States could occur as a consequence of advancing larger asymmetrical military and/or political objectives. This possibility, combined with the increasing volume of threats in the cyber realm, suggests that world affairs are trending more towards conflict and less towards peace, and it further suggests that such conflict may manifest itself in ways that extend beyond the confines of traditional battlefields.

3.2. What the United States is doing now – offence and defence

There is no question that grid security is a top issue for policymakers, and, relatedly, there is no shortage of efforts underway or aspired to for purposes of fortifying the grid. At a federal level, the Federal Energy Regulatory Commission (FERC) has been stepping up its reporting mandates. New standards published by FERC last summer require the NERC to report cybersecurity attacks that ‘compromise or attempt to compromise electronic security perimeters, electronic access control or monitoring systems, and physical security perimeters’.97 While this is certainly a positive development favouring a stronger grid, there is wide discretion granted by FERC to NERC on what sorts of attacks constitute an incident98 that would then trigger disclosure.

In addition to disclosure requirements, the government recently announced the Pathfinder programme, which is a collaborative effort among the Departments of Energy, Homeland Security and Defense.99 The purpose of Pathfinder is to ‘advance information sharing, improve training and education to understand systemic risks, and develop joint operational preparedness and response activities … ’.100 In addition to Pathfinder, there are more than 27 other programmes within the federal government tasked with protecting the electric grid from some form of failure.101

At a legislative level, the United States Congress has been busy as well. Most notably, the Securing Energy Infrastructure Act (SEIA), which passed last summer, establishes a pilot programme designed to decrease grid digitisation and bolster manual backup systems.102 The idea behind SEIA is that if grid systems have a reliable manual backup available to operators in the event that a cyber attack disrupts digital systems, then the duration of potential blackout will be less severe.103 Inspiration for this approach is varied, but it is supported in part because the Ukrainian grid attack of 2015 was mitigated somewhat by the use of backup manual controls.104

At a regulatory level, states are also taking an active role in grid security. This is particularly important because much of the power distribution system in the country falls outside of federal jurisdiction (the federal government focuses mainly on the bulk power system).105 Therefore, states are establishing cybersecurity taskforce groups, promulgating rules and standards, and establishing state-specific disclosure requirements. In 2019, 16 states considered enacting measures aimed at promoting grid resilience; California and Texas are leading the pack in implementing cyber defence policies.106 Should this trend continue, then it will help ameliorate a major concern in grid protection, which is the need to standardise and monitor small utility platforms that may not receive the attention they deserve at the federal level.

Lastly, the United States has made clear that cyber offence is an essential complement to cyber defence. The United States government has made clear through word and deed that it is prepared to wage cyber attacks in an offensive capacity as may be necessary. In September 2019, Secretary of Defense Mark Esper, while addressing the annual Cyber Security Summit in Washington, DC, stated, ‘We need to do more than play goal line defense. As such, the department's 2018 Cyber Strategy articulates a proactive and assertive approach to defend forward our own virtual boundaries’.107 Secretary Esper elaborated that to ‘defend forward’ means to ‘disrupt threats at the initial source before they reach our networks and systems’.108 The government has articulated this point in greater detail in both the White House Cyber Policy and the Department of Defense Cyber Strategy.109 In the former, the Trump administration details that consequences will be imposed on any actors that threaten or attack the United States through cyber means. Moreover, the White House asserts that it will establish a cyber deterrence initiative with partnering nations. The international coalition envisioned by the deterrence initiative mirrors prior collective defence arrangements that have been used in more traditional military contexts.110

Beyond rhetoric and policy pronouncements, there is strong evidence to suggest that the United States government has already used cyber weaponry to disrupt industrial control systems in other countries. The most well-documented instance of such an effort is the Stuxnet computer virus.111 This virus, which emerged worldwide in 2010, was a cyber weapon designed to infect the industrial control systems of the Iranian nuclear programme, such that nuclear centrifuges used to produced weapons-grade fissile material would spin out of control to the point of self destruction.112 To that end, Stuxnet was successful. It is estimated that approximately 1000 centrifuges were destroyed at the Natanz nuclear facility, or approximately ten per cent of the centrifuges at that location. Although Stuxnet achieved a significant policy objective of the United States, namely to set back the Iranian nuclear programme, there has never been an official acknowledgement that the United States had anything to do with Stuxnet. However, it is believed that the United States and Israel jointly engineered Stuxnet to strike at the core of Iran's nuclear ambitions. Regardless of whether Stuxnet can be firmly attributed to an American-led effort, the virus illustrates that computer code can cause tangible damage to industrial control systems. Moreover, if the United States did originate Stuxnet, then it demonstrates the United States is both capable of inflicting and willing to inflict a kinetic blow against its enemies through the use of cyber weaponry.

4. Anatomy of an attack

4.1. A grid attack, step by step

Building on the information discussed in the prior sections of this article, this section will explore what a grid attack could look like at the micro level. Understanding the nature of the threat on a global scale is essential for appreciating the nature and extent of the risk posed to grid security, but ultimately this challenge will be met on a detailed operational level. Therefore, it is key for individuals or entities that may have responsibility for thwarting a grid attack to comprehend on a granular level how such an attack could occur.

It is the aim of the author to equip the reader of this article with a general knowledge of how a grid attack may unfold so that the reader may become aware of instances in which their role or responsibilities might entail opportunities to mitigate the risk of grid disruption. For example, a reader of this article advising a power distribution company should know that marketing materials for the company should never include photographs of equipment (specifically, industrial control systems) used at the power generation facility. Cyber aggressors, in reconnaissance missions, may use imagery that unintentionally reveals critical systems. Furthermore, this section borrows heavily from the critical infrastructure report titled When the Lights Went Out, published by Booz Allen Hamilton.113

Lastly, it is important to bear in mind that this overview is hypothetical and simply one of many possible strategies to effectuate a cyber attack. An actual attack may mirror many of the steps discussed here, could vary slightly or significantly, and/or could utilise methods that are presently unknown to the author or to the cybersecurity community. Therefore, the reader should appreciate that the following is but one script among many that a utility cyber attack could follow. Accordingly, it is imperative to stay abreast of changes in cyber offensive capabilities as well as to understand that the greatest threats likely come from attack strategies that are novel and not yet clearly envisioned.

(1) Reconnaissance and intelligence gathering:114 In advance of an attack, the cyber aggressor will research the target through any manner of publicly available information and/or through surreptitious non-digital means. The example alluded to above of a marketing brochure containing a photo of an industrial control system is the type of publicly available information that may be instrumental in planning an attack. If an attacker can determine the type of operational platform in use, then that attacker can begin a plan to exploit that device. This step may also include traditional spycraft methods, such as gaining access to a target facility by seeking employment at that facility or attempting to leverage someone presently employed at that facility, perhaps through blackmail. Although a cyber attack against a grid facility is a sophisticated, technical operation, it often begins with non-technical fact gathering activities. Facilities should, therefore, develop thorough employee monitoring procedures, prohibit visual or photographic access to critical systems, eliminate public tours of critical facilities, install port-scanning detection sensors, deny employees use of personal email or similar applications while using facility networks, etc.

(2) Malware development and weaponisation: Once an aggressor gains insight into the systems used by a target facility, the aggressor will commence procurement or development of the malware necessary to effectuate an attack. Depending on the target, an attacker may need to develop a novel cyber tool to gain access. In other instances, if an attacker can utilise existing malware then they will often take that course rather than write an entirely new programme. This is known as ‘living off the land’.115 An infamous example of this occurred in 2017 when National Security Agency hacking tools were leaked in the EternalBlue exploit.116 The malware gained from EternalBlue has been used repeatedly to ransom data held by governments and corporations.117 While development and weaponisation occur external to a target, it is critical that a target facility take steps to understand the types of malware that are available and test those exploits against their own systems in an effort to strengthen and inoculate critical operations against known malware threats.

(3) Deliver remote access trojan: Once an attacker has determined the vulnerabilities of a facility and developed or procured the malware necessary to exploit those vulnerabilities, the next step is to begin the intrusion. The first step of intrusion is the delivery of a remote access trojan (‘RAT’) or some similar software to the business network. The business network is distinct from the network that controls industrial operation systems because the business network is where routine corporate activity occurs, such as financial activity, legal work, human resources, customer service and so forth. The industrial network, on the other hand, is how the facility operates electricity generation and distribution. Gaining access to a corporate network is a necessary step towards gaining access to an industrial control network, which is the ultimate target in successfully disrupting the grid. The RAT or similar software grants the attacker access to the corporate network, which then opens doors to a wider reconnaissance of the facility. RATs achieve this end often by tricking corporate personnel into granting the attack deeper network access; the trick can come in the form of a phishing email that prompts a corporate employee to give their network credentials or to download a seemingly innocuous file to their computer. In the end, this step affords the attacker deeper intrusion into a facility and puts the attacker one step closer to disrupting operations. Methods of combating delivery of a RAT range from having effective malware detection software to a prohibition on using USB drives or accepting files from untrustworthy sources.

(4) Install RAT: Secondary to the delivery of the RAT, the RAT must be installed. This typically occurs when an employee of the business unwittingly installs the RAT to the corporate network. This is often through a ‘social engineering’ method of attack because it exploits human weakness to achieve an objective. An example of this would be sending what appears to be an email from an employee's friend, spouse, etc, that encourages the employee to download a file, such as a party invitation, whereas it is actually an email from the attacker with malware cloaked in a benign attachment. Another example of this would be an attack where the attacker ostensibly applies for a job by sending an application to human resources, but has embedded malware within the attached resume. To combat RAT installation, much like the methods discussed in the previous section, requires both employee education and file monitoring on the corporate network.

(5) Establish command-and-control connection: Once malware is successfully installed within a corporate network, the attacker utilises that malware to establish a command and control connection (CCC) back to an external server of the aggressor. It is at this point that the attacking party gains actionable and unauthorised access to a grid facility's corporate network. Having gained this access, the attacker can now monitor traffic on the corporate network, research files held on the network, harvest network user credentials such as passwords and critical facility codes, upload additional malware and so on. For facility defence at this level, a robust network firewall is essential because by monitoring all communication done with an external server a facility has a strong chance of detecting the attacker's activities.

