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### K – Capitalism

#### Collective bargaining rights channel worker power into institutional channels that reinforce capitalism which dampens alternatives to private control over the economy.

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This article discusses a newly emerging historiography of post New Deal United States collective bargaining law.1 Critical labor law will be depicted primarily by highlighting its main lines of attack on traditional learning. Most contributions to the literature of collective bargaining law are overwhelmingly doctrinal and rule-focused in emphasis. They are written, explicitly or implicitly, from the perspective of beliefs and values about the social function of collective bargaining drawn or inferred from the stated purposes, the legislative history of and judicial glosses upon the major federal labor statutes.2 This litera ture takes as given and unquestioned the desirability of maintaining the basic institutional contours of the liberal capitalist social order.

By contrast, although the critical labor jurisprudence exhibits widely divergent political views,3 it tends to challenge or at least to question the adequacy of established social institutions to protect the needs and interests of working people, particularly with respect to the openness of those institutions toward worker participation in the deci sions affecting their industrial lives.4 Likewise, critical labor law is skeptical that the stated purposes and received wisdom of federal labor law adequately explain either the developmental path of collective bar gaining law itself or its broader social functions.

Critical labor law has therefore attempted to reconstruct the ideo logical content and political and institutional implications of collective bargaining law by "decoding" its doctrinal literature. By this I mean that critical labor law focuses on analysis of important texts within their social and historical settings. The effort is to uncover the constellation of assumptions, values and sensibilities about law, politics and justice these texts evince, to reveal their latent patterns and structures of thought about legal and industrial issues and about the possibilities of human expression in the workplace.5 An underlying assumption of this methodology is that the intellectual history of labor law is a significant and neglected component of the social and political history of the American working class since the New Deal. Another is that because it is such a powerfully integrated structure of thought, deeply resonant with other aspects of the hegemonic political culture and closely articu lated with important collateral developments in intellectual history (e.g., in political and managerial theory), liberal collective bargaining law is itself a form of political domination.6

Despite sharp differences on other matters, two common themes run throughout critical labor jurisprudence. First, we argue that collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace. The second theme is that collective bargaining law has evolved an institutional architecture, a set of managerial and legal ar rangements, that reinforces this hierarchy and domination. Viewed as a component of public policy, the two central goals of the collective bargaining laws are to integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regu late and thereby dampen industrial conflict. Viewed as a component of managerial practice, the collective bargaining laws seek to formalize industrial dispute-resolution and thereby to reinforce management control over enterprise goals and the direction of the work process. In fulfilling its public policy and managerial functions, collective bargain ing law frequently aims to restrain labor unions from serving as vigor ous, uninhibited representatives of employee interests. Rather it seeks to place unions in the uncomfortable position of serving as fiduciaries of an imagined societal interest in industrial peace7 and of serving spe cific managerial8 and disciplinary9 functions. I believe that a primary initial achievement of the critical labor jurisprudence is its demonstra tion that the doctrine of collective bargaining law has been systemati cally fashioned, particularly at the Supreme Court level, to serve these goals.10

However, the intellectual history of the field is complicated by the fact that from its outset modern collective bargaining law has endorsed and to some extent has actually engendered the democratic participa tion of employees in workplace governance. Quite apart from their manifest achievements in improving the working and living conditions and economic security of organized workers, labor unions protect em ployees from unilateral and arbitrary dictates of management. Unions provide an institutional context within which workers can formulate and express their aspirations, aggregate their voices and experience the dignity that comes with having some power to affect the decisions gov erning one's life. Since the battles of the New Deal period, labor law has grown up in a national political climate that mandates legal ac knowledgment, authorization and legitimation of economic conflict and that requires recognition by our institutions of the fact that workers do and should have power."

The internally contradictory roles and setting of collective bar gaining law have precipitated two great challenges to theorists guiding and fostering its development from the traditional liberal perspective.12 The first is to explain how and why collective bargaining law simultaneously encourages and represses workers' self-expression through the medium of industrial conflict. While the collective bargaining laws on the one hand invite and authorize workers to voice and advance their needs through self-organization and collective action,13 they at the same time limit worker self-expression through industrial conflict by establishing a coopting, atomizing, struggle-dissipating framework that narrowly circumscribes the lawful boundaries of col lective action. That is, the ultimate impact of collective bargaining law in many settings may well be to impede solidarity and mutual aid and to narrowly channel collective action into limited, institutionalized forms.14

Traditional liberal theorists of collective bargaining law have had to explain, secondly, how this body of law simultaneously authorizes and limits employee participation in workplace governance. For, although the collective bargaining laws acknowledge the justice of worker participation in the industrial decisions affecting their lives,15 they also carefully control and restrict this participation. Collective bargaining law limits worker participation in workplace governance by deflecting the intervention of workers' power away from such concerns as the organization of the work process, enterprise management and goals, and the internal direction of labor unions. Rather, the legitimate exercise of workers' power is generally confined to occasional conflict outside the workplace, in the market for the sale of labor power, i.e., to the economic strike.16