(6) Deliver malware plugins: Building upon recently installed malware, the attacker will now deliver malware plugins. The purpose of additional plugins is to expand the range of network reconnaissance. An example of a malware plugin would be a keystroke logger, which functions as a recording device on an employee's computer that records each keyboard input and then transmits that keystroke record back to the attacker. Much like the antidote for other forms of malware, the target can defend against this manner of intrusion with sophisticated and updated malware detection software.

(7) Harvest credentials: Similar to the delivery of malware plugins, the attacker will pursue a strategy of credential harvesting, or, in lay terms, username and password theft. This is a critical step, because by obtaining the login credentials of individuals with broad network authority access the attacker can expand their reach throughout the corporate network and, most importantly, into the industrial control system network. This is a significant step towards both the disruption of the grid and the attack's ability to navigate network traffic largely undetected. In effect, the attacker subsumes the grid control authority and access of an individual or individuals with the ability to alter conditions of the industrial control network.

(8) Lateral movement and target identification on the corporate network: This stage marks when an attacker effectively maps an entire corporate network, or at least its essential components. This step may require months of execution, but by the end of this phase the attacking party should have full understanding of and access to relevant servers, employee work stations, telecommunication infrastructure, power supply and so on. Aside from monitoring for suspicious activity, network defence should make efforts to compartmentalise network functions as a means of thwarting comprehensive network movement. Another strategy to detect intrusion at this level is to establish what are known as honeypots, or network decoys, which are network files that serve no useful purpose and would not be accessed by any employees in the normal course of their work. If a series of these decoy files were accessed, this would suggest some form of nefarious reconnaissance is underway.

(9) Lateral movement and target identification on Industrial Control System (ICS) network: This is the stage of the attack in which the attacking party jumps from the corporate network to the industrial control network, ie the systems that provide operational control of the facility's power generation and distribution network. An industrial control system functions like a traditional, manual system except that at key points of its operation it receives digital commands from either automated operating instructions or human input. For example, a hydroelectric power plant may continue producing power through the physics of water-pressure-driven turbines until a human actor, interacting with the facility through a digital control system like a computer or more basic workstation, gives an instruction to the plant control system to either cease power production or ramp it up, or to do something else. These command systems can take many forms, but a basic form is a human–machine interface workstation, which would likely be a laptop type device that is directly connected to an industrial control system, like a programme that has the authority to adjust the speed of a hydroelectric turbine. Within the physical world of the facility, a properly credentialed employee would be able to walk up to this human–machine interface workstation and send a command to the control system for the turbine to alter its operation. In the case of an outside attack on the grid, the attacker would gain access to this workstation remotely and use it to give a command as if the attacker were physically present at the facility. At this stage, an attacker would not yet know how to initiate an attack, but this would be the time when the attacker explores the industrial control system network in an attempt to uncover its vulnerabilities and to identify targets necessary to disrupt the facility's operation. To prevent this stage from occurring, the facility should configure a third, intermediate network between the corporate network and the industrial control system network, wherein the intermediate network acts as holding centre for cross-network traffic to be evaluated. This is akin to a decontamination room that is used when a virologist exits a secure room where they have been studying a dangerous pathogen; the virologist is not permitted to exit a possibly contaminated room without first going through a decontamination room and then, upon approval, being released from that room back into a normal, presumably virus-free environment. While this is not a foolproof method of defending an industrial control system network, it does ensure that an attacker's efforts are more closely scrutinised. Of note, this measure is not the same as an air-gap system, ie a system that separates the industrial control system network from the corporate network. It has been demonstrated that an air-gap system is not practical nor is it as secure as it may seem in theory.118

(10) Develop malicious firmware: Once an attacker has explored the industrial control system network, uncovered its vulnerabilities, and established control system targets, the attacker will develop a weapon appropriate for disrupting those targets. The weapon will be some form of malicious firmware. The attacker does not require access to either the corporate or the industrial control system network during the malicious firmware development stage; rather, the actor will perform this process completely externally to the target facility. However, the attacker may test the malicious firmware on other, similar targets as a means of fine-tuning the efficacy of the weapon. This brings us back to the issue of Ukraine. Ukraine has been and is the testing ground for a host of cyber weapons, and it is generally accepted that malware developed to strike grid-critical facilities are often tested in Ukraine before being executed against their actual target.

(11) Deliver data destruction malware: Preceding an attack, the aggressor will utilise its access to the facility networks (both corporate and industrial control systems) to upload data-destruction malware. The purpose of this malware is to preschedule the deletion of pertinent data that would be relevant to restoring a system's operational integrity. Although the deletion itself is not formally the attack, it complements the attack by frustrating the assessment of what is occurring during an attack as well as hobbling a defensive response to an attack. The only means of confronting this stage of the attack is to maintain robust scanning measures for malware.

(12) Schedule uninterruptable power supply disruption: Grid facilities rely a continuous operation of critical systems during normal operation. During an attack it is even more important to maintain power as a means of ameliorating the disruption. However, using harvested credentials, an attacker will preschedule the termination of otherwise uninterruptable power supply (UPS) sources so that it becomes easier to execute multiple attacks, to do so undetected and to debilitate restoration efforts. A method of combating this tactic is to isolate UPS systems from the corporate and/or industrial control system networks.

(13) Trip breakers: After months or even years of preparation, the attack finally commences. Using access to the industrial control system network and credentials that enable the manipulation of human–machine interface systems, the attacker will issue a command to open the breakers within the facility's power generation and distribution system. The end result will be the disruption of power to a wide range of consumers, measurable in the hundreds of thousands or millions. As discussed above, it is essential to tightly control user access to the industrial control system network, both internally and externally. At this stage, the attack will become known to the facility and corrective measures will likely ensue. For this reason, the attacker will then commence additional attacks to derail any attempted defensive procedures.

(14) Sever connection to field devices: Knowing that a facility control centre will take immediate steps to close the breakers and restore power to the grid, the attack will trigger malware that disrupts power converters and cuts communication between the facility control centre and its substations. The result is that breakers cannot be closed remotely over the network and can only be closed manually. While this may sound like an easy solution, the larger the attack, the longer manual restoration will require. A robust system for monitoring industrial control system network traffic and simulated attack and restoration exercises are necessary to avoid this scenario.

(15) Telephony denial-of-service attack: At a corporate network level, measures will immediately commence to register consumer complaints and formulate a company action plan. As with most power outages, consumers will begin calling the corporate call centre to report a disruption, only now the attacker will flood the call centre with a telephony denial-of-service attack so that the call centre effectively drowns in fake calls and is rendered incapable of addressing legitimate consumer complaints. In order to avoid this frustration, a power company should partner with its phone service provider to develop a means of filtering legitimate from fraudulent calls.

(16) Disable critical systems via UPS: At this stage, step 12 becomes relevant as the attacker's prescheduled power outages begin to wreak havoc on the response effort. Commonly, facility operators will take steps to rely on backup power systems, but here they will find them suspended and useless. This will add more chaos to an already chaotic situation.

(17) Destroy critical system data: Finally, with the power disrupted, control stations neutered and the power company thrown into a technical maelstrom, the attacker will cut the jugular of the facility. With vast access to the corporate and industrial control system networks, the attack will trigger malware that systematically deletes data critical to the operations of the facility. This step of the attack has the potential to make internal restoration of power impossible. Moreover, with the physical components of the facility effectively turned off and the digital systems wiped of all critical data, the likelihood of power restoration in the foreseeable future becomes questionable at best.

(18) Physical destruction of plant systems: Although the 17 prior steps are adequate to turn the lights out, another element of a successful attack warrants attention. Had the attacker initiated a command that caused a power surge sufficient to burn up necessary critical infrastructure, then not even manual restoration would remedy the disruption.119 Under this scenario, power could only be restored by installing new equipment, which, depending on the severity of the attack, could be a protracted solution that requires years of work.

4.2. Post-mortem or restoration

If a large-scale cyber attack does come to fruition, what might be some of the second-order effects? One example comes from a situation that occurred in Wyoming in February 2017, when a strong windstorm knocked down a large number of power lines.120 Because of the inoperable power lines, along with heavy snow, power was not restored for approximately a week. Generators initially powered sewage treatment facilities, but eventually the generators began to fail and as a result sewage began backing up. To avoid wastewater flooding into homes, the area's water supply was cut off. One needs only a modest imagination to consider the impact that a similar situation might have in New York City, Los Angeles, London or any other major metropolitan area. And, to make matters worse, curtailment of clean water could be only one of many challenges resulting from lost power.121 This grave concern prompted Lawrence Susskind at Massachusetts Institute of Technology (MIT)'s urban systems department to remark, ‘Millions … could be left with no electricity, no water, no public transportation, and no waste disposal for weeks (or even months) … . No one can protect critical urban infrastructure on their own’.122

Combined with the social and economic turmoil that could be caused by a crippling grid attack, there could be further difficulties caused by the disruption to supply chains that would be necessary to restore power. At an MIT facility doing work on wind turbine power generation, a mechanical failure to the turbine took almost three months to fix because a necessary part had to be developed and delivered from Germany.123 Expand a situation of this type across an entire grid system, and it could take years to return all systems to normal working order. This sort of dismal situation is known as a black start, and it could prove extremely difficult to overcome. Moreover, one need to only look at the present challenges created by the COVID-19 viral pandemic to appreciate how delicate these critical infrastructure systems are when placed under unexpected and severe stress. An attack on the grid resulting in prolonged power loss would in many ways mirror, and in some ways far exceed, the disruptions presently occurring as a result of the virus pandemic.

#### Only robust investment prevents outages.

Chatterjee 25 – Columbia Center on Global Energy Policy Distinguished Visiting Fellow, Former Commissioner and Chairman of the Federal Energy Regulatory Commission.  
Neil Chatterjee Interviewed By Jason Bordoff, “In a Charged Environment, FERC Faces Demands for Energy”, 11/25/25, Columbia Center on Global Energy Policy, https://www.energypolicy.columbia.edu/in-a-charged-environment-ferc-faces-demands-for-energy/

Jason Bordoff (51:48): What do you think the grid looks like in a decade? Say, how are the broad percentages different than today? Where are we going to see the most growth? I

Neil Chatterjee (51:56): Think it’s going to be a far more distributed grid. I think we are at the precipice of moving away from sort of our centralized system of generation distribution and consumption of power. I was proud to have played a small role in that in pushing FERC orders 841 and 2222 that removed barriers to entry for some of these aggregated distributed energy resources to enable them to be compensated for all of their attributes, for capacity, for energy, for ancillary services. It’s taking a little bit longer than I would’ve hoped at the time that I promulgated these rules, but I am confident that by 2030, 2035, we are going to have a very, very different looking grid. And I do think this surge in demand being driven by AI that’s going to drive up prices, will be the mechanism that allows for greater deployment of these aggregated distributed energy resources.

### AT: No Swing Vote

#### they’re prone to horsetrade.

Feldman 25, Arthur Kingsley Porter University Professor, Law, Harvard University, JD, Yale Law School, (Noah, July 7, 2025, “Comment: Supreme Court’s majority is picking its battles,” *Hearld Net*, https://www.heraldnet.com/opinion/comment-supreme-courts-majority-is-picking-its-battles/)

Many legal commentators apparently believe that, in the term that just ended, the Supreme Court further enabled President Donald Trump. The court did, in fact, issue a series of conservative decisions that Trump likes. However, under the leadership of Chief Justice John Roberts, the court also simultaneously pursued a careful strategy aimed at preserving the rule of law in the face of Trump’s unprecedented challenges to it.

The court picked its battles, upholding a meaningful number of lower court orders that blocked unlawful Trump initiatives. At the same time, the justices worked hard to avoid a direct confrontation in which Trump might overtly declare his intention to ignore a court ruling.

Even its most controversial recent decision — ending the Trump-era judicial practice of issuing universal injunctions against presidential action — may be understood as an effort to prevent lower courts from creating a direct conflict with the administration that might lead to a showdown the courts would lose. On this interpretation, Roberts wants to exercise his own careful judgment about when to go toe-to-toe with Trump. His goal is to avoid a constitutional crisis that could undermine the power of the judiciary for generations.

Let me be crystal clear: I disagree strongly with essentially all of the ideologically conservative decisions the court issued this term. (You can read my columns on each of them to see why.) Yet these decisions, wrong though they are, were not the most important element of the Supreme Court’s job since Trump took office.

No, since this Jan. 20, the court’s essential function has been to fight for the preservation of the rule of law. That fight cannot be won simply by bluster, for a very specific constitutional reason: The Supreme Court has no direct enforcement power and no power of the purse. It is, as Alexander Hamilton famously wrote, “the least dangerous branch,” which also means it is the least powerful.

In the end, the Supreme Court has power only because the executive obeys it. If the president defies the courts, the only constitutional remedies available are congressional attempts to withhold funds (which is not going to happen under this Congress) and impeachment (good luck). Maybe — one can only hope — millions of people would go into the streets in defense of the rule of law. Maybe the financial markets would decline sharply. But these are extreme contingencies, and they might not work.

Trump, more than any president before — even Abraham Lincoln in wartime — has shown he is prepared to openly violate the Constitution and the laws of the United States. His attacks on the judiciary, echoed by his vice president, are clearly intended to signal his openness to outright defiance. And in a direct constitutional crisis triggered by defiance of judicial orders, it’s hard to say with confidence that Trump wouldn’t win.

So the job of the court over the last six months has been to hold the line.

It has done so — not resoundingly, but cautiously, as befits judges who aren’t politicians and don’t have a constituency to rely on.

When the lower courts blocked some of the president’s efforts to freeze federal grant money and fire career government employees, the Supreme Court mostly left those orders in place. When District Judge James Boasberg ordered the Trump administration to “facilitate” the return of Kilmar Abrego Garcia, who had been deported to El Salvador without due process, the justices upheld the order; and he is now back in the U.S., albeit facing new criminal charges. When other detainees slated for deportation sought their day in court, the justices affirmed their due process rights.

Of course, the court’s majority hasn’t stood up to the Trump administration in every instance. Sometimes that has been for technical legal reasons. But it is also because Roberts wants, ideally, to avoid a situation where Trump directly defies a court order.

And if the confrontation must happen, Roberts and the other justices want it to be on an issue where the court’s legal and rhetorical power is at its maximum. That means trying to pick an issue where the law is clearly against Trump; all nine of the justices agree; and no foreign actors outside the court’s jurisdiction are necessary to effectuate the court’s judgment.

The court’s decision ending universal injunctions should be seen as part of this strategy. The practice gained popularity during Trump’s first term as a tool for the courts to block him. It had the advantage of efficiency; once a court ruled a presidential action unlawful, plaintiffs didn’t have to go to multiple courts.

Yet the injunctions turned out to be a double-edged sword, wielded by Trump judicial appointees against Biden administration actions like student debt relief. During the Biden years, liberal lawyers began publicly acknowledging that universal injunctions were a problem in need of fixing. That bipartisan skepticism has now been entirely effaced in the current moment of discussion.

During Trump’s second administration, universal injunctions have revealed another worrisome attribute: They have allowed any district court judge in the country to create a nationwide, direct conflict with the administration. From the perspective of Roberts and the justices, that is like giving battlefield colonels the power to launch a major war. As the senior generals, the justices would prefer to make the tactical and strategic decisions about when to fight the president; the most dangerous adversary they’ve ever faced. Ending universal injunctions gives them that discretion.

Meanwhile, as this judicial calculus is going on, the conservative constitutional revolution is far from over. This term delivered plenty of deeply conservative decisions. These included free speech; in the form of the disastrous TikTok case and the decision permitting age-verification requirements for access to pornography. The court also addressed equal protection; allowing states to bar access to gender-affirming care for teens. And it continued the partial restructuring of the administrative state; a holding in the emergency docket that appears to permit the president to fire even the heads of multimember independent agencies.

These decisions reflect ongoing trends in conservative jurisprudence. They aren’t fundamentally tied to the court’s broader project of preserving the rule of law. A fair assessment of the Supreme Court term should focus not only on these decisions, but also how the court is doing on the most consequential issue: keeping the Constitution alive.

The answer is the court is doing all right. It doesn’t need to win any awards. It just has to do its part in the existential struggle to save democracy and the rule of law.

#### That’s especially true in the labor context.

Doerfler and Moyn 21 – Professor of Law at the University of Chicago Law School; Henry R. Luce Professor of Jurisprudence and Professor of History at Yale University.

Ryan Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” California Law Review, 2021, Vol. 109, No. 5 (2021), pp. 1703-1772, JSTOR

At first blush, partisan balance requirements operate the same way, ensuring at most a limited partisan skew and more ideologically moderate outcomes.161 Some, however, advocate partisan balance on the theory that such an arrangement would necessitate ideological compromise, which, these advocates insist, would take the form of less sweeping judicial holdings.162 Such judicial minimalism163 would, in turn, leave more space for Congress to act. While attractive in theory, this minimalist prediction fits poorly with recent historical practice. The narrowly divided Roberts Court, for example, has opted for horse trading rather than incrementalism in some of the most politically significant cases.164 And even in areas like abortion where the Court has taken a more incrementalist approach, the ultimate effect looks to be a more significant shift in constitutional law than would result from more dramatic rulings followed by predictable backlash.16

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C. Rights The most common objection to disempowering reforms to the Supreme Court focuses on the need for it to protect important rights, especially minority rights against hostile majorities. For many, rights protection is the leading criterion for assessing not just judicial reform, but the basic purposes of a judiciary in the first place.166 We need not review the gargantuan literature on the plausibility of the familiar claim that democracies empower judiciaries precisely to protect rights. As Justice Robert Jackson immortally put it, the goal is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”167 But a few targeted responses to that conventional wisdom from the perspective of Supreme Court reform are indispensable. We will argue that (1) disempowering reforms open the possibility of much superior rights protection precisely because the progressive legislative agenda withdraws unjustifiable protection for the powerful and allows for or improves upon rights protection for both majorities and minorities alike; (2) disempowering reforms leave a range of plausible judicial mechanisms for rights protection in necessary cases; and (3) even to the extent that disempowering reforms imaginably threaten rights, it is not clear that personnel reforms have better credentials for ensuring their protection. (1) The progressive frame disputes that majority rule endemically conflicts with rights protection. On the contrary, the historical record clearly demonstrates that legislatures serve as the chief historical source of rights, while judicially enforced rights protections can easily devolve into technologies of minority rule.168 If true, as a general matter it is quite possible that disempowering leads to superior rights protection, not worse. On the one hand, it subjects to majority rule the powerful and wealthy minorities claiming and getting the protection of the courts.169 On the other, progressive reform through the political branches of government can potentially lead to superior legislative protection of the rights of majorities from those powerful and wealthy minorities, as well as superior legislative protection of the rights of vulnerable or weak minorities. The American (and, even more, global) progressive default was long, not the absence of rights as a political goal, but “legislated rights.”170 The privilege of the judiciary led to the Lochner era. No doubt, if that case is anticanonical in American memory, it is so precisely as a form of illicit rights protection and was cast aside to achieve better rights protection through legislative means. As Roosevelt accurately explained, “the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.”171 This sometimes requires putting courts in their place in order to privilege legislatures pursuing rights for all and balancing the claims of majorities and minorities alike. In this spirit, the legislature can be seen as the first and most important defender and propagator of rights, and majority rule the default source of legitimacy for assessing the scope of rights and resolving conflicts among rights and between rights and other priorities. Roosevelt’s “Second Bill of Rights” envisioned a suite of economic and social entitlements of modern citizenship, but not one that judicial authority would enforce and whose scope remained to be determined in light of other interests and values.172 And though they did not enact it, Americans have remained within a legislated rights frame in propounding civil rights acts that effectively did more than any judicial decision to confront exclusions based on race, gender, or disability.173

<<PARAGRAPHS RESUME>>

Consider again from this perspective the current baseline of rights protection in American constitutional law and what the Green New Deal would do in supplementing it. As noted above, illicit forms of rights protection associated with the Lochner era and our own neo-Lochnerian one foil prospective reform absent Supreme Court renovation.174 Americans can boast strong judicial protection of core forms of speech, along with other protections of religion. These decisions have their defenders even when used to limit the scope of other constitutional rights or even allow the Supreme Court to expand statutory antidiscrimination protections to sexual orientation, in expectation that those requesting religious accommodations and exemption will be provided them.175 By the same token, however, Americans do not have other basic rights under the U.S. Constitution, whether rights to basic provision (of food, housing, sanitation, or water, all familiar in other national settings and international law).176 In the case of health care, not only do Americans not have a right to it, but the Constitution’s established judicial power weakened the initial attempt to take some steps towards it under the star-crossed Affordable Care Act (ACA).177 State constitutions often protect the right to education, but the Supreme Court explicitly rejected it.178 More generally, even with respect to the rights for which constitutional law provides robust protection, they are not class sensitive, and not only are material insufficiencies not understood as rights violations under judicially elaborated frameworks, material inequality is not either.179 A right to work, or labor rights to organize and strike, have never been significant features of America’s constitutional law.