In sum, traditional liberal labor law thinking has confronted the enormously complex challenge of inducing organized workers to consent to and participate in their own domination in the workplace.17 In this sense, the development of collective bargaining law is paradigmatic of all public policy in liberal capitalism. I believe liberal capitalism is a social order founded upon enormous inequality and historically unnecessary constraints upon human freedom, coexisting with political insti tutions and a political culture premised on democratic ideals.18 Public regulation of class struggle through collective bargaining law replicates the role assigned to the state in the classics of liberal political theory, namely to manage and contain conflicts said to inhere in the sphere of social and economic activity ("civil society"). The philosophy of collective bargaining law, elaborated since the 1930's in doctrine, law review commentary and management literature, is an important effort to conceptualize, justify and legitimate the modern, regulatory state in the period of advanced industrial capitalism. As such it is a premier mode of elite ideological practice and an enduring contribution not just to law but to liberal political theory generally.19 It is this fact which opens the greatest promise to critical labor jurisprudence, affording us the opportunity to make a contribution to political theory as well as to histori ography and doctrinal analysis.

#### Capitalism fuels extinction through pandemics, biodiversity loss, warming, and war. Only a new political economy solves.

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The idea of a global extinction triangle linking capitalism, environmental destruction (including climate change, pandemics, and biodiversity collapse), and militarism (especially nuclear war) will be viewed in many nations, and especially the United States, as itself madness. It is so taboo that most analysts of climate crisis, pandemics such as COVID-19, and nuclear war – and indeed much of the climate and peace movements – avoid the subject of the capitalist system and the need for systemic transformation like the plague.

To take just climate, the notion that the capitalist system drives climate change is highlighted by only a few leading analysts, mainly on the Left. One is Naomi Klein, who argues that extinction arises from “the collision between capitalism and the planet” and that:

We have not done the things that are necessary to lower emissions be- cause those things fundamentally conflict with deregulated capitalism, the reigning ideology for the entire period we have been struggling to find a way out of this crisis. We are stuck because the actions that would give us the best chance of averting catastrophe – and would benefit the vast majority – are extremely threatening to an elite minority that has a stranglehold over our economy, our political process, and most of our major media outlets.2

Klein acknowledges that “autocratic industrial socialism” can also cause cli- mate change, but argues that the ruling capitalist model is the major risk and we need to pursue a democratic “eco-socialism” to save the planet. Joining Klein in the laser-like but lonely focus on the capitalist DNA driv- ing extinction is the journalist, George Monbiot. He writes that: Ecologically, economically and politically, capitalism is failing as cata- strophically as communism failed. Like state communism, it is beset by unacknowledged but fatal contradictions. It is inherently corrupt and corrupting. But its mesmerising power, and the vast infrastructure of thought that seeks to justify it, makes any challenge to the model al- most impossible to contemplate. Even to acknowledge the emergencies it causes, let alone to act on them, feels like electoral suicide. As the famous saying goes: “It is easier to imagine the end of the world than to imagine the end of capitalism.” Our urgent task is to turn this the other way round.3

Monbiot is not joking when he says our most important task is to “turn this the other way round.” While this sounds daunting, imagining systemic change in the global capitalist economy has become essential to human survival. In a period when there is a new awakening about “systemic racism,” we need now to expand our consciousness about our economy, recognizing that we are now living in a new stage of “extinction capitalism.” Only systemic change in our political economy can save us.

Klein is Canadian and Monbiot is British. These are both societies where it has long been possible to offer critiques of capitalism without sounding like a crackpot. Both Britain and Canada have labor or socialist parties, and main- streamed the idea that large parts of the society should be separated from profit- making and organized for the provision of public goods. These societies are less complicit than the United States in climate and military policies fueling extinction.

In the United States, mainstream socialist political parties do not exist, and “big government” and universal welfare programs are seen as enemies of lib- erty, with the exception of an enormous military. Klein and Monbiot have an audience in the United States, but their views that to survive means moving beyond capitalism and especially neoliberalism capitalism runs into huge hur- dles, especially in American political discourse, even among liberals. However, we shall see that it is not an impossible dream, and that even a President as moderate as Joe Biden, pushed by people of color, young people, and social movements, has begun to break with neoliberalism and shift toward a public goods economy that could help save the planet.

Crossing the Threshold: Humanity Confronts Its Final Stage

Beginning in the mid-1940s, when the United States attacked Japan with nu- clear weapons, we saw the emergence of the first period in human history – now known as the Anthropocene – in which capitalism began to threaten both nuclear and climate extinction. As Noam Chomsky writes: Review of the record reveals clearly that escape from catastrophe for seventy years has been a near miracle and such miracles cannot be trusted to perpetuate.

On that grim day in August 1945, humanity entered into a new era, the nuclear age. It’s one that’s unlikely to last long, either we will bring it to an end or it’s likely to bring us to an end. It was evident at once that any hope of containing the demon would require international corpora- tion ….

It was not understood at the time but a second and no less critical new era was beginning at the same time. A new geological epoch, by now, called the Anthropocene–an epoch defined by extreme human impact on the environment.

The Anthropocene and the nuclear age coincide, a dual threat to the perpetuation of organized human life. Both threats are severe and immi- nent. It’s widely recognized that we have entered the period of the sixth mass extinction.4

Extinction denialism has limited public awareness of the new stage that arose in the late 1940s but is rooted in the foundations of our economic system. Indeed, capitalism, even as it historically helped build new economic growth and innovation and pulled millions out of poverty, has always created war and environmental destruction. Its historical progress fueled “development” that catapulted the European and American world toward prosperity and material well-being for two centuries. But that huge leap forward also froze into so- ciety an unsustainable quest for unfettered growth threatening military and environmental catastrophe and externalized multiple costs onto the peoples of the Global South. The history of capitalist successes disguised latent crises now surfacing in the extinction stage. The historical benefits of capitalism have not disappeared, but their relative value has declined compared to the costs and risks – ultimately of extinction.

The Triangle of Extinction: Mad Money

To save humanity and all life on the planet, we need to understand the new extinction stage as rooted in a causal triangle of three intertwined threats. The only way that humanity will survive is if the world – including all states, peoples, and social movements – come together to dismantle the triangle and create a new circle of sustainable life systems.

Capitalism drives the triangle of extinction. Its very nature, as a system, foments militarism and drives environmental destruction. In Chapter 2, we argue that capitalism’s constant need to expand both its resource base and its markets fosters a militarism to pry open markets and “protect” investments. Territorial expansion across national borders has a corollary in the capitalist dynamic to test and break ecological thresholds, producing the third corner of the triangle, environmental destruction.

However, these two corners – militarism and environmental destruction also feed back into, affect, and reinforce the logic of capitalism. Both create the disasters that leave communities and states turning to capitalists for solutions. The soil fertility depletion, for example, that capitalist agriculture produces, leaves us all more dependent on the petrochemical and agro-industrial corpora- tions selling fertilizers and pesticides. Similarly, capitalism’s inherent instability, particularly in the American case, produces a “military Keynesianism,” using state spending to increase production and profits of military companies. This, in turn, compromises democracy, giving weapons contractors privileged access to the state, rendering the latter dependent on the “market” fortunes of these corporations (Figure 1.1).

A diagram of a diagram of a different way

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Figure 1.2 omitted

As we contemplate this triangle, we must recognize that its dynamics play out in social and historical structures that are profoundly intersectional, ones characterized at the global, regional, and national levels by evolving hierarchies including those of race, gender, class, and states. A more complete picture of the triangle therefore looks like this (Figure 1.2).

This second diagram spells out the variety of forms of environmental de- struction and militarism that create existential and extinction threats, whether they be, in Bostrom’s terms, forms of bang, crunch, shriek, or whimper risks. In both pictures, we are adhering to the idea that existential threats – and extinction itself – should not be defined exclusively as total annihilation. The second picture shows that there are several major existential risks; among the risks in the environmental destruction corner are three well-known ones, climate change, pandemics, and biodiversity loss. But these interact with the others listed, as well as with the many other risks that are less well known. Similarly, militarism produces nuclear, biological/chemical, and cyberwar risks. All of these six varieties of existential risk are extremely important, and all are “systemic” in that they are partly caused and fueled by the United States and global capitalist system. All deserve urgent study leading to emergency transformative change because each of them could create devastating mass death from which humanity might not be able to recover. In addition to these six existential risks, the clusters around each corner of the second diagram also name other risks that may escalate into either existential risks or radically re- duce the quality of life and pose civilizational risks.

In this book, mainly to keep the book shorter, we do not analyze biodiver- sity collapse, cyber war, or biological war, focusing instead on nuclear war, cli- mate change, and pandemics. If we were to write a second volume, we would analyze with the same sense of urgency the other three incredibly dangerous threats; they are growing and increasingly intertwined with the threats we focus on here.

The arrows in the diagrams reflect causation. Capitalism itself creates a threat of extinction, independent of environmental death and war. But it also causes and fuels the environmental threats of climate change, pandemics, and loss of biodiversity, which multiply the extinction threat. And capitalism, es- pecially the militarized hegemonic form modeled by US neoliberal capitalism, causes war, which further multiplies the extinction threat embedded in the possibility of nuclear war. Climate change, pandemics, and extreme war could arise from other systems than capitalism, but capitalism is a leading cause and accelerator of all these threats, which in turn intensify the extinction dangers of each other. Climate change is a major driver of war and war has become a leading cause of climate change. Scholarship on climate change and broader environmental matters typically recognize several major tipping points and en- vironmental thresholds beyond which abrupt and catastrophic outcomes are to be expected. While we do explore these in depth, we consider these important aspects of the three corners of the triangle of extinction.5

The causal chains of capitalism here are not the only causes; religion, na- tionalism, racism, sexism, population growth, and technological change, among other factors, contribute to extinction as well. Race and racism play an especially important role – since the initial violence and death of the extinction system target people of color most powerfully. Much of the entire system is legitimated as a defense against non-white races who are portrayed to be threats to the nation in the West especially by right-wing authoritarian and neo-fascist movements. The triangle of extinction is new but it grows out a long history of capi- talism, which laid the foundations over several centuries of unfettered global growth and profit-seeking. It is easy to say that it is simply technological inven- tions – such as the creation of the nuclear bomb – that defines the new stage of extinction. But such technological determinism, while attractive in United States and other capitalist nations, is far from a complete story. It neglects the historical choices and structural forces that led most recently to the neoliberal capitalist model in the United States that has made extinction a truly central systemic feature of both the United States and the global capitalist system it presides over.