By contrast, while not everything an H.R. 1 democratizing statute, Green New Deal law, or other progressive legislative reform should be conceived as the elaboration or substantiation of a right, much of it is easy to understand that way. Many of their key planks—access to the polls and other voting entitlements, job guarantees vindicating the right to work, high-quality food, health care, housing, or water correlating with well-known rights, promises for high-quality education not only at the primary but secondary level—fit.180 Even its “green” part can be seen as rights protective. The more general rhetoric of facing down inequality after decades of its expansion bears not only on basic rights, but also can be conceived to involve rights beyond sufficient provision to an entitlement to rough equality in life chances. Ronald Dworkin has epitomized a stereotypical view of judicial authority that was absolutely required for rights to be invoked as principled “trumps” against aggregating legislatures.181 This picture entirely missed whether legislatures might be fora of principle equal or even superior to defending extant rights commitments and propagating new ones. (Dworkin did acknowledge that “fit” with American traditions forbade any very expansive understanding of our constitutional rights.)182 Shifting away from recent Dworkinian assumptions is especially pertinent when it comes to so-called positive rights, none of which are protected under the U.S. Constitution and few of which have ever been sought— even at the zenith of liberal power on the Supreme Court—through judicial interpretation. As Dworkin’s assumptions more or less accurately reflect, Americans boast a small number of rights that they protect in absolutist ways through judicial intervention. Other countries proceed differently by propounding a much wider variety of rights, which their legal systems protectless robustly through proportionality balancing against other interests and distributed institutional control over rights.183

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It is, of course, true that judge-led interpretation of the Constitution’s rights applied most of them to the states in the middle of the twentieth century, and in doing so revolutionized protections in criminal procedure. It also extended individual rights not mentioned in the constitutional text across the century—in the phase since the 1960s, mostly under the Due Process Clause’s promise of liberty, freed from the constitutional protection of freedom of contract as a right. In this vein, the Court protected rights like freedom from compulsory sterilization,184 and to choose to abort a pregnancy or marry a spouse of a different race185 or the same sex.186 And the Equal Protection Clause banned formal apartheid, and especially formal segregation of races in schools.187 These results account for the familiar anxiety that Supreme Court disempowerment would threaten rights protection. And no one should pretend that a legislated rights regime would match the set of entitlements achieved through judicial interpretation precisely. Even if a legislated regime provides for many rights on its own, or more of them, it may miss others. But it is pivotal to any genuine comparison that it is not a matter of exclusive principled defense of rights in judiciaries on one side against unprincipled majoritarian action on the other. Instead, it is a comparison of some schedule of rights and some modicum of protection on both sides of the line. Minimally, rights concerns do not cut against legislative empowerment per se. And more maximally, progressives assume that rights protection may well be available in superior form through political branches as agents of national transformation. However, judicial empowerment to achieve the current spotty and weak protection of rights generally serves debatable ends, and primarily protects the rights of powerful and wealthy interests. Not only can legislatures protect rights for majorities and minorities, but judiciaries can convert rights protection into illicit minority rule. Indeed, if existing entitlements for the needy are weak and for the powerful are strong, judicial empowerment can at least as plausibly be construed as a project of rights violation as of protection and disempowering as instrumental for the sake of rights themselves. Sometimes progressives may rely on accounts of the comparative institutional bias of judiciaries (relative to legislatures) towards views of elites188 and outcomes favoring them.189 Sometimes they may even—as in Karl Marx’s early writings190 and in the critical legal studies movement191—claim that individual rights are especially susceptible to the production of those same outcomes. And those suggestions deserve careful scrutiny. But even if neither kind of account is persuasive, disempowering reform can be construed as a project of rights expansion and vindication, beyond the narrow list and weak protection of Supreme Court doctrine, currently and even historically. One should question whether the Supreme Court’s unimpressive baseline protection of the rights of vulnerable minorities, even as it has come to systematically favor neoliberal outcomes in First Amendment jurisprudence and beats back at legislative protection in areas like affirmative action or voting rights, suffices to justify its empowerment as guardian of basic entitlements. When we consider the likely obstacle the Court would pose to rights expansion as a progressive agenda, the answer to that question is not hard. Disempowering reforms would count as a far greater victory for rights than an empowered victory could ever deliver. (2) Furthermore, while the functional effect of disempowering reforms like jurisdiction stripping and supermajority rules on the Supreme Court reduces the significance of judicial review, it is not a matter of either-or. Functional disempowerment of the Supreme Court leaves a series of stopping points short of full negation of judicial review through some institutional reform, which only a persistent but tiny minority of followers of Thomas Jefferson in American life supports.192 Indeed, many proponents of weakening judiciaries have offered stopping points to manage judicial rights protection. If they have generally failed— leaving too many protections for the undeserving and too few for those in need— it by no means obviates a new compromise leaving some crucial judicial rights protection intact. James Bradley Thayer’s proposal merely to subject majority legislation to rationality rule left room for policing irrational results.193 More boldly, the original move in the 1930s, first defended in the fourth footnote of the Carolene Products opinion194 and canonically justified by John Hart Ely,195 was to “bifurcated review.” This framework subjected economic legislation to rationality review after the abandonment of the old substantive due process while protecting some schedule of rights and some kinds of minorities. Where personnel reforms do not react to the general failures of past compromises either to deal with underenforcement of rights or “juristocratic” excesses, disempowering reforms hardly abandon the possibility of a more successful one. Relative democratization hardly means total disempowerment of judiciaries to protect rights. The same verdict applies to Ely’s defense of judicial review to remedy participatory exclusions and failures. While there is no reason on its recent track record to believe that the Supreme Court will pursue his vision,196 attractive in theory but dead in practice for several decades, nothing forbids a disempowered judiciary from doing so. If properly calibrated, jurisdiction stripping statutes, for example, could insulate precisely the attempted expansion of legislative rights from judicial limitation in the name of various provisions of the Constitution weaponized by the right (notably, the Free Exercise and Free Speech Clauses), while leaving judges power to protect other rights from unsuspected majoritarian excess. Similarly, supermajority rules have a distinctive capacity compared to personnel reforms for counteracting the reality that controversial minoritarian tyranny today very much works through the Supreme Court, while leaving room for justices to intervene in the case of genuine majoritarian tyranny when enough justice agree it is real, rather than a smokescreen for illicit capture. Finally, unlike personnel reforms, disempowering reforms do not rely on judicial self-restraint as a mechanism to ensure democratic choice. Thayer’s proposal relied on judicial self-restraint, and Carolene followed suit insofar as it ultimately consecrated a purely judicial determination as to when to cross the line from rationality review to heightened forms of scrutiny. The result was, arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically. Judges allowed democratic will-formation, blocking it contingently (sometimes for better, regularly for worse) based on their own evolving doctrines of intervention. What all of these reforms shared was a rejection of Thayerian deference de facto, and an expansion of judicial authority uncontemplated and undesired in the middle of the twentieth century.197 “A lesson that some will take from today’s decision,” one conservative justice remarked bitterly at the end of the day, “is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means.”198 If he was right, however, it was because judicial self-restraint failed to ensure conservative (not just liberal) self-policing. Even with personnel reforms, any bench will face the temptation to overstep, whereas disempowering reforms specifically deprive them of the temptation. Disempowering reforms limit the Court’s power to act or abstain from acting in the first place. (3) Finally, even to the extent disempowering reforms hypothetically threaten rights, personnel reforms do not plausibly provide superior protection. Generally, the goal of relegitimation of the Supreme Court—the rationale for many proposed reforms today, as discussed above—is orthogonal to rights protection. There is no reason to believe a court with comparable powers as now, but with improved legitimacy, would improve rights protection. To make out a case that it would, one would have to correlate legitimation with rights protection, and it seems churlish to suggest credibly doing so. As we suggested above, most approaches to legitimacy define it in terms of partisan neutrality rather than rights protection. To be sure, there are some accounts of normative legitimacy of apex judiciaries that may be less about nonpartisan neutrality than most, and may even put rights protection at the very heart of what a normatively justified Supreme Court would do.199 The trouble is that none of the personnel reforms credibly advance that form of legitimacy. It is, alas, unclear that any reforms of the Supreme Court we can imagine would do so—thus it cannot be an argument against disempowering reforms that they fail to do so. Of course, personnel reforms might plausibly stave off the threat posed by the current conservative majority on the Supreme Court in the short term— though evidence suggests that the most extreme fears of the majority’s consequences for abortion and other rights have proved premature. Our point is that, even conceding the possibility of threats to rights, relegitimation is hardly well-designed to achieve this end exclusively and narrowly. On the contrary, given recent baselines before the need to “save” the Supreme Court became apparent, relegitimation involves far greater risk for confirming the endemic judicial underenforcement of rights of the vulnerable and weak, and potentially even overenforcement of those of the powerful and wealthy. And if the suggestion is that personnel reforms achieve short-term democratic legitimacy by updating the bench to match the popular will, then any improvement they might achieve in rights protection is also available legislatively. Either way, there is no way to conclude that disempowering reforms would lead to more abuse of rights than other reform options, and may well lead to their greater vindication. D. Regularity A separate aim of many reforms is to regularize the appointment of Supreme Court justices.200 According to the standard narrative, the Supreme Court appointment process has grown increasingly fractious since the Senate rejected Robert Bork’s nomination in 1987.201 Today, it is popular to insist that the appointment process is “dysfunctional[,]”202 “broken,”203 or otherwise in disrepair. Complaints about the dysfunction of the appointment process are typically coupled with worries about undue “politicization.”204 As discussed above, worries about politicization go to the Supreme Court’s legitimacy. Apart from legitimacy, however, several reformers allege concern with the functionality of the appointment process. According to these scholars and advocates, increased “polarization” and the stakes of judicial appointments have resulted in a system burdened by gridlock and that encourages destabilizing political tactics.205 Most of the contestation over Supreme Court appointments is tied directly to important normative disputes within our political community. As such, so long as Supreme Court justices continue to wield tremendous authority, it is both predictable and appropriate that political actors will fight aggressively for control of the Court. Given the stakes, efforts to regularize the appointment process through mere shifts in personnel will predictably fail. To see why, take the proposal to impose term limits on Supreme Court justices. As described above, this proposal would, in its most popular form, allot one Supreme Court appointment per congressional term, with each justice permitted to serve for a period of eighteen years.206 One of the supposed advantages of this reform is that it would help regularize the appointment process by lowering the stakes of individual appointments.207 Because each president “gets two appointments per term,” the motivation to contest specific appointments is, we are told, substantially less.208 Notice, however, that each president “get[ting]” two appointments is more hope than promise under this scheme. Because its advice and consent function would remain the same, an opposition Senate would retain the incentive to reject nominations, thereby helping to accrue partisan advantage on the Supreme Court over time. Even if quorum and vacancy rules would eventually force the choice of confirming a nominee or rendering the Supreme Court incapable of issuing binding judgments,209 a strategic opposition might easily prefer to effectively empower the courts of appeals, building partisan advantage at that level through similar tactics. The point here is that Supreme Court term limits would do little to deter an opposition party from engaging in constitutional hardball. While true that the stakes of an eighteen-year appointment would be lower than an appointment of an indefinite tenure, determining the ideological character of the Supreme Court would remain an enormously high-stakes affair. If the fate of climate or health care legislation, say, were to continue to rest with that institution, it would be malpractice for progressives not to do everything within their power to ensure that the Supreme Court was progressively inclined. Other purportedly regularizing personnel reforms suffer from similar defects. Partisan-balance requirements, for example, would present an opposition Senate with the same opportunity to refuse to confirm nominees to seats assigned to the President’s party. Again, an opposition Senate might be left with the choice of confirming a nominee or depriving the Supreme Court of a quorum, but as our current politics shows, such aggressive tactics are sometimes appealing.210 Merit selection presents similar issues, though this time with both the President and the Senate. Barring constitutional amendment, any potential nominees chosen by a nonpartisan or bipartisan panel would have to be nominated by the President formally.211 Given a cooperative Senate, a boldly progressive or conservative President would have little reason to assent to the sort of centrist or moderate candidate such panels are designed to produce. The same would be true for a stridently progressive or conservative Senate. Why settle for a “compromise” nominee when one has the leverage to demand more? The complication with lottery systems is slightly different. As described above, such proposals would replace our system of permanent Supreme Court justices with panels composed of randomly selected judges from the federal courts of appeals or permanent associate justices drawn from an enlarged pool. Pursuant to this reform, although the Supreme Court as such would retain its authority, the authority of the individual judges who make up the Court would be substantially reduced. On this scheme, individual judicial appointments would be less significant than the appointment of justices today.212 Still, because this proposal would make every federal court of appeals judge a potential Supreme Court justice, the stakes of filling court of appeals vacancies would increase accordingly. Given the already rising level of contestation over such nominations, it is hence easy to imagine a panel system causing appointment “dysfunction” merely to spread. Again and again, we see the same basic issue. Under our constitutional scheme, both the President and Senate have a say in the appointment of justices.213 Because Supreme Court justices wield tremendous authority and because ideology determines in part how they wield it, those two parties will be disposed to fight should their ideologies differ. The intensity of that disposition will depend, of course, on the strength of their ideological disagreement. In a country racked with intense political disagreement, however, that disposition is going to be incredibly strong at least some of the time. Given the intensity of that disposition, comparatively small adjustments like the imposition of term limits would barely affect, say, an opposition Senate’s decision-making calculus. With the stakes of appointments so incredibly high, such modest if salutary reforms are not at the requisite scale. By comparison, more aggressive disempowering reforms might at least register with a president or opposition Senate. Stripping courts of jurisdiction over constitutional cases or requiring a supermajority to declare federal legislation invalid, for example, would meaningfully reduce the stakes for Supreme Court appointments and judicial appointments more generally. Even with its authority so limited, the Court’s ideological character would continue to matter even outside of constitutional or politically significant cases. Still, in terms of stakes, disempowering reforms would make the appointment of justices more akin to the appointment of agency officials. To be sure, the appointment of such officials is also increasingly contested, as should be expected in polarized times. In terms of regularization, then, even aggressive disempowering reforms can only promise modest benefits.