The extinction stage – and the triangle of extinction that shows its inter- twined perils – is wrapped up not only with all kinds of technological innova- tions, but also with a huge complex of economic, social, and cultural historical choices foreshadowing and entrenching the path toward unsustainable growth, climate change, global pandemics, and genocidal war. Technological deter- minism is a way of diverting attention from the dominant economic and politi- cal structures creating and ruling the extinction stage. Elites are eager to focus on technology as both the cause and the solution to our current predicaments, and many environmental theorists embracing the “environmental moderniza- tion theory,” argue that new technologies will themselves liberate the world from dangers of extinction.6 Similarly, many focus exclusively on eliminating nuclear weapons without looking at the same time as the need to eliminate the militarized state which can always rebuild nuclear weapons, the techno- logical delusion we called earlier “weaponitis.”7 But those looking to sustain survival of humans and all life on the planet have to take a systemic perspec- tive, focusing on the power structures and elites that benefit the most from the current extinction stage, even though it will ultimately kill them along with everyone else.

Caveats on Capitalism and Extinction

First, the emergence of capitalism as a global extinction system is, ironically, a measure of some of its historic successes. Capitalism is not the only eco- nomic system causing climate change or war, as we have already highlighted, but it has emerged as the most powerful driver of these threats. This reflects in part its rise as the dominant global economic system of the 20th and 21st centuries, a reflection in turn of its superior capacity to create productivity, growth, and technological innovation. These “virtues” not only had real positive effects on economic growth but also had shadow sides that evolved into existential threats themselves, even beyond their contributions to cli- mate change and extreme war.

Second, market forces within capitalism, including its neoliberal system, can help begin to move energy production toward renewable energies. The price of oil was falling, even before COVID-19 reduced demand for carbon- driven transportation and products, and the costs of coal are rising sharply in relation to falling prices of wind and solar. Capitalist proponents argue that the market itself is driving Big Oil and Gas toward producing more green energy, the ultimate solution to climate change. But while these market factors are real and should be recognized as highly important, they do not create the scope and speed of change needed to prevent climate catastrophe. The oil and gas companies have too much profit “sunk” into the carbon infrastructure and the oil reserves they enjoy to jettison their short-term but vast returns; they will advertise themselves as “going green,” even as they commit themselves to getting as much profit out of dirty carbon energy as possible before shifting to a sustainable energy system. In the short to medium term, while the corpora- tions begin to shift toward major new green technologies such as electric cars, they will block the systemic change we need, pushing us in the name of green capitalism toward climate extinction.

#### The United States Federal Government should mandate transition to a democratically planned, worker-owned economy.

#### Abolition of private ownership and social management of production frees the economy from markets and corporate control. Only this creates genuine worker power and reorients the economy away from profit and towards collective need.

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Moreover, workers taking over all the various nodes where they work in the system of social production is strategically central to the working class gaining power in society. The syndicalist proposal is for the working class to socialize the economy “from below” through a process of workers taking over the various industries and creating their own democratic organizations to self-manage the work in that industry. Here is a basic truth: If workers do not control their own work activity and the workplaces, then some other class will, and thus the regime of class oppression will continue. So an essential task for worker’s liberation is the worker takeover of the various workplaces and industries and the creation of organizations of worker self- management. For workers to control the labor process, the organization of the work, and the control of the workplace, there must be face-to-face democracy of periodic assemblies of the workers in that facility. This is where the staff can deliberate and make decisions on the basic policies and the over-all governance of their facility and for their industry. For ongoing coordination of the labor, the workers can elect colleagues to a coordinating or administrative council. In a typical facility that is fairly sizable, there are often departments that have issues that pertain first and foremost to them, which suggests a kind of distributed decision-making structure where departments have their own periodic assemblies to make collective decisions for themselves.

However, this direct self-management of production does not mean that workers would be split up into competing cooperatives or “collectives.” Rather, as Diego Abad de Santillan put it during the Spanish revolution in 1936, the worker production groups are not “proprietors” of the industries but are “only administrators at the service of the entire society.” The goal of a syndicalist program is socialization, not converting workplaces into the collective private property of the workers there.

De Santillan justified the CNT movement’s goal of socialization in this way: “We are an anti-capitalist, anti-proprietor movement. We have seen in the private ownership of the instruments of labor, of factories, of the means of transport, in the capitalist apparatus of distribution, the primary cause of misery and injustice. We wanted the socialization of all the wealth in order that not a single individual should be left on the margin of the banquet of life.”

There is an assumption that worker self-management of the industries must be accountable to the whole society. When the CNT unions seized the various industries in the revolution in the 1930s, they expropriated the assets on behalf of all the people, implying a commitment to a form of planned economy where there is popular participation in working out the agenda for production.

Neighborhood Assemblies

Various decisions about an industry or workplace will impact people other than the workers in that workplace. Whether someone is working in the social economy or not, the people who live in a city neighborhood or rural area will have concerns that are common to those in their area—such as elimination of pollutants, or the character of the public goods and services available in their area. Thus residents of a city, neighborhood, or region need to be able to self-manage the planning about provision of services or protection from environmental degradation. These are decisions that affect everyone who lives in a region, and is where neighborhood assemblies come into play. Just as worker assemblies provide the base for workers self-management of workplaces, assemblies that bring people together can provide a social base for self-management of public affairs and public services by an area’s population.