<<PARAGRAPHS RESUME>>

E. Pragmatism

A less conceptually ambitious but equally commonplace framework for evaluating a reform scheme is pragmatism: case-by-case consideration of the reform’s outcomes. This criterion is not oriented to the legitimacy of the Supreme Court either as an apolitical, neutral institution or as one made safe for democratic life. Pragmatism appeals to a narrower kind of legitimacy: one of output. Are the results of Supreme Court decision-making good (enough), or at least not bad (enough)? But the truth is that, as our parentheticals indicate, such a criterion is overwhelmingly oriented to harm avoidance, pointing not to good results but to ones that are a tolerable mix of outcomes, or—even more modestly—do not incur grievous enough harm.214

As an example of pragmatism in action, consider June Medical Services v. Russo,215 the Court’s latest consideration of an already whittled-away abortion right. The case might have constrained that right further, reducing the number of Louisiana clinics where women can seek abortions from four to one, but instead protected the right. In the hours after the decision, liberal outlets responded with a palpable relief. Early narratives said Chief Justice Roberts had “betrayed” his conservative movement in failing to grasp a long-sought prize here, and in his vote two weeks earlier to extend statutory civil rights protection to sexual orientation.216 Yet commenters also noted that Roberts’ majority decision, clearly in response to the erosion of the Supreme Court’s sociological legitimacy, also opened the way to less brazen legislative curtailments of abortion rights in the future.217 Though not the dire outcome long feared, Roberts’s controlling opinion was widely recognized as a terrible blow for the very right it purported to preserve.

Routinely, pragmatism really amounts to what one might call a Supreme Court liberalism of fear.218 It greets the fact that justices have not eroded past progressive gains, while also restraining the conservative majority from experiments that are too perilous—as if such triangulation were a worthy cause. This pragmatic sensibility surges in real time at the end of each Supreme Court term as observers, though far from celebration, welcome individual case results as examples of the institution not doing its worst. Chief Justice John Roberts has, over the last decade, become the icon for this approach,219 [FOOTNOTE 219] 219. For recent instances in an infinite commentary to this effect, see, for example, Jeffrey Rosen, John Roberts Is Just Who the Supreme Court Needed, ATLANTIC (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court needed/614053/ [https://perma.cc/43UR-PF3J]; Hail to the Chief: Justice John Roberts Joins the Supreme Court’s Liberal Wing in Some Key Rulings, ECONOMIST (July 2, 2020), https://www.economist.com/united-states/2020/07/04/justice-john-roberts-joins-the-supreme-courts liberal-wing-in-some-key-rulings [https://perma.cc/ER3G-H34Q]. [END FOOTNOTE 219] sometimes abetted by due respect for Justice Elena Kagan as a master strategist of achieving harm avoidance through compromise with conservatives.220

Assuming the pragmatic rationale really does minimize harm in the absence of a possibility of help—both prongs of which are easy to dispute—it could succeed on its own terms. For many, however, it tolerates the enormous harm it says it avoids while foreclosing help through institutional creativity backed by political action. Worse, the rationale’s price is a set of unacceptable baselines that it defends. The basic objection to this outlook, then, is that it is not very pragmatic. What is pragmatic about accepting the continued erosion of current baselines that leave cherished liberal policies like abortion rights221 and affirmative action222 hanging by a thread, even as multi-decade conservative inroads in many doctrines—including edging up to the deconstruction of the administrative state223—continue accruing? Such “pragmatism” allows existing doctrines and case law to remain entrenched, on the rationale that the Supreme Court could worsen them. For progressives, by contrast, the current baselines are the problem and could allow a Supreme Court, even one saved from doing its worst, to damage their legislative proposals. The pragmatic framework rests content with the existing baseline of stunted left-wing policy, as if a right-wing adventurism blocked by John Roberts justified the threat a powerful Supreme Court—and John Roberts himself—would pose to genuine progressive reform were it to emerge.

In fairness, one sometimes senses that pragmatism shelters the utopian hope that someday the Supreme Court will return to its predestined role institutionalizing justice in the country. That maximalism can take refuge in minimalism does not mean the permanent replacement of the one by the other. Indeed, pragmatists often feel that depression about outlooks—acceptance of bad outcomes because they could be worse—is in fact justified solely because the alternative is to attack the Supreme Court itself, to which they profess independent allegiance. “The Roberts court, against all expectations, has made this battered country a better, safer place[,]” wrote senior courtwatcher Linda Greenhouse in response to the recent abortion case, epitomizing the pragmatic stance.224 “For now[,]” she clarified—adding that, while she “breathed a deep sigh of relief,” it was not just for the Louisiana women affected but also “for the Supreme Court itself, for having avoided plunging along with Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh into an institutional abyss.”225 In other words, the pragmatist acceptance of an unacceptable baseline requires some justification other than pragmatism itself. If it were plausible that keeping the Supreme Court from the abyss for now would allow it to ascend to the empyrean later, “pragmatism” might make sense. But it’s not, which reveals pragmatism to be a kind of utopianism.