A district of some thousands of residents might have its own periodic neighborhood meetings, its elected neighborhood committee, but also elect delegates to a city-wide or regional congress of delegates from all the neighborhoods. We might call this a Congress of Communities. The area of decision making that the neighborhood assemblies and the regional congresses of communities would work on would be the development of the plans for provision of public goods and services, protection of the interests of people as consumers, protection of the ecological commons, controlling the land use, and issues like emissions that affect air and water.

Different kinds of public goods and services affect people at different geographic levels. The neighborhood assembly might be concerned about the creation of new parks, a gym, or other recreational facilities, or better bus service. On the other hand, the overall operation of the transit system or major new services like a subway line would be a part of the planning of a congress for the whole metropolitan region.

The neighborhood assemblies and wider-scope congresses of communities would be developing requests to the worker-managed system of social production. When the regional congress of community delegates for the metropolitan region works up proposals for new bus lines or other transit system improvements, they do not hire managers to form an autocratic bureaucracy to control transit workers. Rather, the workers would self-manage the transit system.

A relevant example in recent times has been some cities’ attempts at “participatory budgeting”—based on participation by residents in neighborhood assemblies. An example was the participatory budgeting experiment enacted by the Brazilian Workers Party when they controlled the city government of Porto Alegre, Brazil. The city allotted control of planning to neighborhood assemblies for a limited part of the city’s discretionary budget, to determine what services the neighborhoods wanted. When I was in Brazil in 2003, I interviewed a member of the secretariat of the Federação Anarquista Gaúcha (FAG)—a sixty-member anarchist activist and organizing group in Porto Alegre. They told me that the neighborhood assemblies did develop plans but very often the mayor’s office would overrule them. This is a limitation due to the fact the assemblies were embedded in the existing bureaucratic state, but this does show that neighborhood planning is possible through a participatory process.

No to Market Socialism

If we reject the state-organized central planning model, what is the alternative? One option proposed by some socialists is a “market socialist” economy of competing worker-controlled enterprises or cooperatives (as in the proposals of David Schweickart and Bhaskar Sunkara). Syndicalists have historically been opposed to market socialism. When the revolutionary syndicalist unions came together to form the International Workers Association in 1922, they defined their programmatic goal as “libertarian communism,” referring to a non-market form of socialized economy. The word “libertarian” refers to positive liberty, and thus to the rebuilding of all social institutions on the basis of self-management. They did not conceive of the goal as private ownership of the means of production by workers via competing “collectives” or cooperatives. To build the fighting capacity to replace capitalism with worker power over production, a working-class movement that could drive this change would be likely to have developed a high level of solidarity and a major united front within the groups subject to exploitation and subordination in capitalist society. Why would they want to then pit groups of workers into competition with each other in separate enterprises? Moreover, if the market-governed character of the capitalist set-up is the basis of the ecologically destructive cost-shifting dynamic, market socialism is no solution.

Economic Planning through Popular Participation

The alternative to market socialism and central planning is a distributed model of democratic planning. A socialized economy requires that the worker-managed industries produce the goods and services that the masses of people want. How do we ensure effective accountability? This leads to what I call the dual governance model for a socialized economy. This means that we take seriously the idea of popular self-management for decision making about the concerns that people have as consumers, users of public services, or as residents affected by environmental issues. With the dual governance model, we keep worker self-management of the industries but we add self-management rooted in assemblies of the residents in neighborhoods, and election of delegates from these geographic areas to congresses of delegates over wider regions. This provides a basis for self- management of communal, consumer, and environmental protection issues. A distributed planning system needs to have a way to effectively coordinate between the many centers of self-managed planning in the society— workplaces, coordinated industrial self-management organizations, and planning for social benefit that can occur through delegate bodies over wide geographic scope as well as by local communities.

We’re familiar with the way that prices enable different companies and households to coordinate or adjust their plans to each other within the present society. As we will see, a non-market price system can be used in a planned economy also as a means for coordination between the plans of communities for public goods and services, households in their consumption decisions, and worker production organizations. Because it is a socially controlled price system, the destructive cost-shifting of capitalism can be eliminated. As a non-profit, coordinated economy, the competitive drive for profits is replaced by an economy geared to cooperation, worker mastery of production, and human well-being.

Protecting the Ecological Commons

The potentially catastrophic effects for humanity from global warming illustrate the danger from treating the atmosphere as a free “sink” for emissions. In this case, carbon dioxide from burning fossil fuels, or methane from leaky gas fields, are putting humanity on track to very dangerous levels of heating of the atmosphere and oceans—leading to deadly heatwaves, rising seas, and intensified storms. A lot of the technical changes needed to move away from this path are known or being developed. We can see how this catastrophic direction comes from the cost-shifting dynamic of capitalism. A power firm in Texas burning coal contributes greatly to global warming, and is also damaging the respiratory systems of people downwind from the plant. But the power firm doesn’t have to pay anything for these costs. If they had to pay an appropriate fee, methods of power generation that don’t rely on burning fuels would look a lot better for the financial balance sheets of the power firm.

Protecting the ecological commons means that the society has to take collective responsibility for protecting the air and water, the forests, and so on. My proposal here is to “socialize” the access to the ecological commons by giving control over this access to all the people who are locally affected by a particular commons or by possible emissions into the air or water, or drawing down of a regional aquifer. The population who live in particular areas or regions would have the power to protect themselves against being polluted.