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The limitations of pragmatism—normally deployed by those uninterested in or wary of institutional reform debates—make it a weak candidate for justifying Supreme Court reform. As a potential rationale for reform, pragmatism faces the threshold worry that it is the default stance of those who complacently accept the institution as it is. It is hard to imagine a compelling justification for institutional reform that appeals to slightly better outcomes and does not shift major baselines. Nor, if pragmatists called for reform out of exasperation with enough bad news, does their framework obviously help select among reforms. There is no denying that Supreme Court reform in the name of pragmatic output legitimacy could make sense on its own terms—a slightly less scary nightmare is worthwhile if waking up is not an option—even if it entrenches the prevailing low expectations for output. It might face a constituency problem: if those interested in Supreme Court reform at all move to put pressure on the mainstream acceptance of the institution in current form, it is because they are dissatisfied with how little pragmatism currently boasts. If they adopted a pragmatic rationale for evaluating their prospects, advocates of Supreme Court reform would have to rationalize embarking on an agenda that will be decried as radical when their ends are merely to reinstate low expectations at a somewhat higher level. And if it is true that the Supreme Court could indeed get even worse either by abandoning favorite progressive precedents or minting novel conservative doctrines, pragmatic reform would not necessarily change this. The framework also provides little help for selecting among imaginable reforms, especially compared to a democracy criterion for evaluating them. Once again, contrast a partisan balance scheme with a jurisdiction stripping one. The first might well aim to “reset” the current lopsided ideological configuration of the Supreme Court by repopulating the justices and depriving conservatives of their current majority. But while this scheme is a pragmatic choice to reset the Supreme Court to a stage prior to Justice Neil Gorsuch, a Justice Merrick Garland on the bench instead would have resulted in modest doctrinal variation at best.226 Such reform does nothing to reverse decades-long drift or to prepare the ground for progressive legislative reform, which in fact it leaves almost as endangered as before. Supreme Court personnel reforms on pragmatist terms might achieve slightly better outputs than before. But the same is true of disempowering reforms. At worst, jurisdiction stripping simply leaves things the way they are, made no worse by Supreme Court intervention—this time because it is disempowered to act. The same is true of a supermajority rule. At worst, it would stabilize current doctrine because not enough votes are available for a conservative majority to erode past progressive victories or to set off in radical new directions of its own. In short, whatever modest improvement of current baselines that personnel reforms justified pragmatically can achieve, those justified democratically can as well. At best, those latter reforms may make room for political branches to alter existing baselines by passing legislation that a disempowered Supreme Court can no longer block as easily. Contesting a pragmatic view through progressive beliefs, personnel reform sounds like a choice between resting content with the current Roberts Court or turning it back into the one in which Roberts could indulge his priors while allowing Justice Kennedy to control the right instead of him. By contrast, disempowering reforms, by sidelining the institution altogether, far more plausibly allow a potential shift away from a pragmatism of harm avoidance and reduction to make room for progressive reform if the political branches settle on it. That may, in the end, be the only durably pragmatic hope Americans have in the future. IV. FEASIBILITY Part III assessed reform proposals in terms of desirability. Here, we turn to feasibility, asking which reforms stand a chance at successful implementation. To do so, we evaluate the various proposals according to two criteria. First, we consider whether a given proposal would be legal, which is to say consistent with the Constitution without amendment. Second, we look at political feasibility, examining whether a stable coalition might emerge in support of a reform. As we show below, both personnel and disempowering reforms are subject to legal objection. In most cases, however, those objections admit of rejoinders, leaving the two approaches roughly on par. Similarly, while any reform faces an uphill political battle, we argue that disempowering reforms have at least as good a chance as personnel reforms at garnering coalitional support. A. Legal The legality of different reform proposals has been covered exhaustively by existing scholarship. In this brief survey, we suggest that both personnel and disempowering reforms are fairly characterized as legally plausible. Because both types of reforms are vulnerable to judicial obstruction, the fate of either would depend on the willingness of the political branches to push back in support. 1. Personnel Reforms Among personnel reforms, court-packing is probably the most uncontroversially legal. As others have documented, the number of seats on the Supreme Court has been set since its inception by statute,227 and Congress has adjusted the size of the Court—from six to seven,228 to nine,229 to ten,230 back to nine231—numerous times.232 This longstanding congressional practice couples with relative constitutional textual silence. While Article III assumes the existence of a Supreme Court and Article I, section 3 that there will be a Chief Justice, nothing else in the text seems to bear on how large or small the Court must be.233 Such historical and textual evidence notwithstanding, court-packing has been and continues to be subject to legal objection.234 For instance, the 1937 Senate Judiciary Committee declared President Franklin Roosevelt’s court packing proposal unconstitutional. According to the Committee, the apparent purpose of the reform was to “appl[y] force to the judiciary,” coercing it to adopt a “line of decision” that it otherwise would not.235 The proposal, the Committee continued, was “an invasion of the judicial power such as has never been attempted” before, alleging that prior adjustments to the Court’s size were not intended to “influence . . . decisions.”236 After court-packing, the legality of personnel reforms gets murkier. Panel systems, for example, typically require individuals to be appointed both as a federal circuit court judge and as an associate justice. As Epps and Sitaraman concede, one could argue that such dual appointments would be unconstitutional, reasoning that both Article III237 and the Appointments Clause238 understand those two offices as distinct and so not to be combined or jointly held by some individual.239 Maybe more worrisome, transitioning to a panel system could be characterized as effectively removing sitting justices from office in violation of Article III.240 Term limits for Supreme Court justices are vulnerable to analogous objections. Imposing term limits on all federal judges would plainly require constitutional amendment. For the Supreme Court, the proposed workaround is for appointees to serve as active justices for a fixed term, after which those individuals would transition either to “senior” status, sitting only in the event of recusal or temporary disability, or to acting as judges on the federal courts of appeals.241 The senior status proposal invites charges of effective removal from office. Rotating justices to circuit court judges is more promising (though not without concern242). And even that approach leaves the issue of sitting justices, who would either have to be removed without being “removed” or allowed to depart the Supreme Court over time. Partisan balance reforms are open to challenge as well. Partisan balance is a familiar feature of agency design and has generally been upheld by courts, though we lack a definitive endorsement along the lines of Humphrey’s Executor.243 Partisan balance on courts, however, raises distinctive questions. For one, the Supreme Court is, unlike the Federal Elections Commission or the Securities and Exchange Commission, a creature of the Constitution,244 suggesting that Congress may have less discretion in setting qualifications for Supreme Court justices. More still, depending on the formulation, conditioning appointment to the Court upon the party affiliation of the appointee or the appointing president or on the approval of some congressional block245 would present either First Amendment246 or Appointments Clause concerns.247 Last, merit selection presents obvious Appointments Clause worries insofar as the recommendations of the selection committee are binding.248 Epps and Sitaraman cleverly try to avoid this worry by assigning appointment of a subset of justices to the other, regularly appointed justices and then limiting the pool of potential Supreme Court justices to judges previously appointed to lower federal courts.249 In so doing, Epps and Sitaraman attempt to mirror the widely accepted practice of federal judges sitting “by designation” in different jurisdictions and at different levels of the judicial hierarchy.250 Even here, though, the Supreme Court’s current hostility to institutional innovation poses a serious challenge,251 as no lower court judge has ever sat by designation on the Supreme Court. 2. Disempowering Reforms Disempowering reforms are also legally contestable. Jurisdiction stripping is perhaps the most aggressive reform and famously raises numerous constitutional questions—questions that become more difficult the more comprehensive the strip. In particular, the Supreme Court has remarked repeatedly that “serious” concerns “would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”252 Such worries apply to specific constitutional issues, let alone to broad categories of claims. Despite this controversy, stripping courts of jurisdiction, even over constitutional challenges, has strong textual footing. As numerous scholars have observed, Article III’s grant of authority to Congress to “make . . . Exceptions” to the Supreme Court’s appellate jurisdiction while at the same time placing the existence of “inferior” federal courts entirely within congressional control suggests that Congress enjoys sweeping authority concerning federal jurisdiction.253 And as to state courts, both the Supremacy Clause and the Necessary and Proper Clause appear to provide Congress substantial discretion there as well.254 Taken together, Christopher Sprigman argues that these features indicate the Constitution “gives to Congress the power to choose whether it must answer, in a particular instance, to judges or to voters,” relying in some instances on political rather than judicial checks to enforce constitutional constraints.255 Voting rules present different issues. Sachs, for instance, argues that a supermajority rule for constitutional invalidation would amount to Congress “pick[ing] and choos[ing] among different substantive holdings,” requiring a “supermajority to express one legal conclusion,” but allowing a “minority of Justices” to uphold another.256 Similarly, Evan Caminker worries that “Article III implicitly mandates that the Supreme Court decide cases by bare-majority rule.”257 And likewise, Epps and Sitaraman acknowledge that some read Article III as granting the Court exclusive or final authority to “decide how to resolve its own cases.”258 Jed Shugerman has offered the most comprehensive response to these objections. He begins by noting that the Court already makes various decisions pursuant to non-majority rules—whether to grant certiorari, for example.259 In addition, Shugerman observes, Congress already exercises authority over how the Court operates, defining by statute, for example, how many justices constitute a quorum.260 Last, as to the concern about Congress dictating substantive holdings, Shugerman argues, channeling Frank Easterbrook,261 that supermajority rule should be conceived as a constraint on the Court’s jurisdiction, depriving it of jurisdiction to pass on a constitutional question if only a bare majority of justices vote in favor of unconstitutionality.262 Finally, proposals for a legislative override raise fundamental questions about the constitutional basis of judicial review. In its weaker form, a legislative override would amount to an assertion of constitutional departmentalism, respecting individual judicial judgments but reserving to Congress the right to interpret the Constitution independently. Departmentalism has a strong legal263 and historical264 pedigree. At the same time, this sort of limited override would leave the Supreme Court as the final arbiter on most constitutional matters, especially in areas such as climate change in which only a single judgment could substantially undermine federal policy.265 By contrast, allowing for a legislative override that displaces or precludes future contrary judicial judgments requires, by definition, a rejection of what Mark Tushnet calls “[s]trong-form” judicial review.266 It is widely (though not universally) accepted that the Constitution provides for that form of review with respect to individual judgments, making displacement of judgments an uphill constitutional battle.267 With respect to future contrary judgments, however, one could fashion a legislative override as a forward-looking strip of jurisdiction, depriving courts of the opportunity to issue analogous judgments going forward. Such an override would, of course, inherit the constitutional questions surrounding jurisdiction stripping more generally.268 In sum, both personnel and democratic reforms are vulnerable to constitutional objection. Few if any of those objections are knockdown. Both types of reform are, broadly speaking, legally plausible. Nonetheless, to call both types of reform plausible is not to say that the current Court would rule in their favor. The Court has been hostile to institutional innovation, as well as protective of its present character and authority. It would be presumptively hostile to almost any of these proposals. As we see today, though, the Court is also acutely aware of its relative institutional power. Ultimately, the likelihood of success for any of these plausible legal theories depends upon the political support in their favor. B. Political A separate question from the legal availability of these reforms concerns their political feasibility. By “political feasibility,” we mean the range of non legal constraints and possibilities that might make enacting one reform rather than another less or more likely. In the litigious real world, legality may loom large in the political feasibility of any reform. Still, separating the criteria is useful. There is no point in pursuing one reform, however legally plausible, if it is wholly infeasible on other grounds. Conversely, the ease of forming a coalition or gathering momentum for a given reform might offset its legal challenges. The worry that institutional intervention will cause “spirals” of tit-for-tat partisan response is also serious enough to warrant separate treatment; such a destructive cycle of vengeance is to be avoided, other things being equal. As with feasibility generally, this specific risk of spiraling varies across different reforms tremendously. Our essential contention is that personnel reforms are no more politically feasible and often less so than disempowering reforms are (in part because the latter are not plausibly subject to the risk of spiraling out of control). If legality is no bar to more desirable proposals for Supreme Court reform, neither is political feasibility. 