As we will see below, this approach will allow us to calculate prices for ecological damage. These prices can then figure in costs assigned to the balance sheet of production groups, giving them a positive motivation to reduce ecological costs. This allows us to define a concept of ecological efficiency. Following Robin Hahnel, I define throughput as consisting of all the natural resources that we extract (wood from forests, limestone from a quarry, hydrocarbons from the subsoil) and all the negative effects of pollutants that are emitted. To the extent we reduce throughput required per unit of social benefit from social production, we have improved ecological efficiency. The ability to assign accurate prices to throughput enables us to have an economy that generates a tendency toward greater ecological efficiency. Thus, if the ecological efficiency of production is improved, some element of growth can occur without increasing ecological damage.

Some radical environmentalists say that the source of the ecological devastation of the capitalist regime is “growth.” But growth in regard to what? It is true that the non-profit-driven planned economy proposed in this chapter would be lacking the capitalist regime’s obsessive drive for profit. Nonetheless, growth is going to be needed along various dimensions —growth in equipment needed in the shift to a non-fossil fuel based electricity system, growth in free-to-user health provision, growth in rehab of buildings to make them more ecologically sound, and many other areas. And this also means we need a way to ensure a shift in the production system so that it works at reducing its damaging ecological impacts.

Replacing the State

An important lesson from the revolutions in the twentieth century is that the initial steps in the process of social transformation need to avoid creating new institutions that will simply continue some system of class oppression over the working class. Thus a key part of the syndicalist program is the initial moves to take over the workplaces and re-organize production under worker self-management, which gives the working class the power to shift the priorities of the production process on issues such as ecological impact, quality of the products, improved health and safety for the workers, etc. This differs from a Marxist conception of social transformation, which sees the key aim as the capture of state power by a “worker’s party.” Through this “worker’s state” the party would implement a socialist program. In fact, “proletarian state” is a contradiction in terms. States are based on top-down managerialist bureaucracies where public sector workers are subordinate, so class oppression is built into the structure of the state. When the Bolsheviks got control of the central state in Russia in 1917, they proceeded over several years to build a system of top-down central planning with managerialist bureaucracies installed from above over the workers in the various industries. Thus they set in play a process that created a new class-divided economic arrangement, based on the power of the bureaucratic control class.

A key task the working class must accomplish in a period of social transformation is the breaking down or dismantling of the State. Taking over the various industries and establishing worker self-management of production is a central task, but changing the system of political power in society is equally important. A society must have a method to decide basic rules and enforce them. This is the core of the governance system of that society. Breaking down the State means changing the governance system so that the formerly oppressed majority gain control over governance.

We are used to thinking of a geographic basis for “democratic government” in which people elect politicians to represent the people in a district, based on universal right to vote. Thus it might be thought that the neighborhood assemblies and congresses of delegates from neighborhoods might be sufficient for a new government system. I think this is likely to be a mistake. A revolutionary process that works to liberate the working class from subordination to the capitalist and bureaucratic control classes needs to expropriate the means of production from the old owning class but also needs to break the power that the bureaucratic control class has wielded over workers and over the state. This process is likely to lead to major opposition from the people in these classes who lose power. The college- educated managers and top professionals whose power is threatened or removed are likely to oppose their loss of power. Moreover, they have the speaking and writing and organizing skills to build organizations and organize in neighborhood assemblies and congresses of neighborhood delegates to advance their class interests and try to maintain a powerful role for their class. They can build “political parties” that push a program that would shift power to the high-end professionals and managers. To prevent this, I believe that the working-class mass organizations must build political power based on workers and their assemblies and organizations in production.

This is where the syndicalist proposal for worker congresses comes into play. These would be congresses of elected and revocable worker delegates, elected from the various worker assemblies throughout a metropolitan area, a larger region—or throughout the region transformed by the revolution. Bringing together all the neighborhood and workplace organizations from the region being transformed creates what we might call the Social Federation. I would see the regional and Social Federation-level worker congresses as akin to a legislature, having the power to craft a new charter for society and set out the division of powers of the various organizations. The worker congresses are a key aspect of working-class political power.

A part of the governance system is the way that social self-defense is organized. There is the potential of foreign invasion—such as a force trying to restore capitalism. People are also going to want protection from individuals or gangs who act in predatory, anti-social, or violent ways—who commit assaults, try to bully their neighbors, engage in theft or sexual violence. At the same time, there needs to be a fair process of finding out if a person accused of such crimes is actually guilty—based on evidence and activities of workers such as those in forensic labs. People want to be free of the insecurity from the threat of violence. Of course, in a society where a movement of the oppressed majority has gained power, the self-defense roles—such as policing or segregating people for violence offenses—would need to be done differently than under the kind of massively violent police and prison regime that exists in the United States at present. The police in the US currently operate with virtual impunity when they engage in violent or repressive behaviors. Since their origin in the early-nineteenth century, American police have been a central part of a racialized regime of class oppression. They know that their role is to defend propertied interests and keep the masses in check. Thus enforcement of the basic rules of the society needs to be rebuilt on a different basis.

For syndicalists, a crucial issue is going to be “Who controls the dominant armed power in society?” The idea that the worker mass democratic organizations need to gain control of the dominant armed power in society in a revolution is a long-standing syndicalist principle. As such, the 1922 principles of the syndicalist International Workers’ Association said: “Syndicalists do not forget that the decisive struggle between the Capitalism of today and the Free Communism of tomorrow, will not take place without serious collisions. They recognize violence, therefore, as a means of defense against the methods of violence of the ruling classes, in the struggle of the revolutionary people for the expropriation of the means of production and of the land. Just as this expropriation cannot be commenced and carried to a successful issue except by the revolutionary economic organization of the workers, so also the defense of the revolution should be in the hands of these economic organizations.”

This would mean the development of a worker’s militia or “people’s militia,” drawn from the communities of the oppressed and exploited majority. Although some aspects of social self-defense require full-time trained people, such as the forensics staff, much of the activity can be performed by people who are trained, but do the work part time and have other work activity they do at other times. People who do policing as a full- time job have a tendency to develop a view of themselves as a group set against the population. But in a war situation, on the other hand, the military role of the militia would require full-time work.

The governance institutions here are a form of government. Although states have been the way government has been carried out for centuries, a form of government need not be a State. Under a libertarian socialist proposal, governance is rebuilt on the basis of self-management—rooted in the face-to-face democracy of the neighborhood assemblies and worker assemblies. All the public services are self-managed by democratic staff organizations. There is no paid bureaucracy of professional politicians and state managers set over the population and engaging in top-down control through the state managerial hierarchies. Governance still exists but is conducted through organizations that are grounded in democratic participation.

In what follows I am going to flesh out more of the program for building self-managed socialism.

Industry-wide and Society-wide Worker Coordination

If workers don’t control their own work activity and the workplaces, then some other class will, and so class oppression will continue. Thus an essential task for worker’s liberation is the takeover of the various workplaces and industries “from below” and their re-organization under worker self-management. Workers will need to bring the different facilities together into an industrial federation to do planning and coordination for an entire industry—such as healthcare, railways, or agriculture. Without a means to coordinated control and policy for an industry, worker groups controlling particular facilities might be pitted against each other in competition. Workers would be atomized and their social power diminished.

The kind of movement that gives the working class the power to challenge—and to ultimately defeat—the capitalist regime would be based on an increasingly intense class-wide solidarity, as the oppressed majority coalesces its forces in a united front around the basic changes needed in society. With this growing level of solidarity, why would workers who take over the workplaces in their industry want to suddenly put themselves into competition with each other as competing cooperative “businesses”? In the situation where the capitalist facilities are taken over, different companies may have stronger or weaker competitive positions, and some workers may receive lower pay or experience worse conditions. A basic principle of industrial unionism is to fight to “take wages and conditions out of competition.” An advantage of coordination of the whole industry through an industrial federation is that it enables workers to achieve better conditions for the worse off. Moreover, splitting workers up into competing firms would atomize the working class, putting them in a weaker position in society. In the period that ensues from the major struggle over liberation from the oppressor class regime, people who have been in the habit of giving orders to workers or holding elite professional or managerial positions will be pushing to retain or regain the power the bureaucratic control class has over workers. Workers will need strong organizations to prevent the continuation of the bosses’ class power.

The goal of a syndicalist program is socialization, not converting workplaces into the collective private property of the workers there. The process that played out in the “expropriating general strike” (generalized worker takeover of industry) in northeast Spain in 1936 provides a useful experience we can learn from. The CNT’s aim was to group together all the industry workplaces into an industrial federation that would be responsible for managing that industry. Social accountability would be reflected in the development of social plans to which the various industrial federations would be expected to adhere in their work. The industrial federations are not “proprietors” of the industries but are “only administrators at the service of the entire society,” as de Santillan put it. We can think of an industrial federation as rooted in the workplace assemblies in the various facilities throughout an industry. Periodically these assemblies would send delegates to an industry-wide convention to decide basic policy, coordination, and goals. The assemblies can also elect an ongoing coordinating committee with delegates in the various facilities.

For the Spanish syndicalists, there were two aspects or phases to syndicalist socialization. The first phase was expropriation of assets of the capitalists and creation of an industrial federation—suppressing market competition between firms in the industry. The second phase would be the creation of overall social planning. For this they envisioned regional and national Worker Congresses with delegates elected from the workplace assemblies. Apart from local exceptions, the Spanish revolution never got to this second phase of overall social coordination.

The CNT’s national industrial federation of telephone workers seized the assets of the Spanish National Telephone Company (the largest subsidiary of ITT). In some cases an industrial federation was created as a joint project with the UGT (aligned with the Socialist and Communist parties). This happened in industries where the UGT was a major part of the workforce—as in the railway industry and on the big hydro-powered electric monopoly in northeast Spain. After railway worker militants seized the Madrid-Zaragoza-Alicante railway—the largest privately owned railway in Spain—they moved to create a single Revolutionary Railway Federation to manage it, and soon merged other railways into this federation, such as the Barcelona commuter railways. The railway federation was coordinated by a twelve-person “Revolutionary Committee” and a full-time Executive Director. The Revolutionary Committee was made up of working delegates. The two unions present on the railways—the UGT and CNT—each had six delegates. Assemblies of the rank and file were held every two weeks in the railway terminals. The delegates gave reports, and could be removed by the assemblies.4 During the course of the revolution the forty-thousand- member CNT health-worker federation built Spain’s first socialized health care system, taking over hospitals and drug factories and setting up health clinics.