1. In General Political feasibility is often treated as a hard constraint, forbidding Supreme Court reform of any kind.269 And the suggestion that any institutional intervention is unavailable affects personnel and disempowering reforms alike. It makes sense to begin, therefore, with the argument that a progressive frame makes more plausible—if not necessary—a lifting of the usual marginalization of reform of the Supreme Court. Dispute about which reform is feasible, after all, pales beside the consensus that none is. But the erosion of that belief in the last few years means its grounds are no longer what they once were. Supreme Court reform was once a fringe notion, and figures as different as Earl Warren and Adrian Vermeule have concurred that it would remain so forever. In 1974, Warren reflected that reformers had not only “consistently fallen under the weight of their own ineptitude,” but the Supreme Court itself “has remained steadfast as an institution,” and “prevailed . . . over those who would destroy its function and its symbol as the chief architect of our constitutional way of life.”270 A quarter-century later, as minor proposals to impose term limitations on Supreme Court justices were percolating, Vermeule offered an elaborate rationale for why Supreme Court reform could never happen. While he grudgingly acknowledged that it is not that “structural reform is impossible,” the hard truth is that “it is systematically unlikely to occur.”271 But there is no doubt that it has become more mainstream today than in nearly a century. As Roberto Unger once remarked in another context, “The distance between the unthinkable and the familiar may be short in the history of politics and of law.”272 One might reply—and the end of the 2019 term substantiates it—that the Chief Justice or an alliance of liberals and conservatives on the court will always prioritize decreasing the feasibility of reform by avoiding sufficiently outrageous outcomes. On one hand, there is currently an alliance of sentiment between “pragmatists,” who operate with a harm reduction philosophy while never challenging the institutional foundations of Supreme Court partisanship or power. On the other hand, there are justices who rank sociological legitimacy over other concerns, even when it means that conservatives deny themselves the disruptive outcomes they may have spent a career preparing to reach.273 This suggests that Supreme Court reform can never become feasible; to the extent it looms, steps to postpone it will be taken. There are two responses to such a hypothesis. The first is that it is hardly guaranteed that the line of feasibility is set in stone, however assiduously managed by those who wish to draw it just far enough so that it is never reached. On the contrary, it is widely recognized that, with the Supreme Court moving further right after Kennedy was replaced by Roberts as median justice, the line of feasibility has been eroded to a remarkable extent. And the events of the late Lochner era prove that there certainly are conditions for it to be erased altogether. The “four horsemen” before the switch in time aroused sufficient political rage to prompt open national debate about the role of the Court in the constitutional order. Judicial intransigence has occurred, and the politics of its overcoming too, albeit with the results of doctrinal rather than institutional reform.274 It is hard to understand what arguments could acknowledge the feasibility of the first but deny the second. The basic answer to the premise that Supreme Court reform could never be feasible is captured by the Georgia deacon when asked if he believes in baptism by total immersion. “Believe in it?” he replies. “I’ve seen it done!”275 Far more important, it takes two to tango. The variable of popular mobilization is central to the feasibility of Supreme Court reform. In a progressive frame, America looks to be moving from a period of quiescence to one of radicalization, and for good reason. If so, no amount of management of institutional credibility inside and outside the Court can avoid answering to the changing—sometimes rapidly changing—demands of mobilized populations. This popular will can and should outstrip any amount of flexibility in Court self management, even in the most generous scenario. Of course, we can embroil ourselves in a debate between followers of Robert Dahl,276 who contend that the Supreme Court just follows popular opinion, and those of President Franklin Roosevelt, who reply that, even if “ultimately the people and the Congress have had their way” in the long run, “that word ‘ultimately’ covers a terrible cost.”277 Our point is merely that even if maximum political feasibility concerns are deployed to keep the Supreme Court’s current institutional form stable, its need to engage in doctrinal management to keep the threat of reform at bay could increasingly fail—making such reform more and more plausible. It is also worth noting that the opposite perspective, which turns feasibility concerns against our exploration of Supreme Court reform, will not work either. On this view, opponents of any reform might claim that, if statutory reform is available, then options like constitutional amendment or revision make more sense. Our response is that there is a great deal of distance between the threshold for institutional reform by statute and the threshold for a constitutional amendment to pass Congress and win approval from the requisite states.278 In fact, due to well-rehearsed reasons, proceeding by constitutional amendment through Congress (to say nothing of a convention, whether for amending or replacing the original text) is practically unthinkable for the moment, even compared to the currently narrow likelihood of statutory intervention. The bolder ideas are increasingly familiar in American constitutional thought after a long absence, associated with commentators such as Sandy Levinson279 and Lawrence Lessig.280 But no matter the desirability of constitutional reform on its own terms, there can be no doubt that the statutory alteration of the Supreme Court within the existing constitutional framework is more feasible. One need not claim that amendments are wholly infeasible to easily conclude that the reforms we categorize and compare in this Article are far more so. 2. Personnel Reforms Personnel changes have to be disaggregated in order to assess their political feasibility. This is not only because court-packing is more or less clearly legal compared to other more contestable personnel reforms, but also because it has received the huge lion’s share of attention in the debates that followed the blocked confirmation of then-Judge Garland. Court-packing or personnel expansion might seem like the most politically feasible reform. And it is true that, currently, it is one of two reforms—the other being term limitation281—that has generated a contemporary advocacy group of its own. Its early familiarity and historical prominence have made expansion the go-to reform. To take one prominent example, Mark Tushnet, while mentioning that “it’s important to keep in mind the background concern about structural reform more generally[,]” has recently oriented his historic challenge to Supreme Court conservatism to court packing (and chairs the academic advisory board of Pack the Court, the advocacy group favoring this reform). It is this reform, rather than other ones, that has become “thinkable again.”282 But familiarity can breed contempt, not just feasibility. The very prominence of court-packing, far from bolstering the feasibility of court expansion, could undercut it. Its uses in Eastern Europe in a wave of attacks on judicial independence are another strike against it.283 More Democrats— including Joseph Biden during his campaign to become Democratic Party nominee for president—are now on record opposing it more than any other reform, and its meteoric rise in recent debate means it elicited unique pushback.284 While President Franklin Roosevelt proved its use as a threat, at least on most accounts of the Supreme Court’s switch in time in the 1930s, the episode left bad enough memories in some quarters, raising its prominence only to undermine its feasibility now.285 Not least, court-packing is the reform most imaginably subject to tit-for-tat acts of repeated expansion without an institutional brake other than durable electoral dominance—a risk we treat separately below. For now, our point is just that the early prominence of court packing, and the somewhat radioactive associations it acquired in the 1930s (and, even more, in some recent re-readings of that era), are an enormous strike against its political feasibility. As for the other personnel reforms, they fall naturally into two sets, with deadly if opposite political feasibility concerns. One set is politically infeasible because it is utopian. Its proposals presuppose restoration of the status quo ante of a pre-polarized judiciary, against the background of endemic polarization that rules such restoration out. The other set is feasible but trivial. Term limitation may well be the most plausibly available of the reforms, but only because it would not solve the problem that justifies reform in the first place. Take merit selection or partisan balance to begin with. All of their imaginable or proposed versions reflect a utopian aspiration to bracket the very political breakdown (and opportunity) of contemporary American politics. They want to wish it away in favor of centrist partisan agreement that has evaporated in the very years that Supreme Court reform has become plausible. The framing of the problem these solutions presuppose rules them out in practice. And besides this sort of infeasibility, many personnel changes also suffer from the mismatch between their technocratic or wonkish character and the progressive coalition that alone has prioritized Supreme Court reform in recent years. The Epps-Sitaraman hybrid proposal is exemplary in this regard. Its endorsement by Buttigieg—celebrated and reviled as a centrist technocrat—is revealing (much like his deference to “smarter legal minds than mine” and to the Yale Law Journal by name onstage at the October 15, 2019 debate of Democratic candidates for president).286 The point is not so much that obscurity afflicts personnel alternatives to court-packing, since disempowering reforms currently have the same problem. It is that the over-complication of some proposals depends on the belief that experts can find the formula to exit political crisis and stalemate. This dooms any case for their feasibility. What only law professors can understand, a popular movement will never demand. On the other side of the mismatch between such personnel reforms and the rising progressive coalition, the reforms would fall badly short of progressive aspirations in an emergency, even if they were available. Progressives, to put it bluntly, are not rallying increasingly around the cause of Supreme Court reform to make the centrist ACA compromise invalidation-proof, or to postpone carbon neutrality to 2050 in hopes that massive concession in advance will save it from the kind of gutting the ACA has suffered in the past decade. Nor, to face expanding inequality, do progressives expect to avoid targeting wealth through direct taxes out of fear of a return to nineteenth-century jurisprudence.287 In a plausible political reality, a progressive coalition will support Supreme Court reform to make progressive legislation viable, and nothing short of it. That merit selection or partisan balance, for the sake of a Supreme Court in centrist equipoise, would surge in the quest to protect such legislation is even more of a fantasy than the feasibility of such reforms against the background of a polarized political class. If such personnel reforms fail the test of political feasibility because they are utopian, by contrast, term limitation might well work because it makes so little difference. Indeed, it is probably for this reason that the American people have considered this reform for decades, while disregarding bolder steps as out of bounds. As we’ve discussed throughout, the goal of term limitations is to ensure that opportunities to appoint Supreme Court justices are distributed evenly according to electoral outcomes. Such reforms would work less well than is often suggested since Congress cannot simply legislate away an obstructionist Senate. They would slightly lower the stakes of Supreme Court appointments and make it more likely that winning a presidential election would mean more chance to shape the Court’s ideological character. But that is all. Laudable as such a reform might be, the imposition of Supreme Court term limits would give progressives little reason for solace. Under the standard proposal, Supreme Court justices would serve for terms of almost two decades, meaning that the dead hand of the recent past would continue to shape judicial policymaking in the present day. To ensure judicial approval of an ambitious legislative agenda, progressives would need to capture the presidency and different chambers of Congress not once but repeatedly, replacing justices from both conservative and more moderate periods. Given the difficulty of achieving sufficiently large legislative majorities to enact Green New Deal-type legislation, the additional burden of appointing sympathetic justices over years, if not decades, is one that progressives plainly ought to reject. 3. Disempowering Reforms Given these concerns with personnel reforms, it seems natural to conclude that disempowering reforms would be no less politically feasible. And there are reasons to believe they would be more so. Jurisdiction stripping may be different. The formidable legal objections it faces, especially where constitutional rights are concerned, affect its political feasibility. Its erosion of the subject-matter jurisdiction of the courts might well feel especially radioactive to some audiences.288 One possibility to exploit, on the model of the World War II price controls regime, is to couple stripping with reallocation of jurisdiction. This is almost certainly the more politically palatable move.289 Either way, there is no reason to believe that jurisdiction stripping would be less feasible on grounds of this kind other than aggressive moves like court-packing, which resemble East European analogues more closely than jurisdiction stripping does. As noted above, some of the personnel reforms suffer feasibility concerns because of their technocratic complication. In contrast, all three of the main disempowering reforms considered—jurisdiction stripping, legislative override, and supermajority rule—have an inverse superiority because they are easier for a general public to understand and evaluate. Like the personnel reforms that have ever gained popularity, court expansion and term limitation, the disempowering reforms are clear and simple.290 One enormous advantage that disempowering reforms have over even clear and simple personnel reforms is that they can cut across existing partisan configuration by not aiming at direct partisan advancement. Disempowering reforms have a unique advantage in making possible conservative buy-in or even creative new coalition building. They have broader coalitional possibilities by redirecting partisan strife to other arenas, without favoring any direct partisan tilt themselves. Court-packing exemplifies a personnel reform guaranteed to attract fierce and immediate resistance for serving Democrats, rather than democracy. But disempowering reforms favor electoral winners generally. True, not all personnel reforms seem as naked an attempt to secure momentary partisan advantage as others. But, as we have already argued, the broader constituency for term limitations could prompt buy-in from a much wider array of supporters mainly because its effect is likely to be so minimal. Other personnel reforms, like the balanced bench or merit selection, will look like Democratic partisan moves to conservatives who enjoy current preponderance in the federal courts. Meanwhile, the disempowering moves improve no one’s position, except those who go on to win elections at various levels. As noted earlier, the critique of the Supreme Court and a number of its recent doctrines as antidemocratic—including in a number of dissents accusing the majority of elite power grabs291—has tended to be conservative in the last several generations, rather than liberal. This trend continued even after the conservative ascendancy in court output began in the 1970s. Since the early twentieth century, conservatives have tended to initiate disempowering institutional reforms to the Supreme Court, including the supermajority rule proposal.292 It would probably go too far to suggest that calls for democracy, so familiar in conservative responses to some Supreme Court doctrine, would raise the feasibility of disempowering reforms by themselves. Right-wing commentators and judges who have spent decades calling for more democracy and less judicial authority are hardly locked into their rhetoric, not least since the judges have felt free to deploy their authority to their own ends. But it would not be rhetorically easy for those who have called for more democracy, rather than judicial control, to refuse its introduction now. By the same token, left-wing disempowering has some past commitments of its own to live down, since progressives have been fair-weather friends of democratic empowerment themselves. For both reasons, it would make more sense to treat disempowering reforms as invitation for coalition-building now, with potentially more chance of success than personnel reforms. In particular, disempowering reforms avoid what Vermeule penetratingly calls the “trade-off between impartiality and motivation,”293 one of his reasons that he infers dooms Supreme Court reform altogether. On his account, nonpartisan attempts at institutional innovation lose the very short-term benefit that justifies and grounds support for reform in the first place. His example is term-limitations proposals that grandfather in extant justices so that no serving justice is deprived of life tenure.294 Disempowering proposals, which Vermeule does not consider per se, may suffer other problems but escape this one. That is, disempowering the court serves whatever majority can now take more security in the immunity of its lawmaking to invalidation. Abstractly, because of the institutional separation disempowering proposals rely on between a site of disempowerment (the court) and a site of contestation (the rest of politics), they can proceed neutrally in the first while retaining heated partiality in the second. Indeed, since disempowering reforms have no direct implications for partisan empowerment in the short term, but instead favor whoever can muster majorities,295 there is reason to believe they can boast unique feasibility benefits in coalitional politics. Unlike personnel reforms, they harmonize with the partisan realignment that many anticipate or even consider necessary for a progressive movement beyond the limits of the country’s current partisan configuration—for example, to create a multiracial working-class party with broader appeal.296

<<PARAGRAPHS RESUME>>

In some quarters, the fact that progressives might come to agreement with (some of) their usual enemies over disempowering reforms might seem like a strike against them. But in most imaginable scenarios, a compromise to shift partisan contention from the Supreme Court to political contest (where it belongs) would benefit, rather than hurt, progressives on the national level. Almost all the areas progressives care about, where the Supreme Court hasn’t delivered—from labor rights to partisan gerrymandering to racial justice—would benefit from democratization, whether or not the threat the Supreme Court poses to their legislative agenda crystallizes. And framing disempowering reform as a compromise that cuts across other ideological disputes would counteract the frequent anxiety that anything less than full engagement in partisan contention through the courts would amount to “unilateral disarmament.”297 A better and fairer way to conceive of disempowering reforms is as a weapons control regime within one arena, in order to concentrate fully on the fight in democratic arenas.

Of course, the greater political feasibility of disempowering reforms that this argument implies is not necessarily costless. Though our point is that judicial empowerment has not favored progressive victories lately, if ever, no one thinks that democratic processes ever guarantee them either. But as with rights above, it is hard to imagine that disempowering reforms would incur less constitutional supervision of the states, in either of two alternative scenarios. The first is that the reforms are calibrated to democratize power at the federal level without returning it to states, as in a supermajority requirement only for constitutional challenges to federal law. The second is that, even if such a reform were extended to challenges of the constitutionality of state law, it would require even more votes to overturn cases from Brown298 to Obergefell v. Hodges,299 and plausibly would never happen. In any event, what passes for federal supervision of outlying states is at its weakest in at least a half century, compatible with current outcomes like restricted abortion rights300 and the unconstitutionality of Medicaid expansion to populations that most need it.301 Nor is strengthening it through any reform of the judiciary an option.

#### But the plan forces them to change on Humphreys.

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Dahlia Lithwick and Mark Stern, “John Roberts Is Winning. The Rest of Us Are Losing,” Slate, 07-03-2023, https://slate.com/news-and-politics/2023/07/supreme-court-john-roberts-winning-americans-losing.html

As the Supreme Court term crashed to a close last week, in a string of stinging defeats to progressives, a familiar narrative began shaping up in the public discourse: The court had, on balance, remained largely loyal to the conservative legal project while delivering just enough compromises to quell any meaningful challenge to its power and legitimacy. That story is the one Chief Justice John Roberts would probably like to have you tell; it is both descriptively accurate and superficial to the point of distortion. The court did, indeed, refuse an invitation to clobber several liberal precedents and policies, which had the effect of leaving the law in place, a set of status quo decisions dressed up as liberal “wins.” It then used the resulting good press as cover to pulverize laws that directly improved the lives of tens of millions of Americans, including the most vulnerable and underprivileged among us. And it achieved these goals largely through the invisible hand of docket manipulation, a trick that’s unique to the modern Supreme Court.

What does that all mean? Nothing too lofty. Justices Brett Kavanaugh and Amy Coney Barrett have finally embraced the chief justice’s tried-and-true formula of years past, joining a series of decisions rebuffing some of the most radical Republicans’ most cynical efforts to yank the law far rightward. The sloppiest, least defensible big swings—pushed by Alabama, Texas, and North Carolina—were rebuffed. Slightly less sloppy big swings were embraced joyfully and written into law, including a case that had no facts and a case that ignored the record below. In swinging at only some of the worst pitches served up, Barrett, Kavanaugh, and the chief justice got a chance to tick off a bunch of policy agenda items that are too unpopular and misery-inducing to pass via the democratic process. After last term’s eruption of molten, cruel conservatism, the 6–3 majority has sought safer political ground without sacrificing any of its most cherished goals.

#### They’ll specifically respond by overturning Humphrey’s Executor as the solution. Kavanaugh has already proposed it, and SCOTUS has a history of bringing in seemingly unrelated issues when it comes to labor.

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Alexander T. MacDonald, “Is Deference to the NLRB Finally Over?,” Federalist Society, 07-09-2025, https://fedsoc.org/commentary/fedsoc-blog/is-deference-to-the-nlrb-finally-over-what-loper-bright-started-a-concurring-opinion-in-consumers-research-may-have-finished

On its face, Consumers’ Research had nothing to do with the Board, or even deference to agencies in general. Instead, it centered on whether Congress had improperly delegated too much power to the FCC to craft a “universal service” plan for telecom providers. The Court ultimately decided that the delegation was fine: Congress had laid out an “intelligible principle” for the agency to follow. So the outcome was far from the earthquake seen in Loper Bright.

But outcome aside, the case still cast light on the debate over independent agencies. Most illuminating was a separate concurrence by Justice Kavanaugh. Justice Kavanaugh started by observing that the FCC wasn’t an independent agency; its members were removable at will by the president. But if it had been, the result in Consumers’ Research might have been different. Independent agencies, he wrote, were by design “unaccountable” because they did not answer to the president. And that lack of accountability made them inherently problematic:

Such a system of disembodied independent agencies with enormous power over the American people and American economy operates in substantial tension with the principle of democratic accountability incorporated into the Constitution’s text and structure, as well as historical practice and foundational article II precedents.

Justice Kavanaugh saw two possible solutions to this conundrum. One would be to overturn Humphrey’s Executor v. FTC, a 1935 decision that allowed Congress to insulate the heads of certain independent agencies. That proposal wasn’t novel; scholars have written about it for decades, and the Court itself has recently suggested that Humphrey’s Executor may be on its last legs. The second solution, however, was new. Rather than overturn Humphrey’s Executor, Justice Kavanaugh suggested, courts could review the actions of independent agencies more closely. Courts could police the agencies’ decisions more diligently to make sure they were acting within the bounds set by elected lawmakers. Or in other words, they could apply a “more stringent version of the nondelegation doctrine.”