In a number of industries, the CNT industrial unions merged the assets of that industry’s businesses (as in the furniture and entertainment industries). The CNT woodworkers union took over the sawmills in the Pyrenees mountains and seized all the furniture factories and mom-and-pop cabinet-making shops in both Barcelona and Valencia. The union used the assets from the shuttered workplaces to build a new factory with the latest American equipment, which had better safety features. The new factory also had a gym and swimming pool where the workers could relax. “The concept that prevailed,” a wood union member recalled, “was that the working class should have good furniture at cheap prices.”5 An internal caucus in the union—an FAI group—disagreed with this focus on mechanized production and wanted to reorganize the industry into self- managed work groups. That might be a better way for the workers to learn and practice furniture design and craft skill, but their critics in the union described this as a throwback to the pre-capitalist era of self-employed artisans. This debate shows that there’s not just one cookie-cutter solution to industrial self-management.

The goal needs to be the creation of a horizontally federated system of production that can implement planning and coordination throughout industries and over a wide region. This would enable workers to: • Gain control over technological development. • Re-organize jobs and education to eliminate the bureaucratic concentration of power in the hands of managers and high-end professionals, develop worker skills, and work to integrate decision making and conceptualization with the doing of the physical work. • Reduce the workweek and share work responsibilities among all who can work. • Create a new logic of development for technology that is friendly to workers and the environment.

#### Any world that includes employers is inefficient – only worker control solves.

**Fitzroy and Nolan 25**, \*Professor Emeritus of economics at the University of St. Andrews, \*\*Lecturer in Economics at the University of Hull, (“Employee ownership and workplace democracy: Antidotes to labour market monopsony?” *Journal of Participation and Employee Ownership*, Volume 8, Issue 1-2, September 16th, 2025, <https://doi.org/10.1108/JPEO-10-2022-0021>) rose

Purpose – We show that employee ownership is more efficient than control by external capital owners/ employers. This complements the empirical evidence for benefits of employee ownership surveyed by Mygind and Poulsen (2021), Kruse (2022) and Dow (2003), and the normative political case for democratising work made by Ellerman (1975, 2022), Ferreras et al. (2022), Piketty (2022) and others. Of course, efficiency issues are usually important in economic evaluation.

Design/methodology/approach – Worker mobility or “exit” is generally costly, so employers with residual control have monopsony power to exploit workers with non-contractible job utility – who are thus less than perfectly mobile and, in the absence of collective bargaining, lack countervailing “voice”.

Findings – The potential for wasteful conflict and exploitation is inherent in the employment relationship, and socially optimal effort is unlikely to be achieved. We show that economic efficiency in a “sticky” world (Banerjee and Duflo, 2019) with imperfect information and incomplete contracting actually requires residual control by workers rather than just capital-labour parity in “democratic socialism”, so labour should hire capital rather than vice versa.

Originality/value – The “labour hires capital” allocation of rights contrasts with the traditional power of capital- owning employers who claim the firm’s residual income and control of hired employees. Such shareholder primacy not only deprives employees of their rights of self-determination and generates conflict, but also, and less obviously, generally fails to attain the efficient effort-output trade-off.

Keywords Workplace democracy, Employment relationship, Economic efficiency

Paper type Research paper

1. Introduction

Empirical evidence on the “pros and cons” of employee ownership has been reviewed by Mygind and Poulsen (2021) and by Kruse (2022), following the early wide-ranging review by Dow (2003). The more general aim of “democratising” work and firms in various ways to achieve at least some of the benefits of ownership is discussed in detail by Battilana et al. (2021) and as a component of democratic socialism by Adler (2019) and Piketty (2022).

Here, Section 2 provides an account of the problems faced by employed workers – and a number of attendant adverse economy-wide trends that may have contributed to, and/or been exacerbated by, the traditional employment relationship. That relationship has typically existed under shareholder primacy in the context of the capital-managed firm (KMF). In so doing, it complements the empirical evidence and the normative-political case for democratisation (Ellerman, 1975; Ferreras et al., 2022). It also notes that KMF is fundamentally inefficient because employers can undersupply job quality and intangible, non-contractible worker utility due to workers’ mobility or “exit” costs in a “sticky” world (Banerjee and Duflo, 2019) – with the inefficiency typically being founded on some combination of monopsony power in the labour market and/or monopoly power in the underlying goods market. In Section 3, some successes and failures are discussed – resulting from a combination of economic circumstances and differing approaches by unions, employers and legislators. Labour-managed firms (LMFs), including, but not restricted to, employee-owned firms, are discussed in Section 4, under the heading of workplace democracy. In Section 5, an array of potential reforms is outlined, alongside quite wide- ranging context and likely consequences. Conclusions are summarised in the final section.

## OFF

### CP – Contempt

#### The United States federal judiciary ought to issue a court order finding federal failure to [PLAN] an ultra vires exercise of authority punishable by exponentially-accruing contempt sanctions.

#### The CP unlocks court contempt power against sitting officials, giving judicial orders “teeth” and reviving checks on executive power.

Levitt 25, Professor of Law at Loyola School of Law, JD, magna cum laude, from Harvard School of Law (Justin Levitt, May 19, 2025, “Against a defiant White House, the courts should use this powerful tool,” The Washington Post, https://www.washingtonpost.com/opinions/2025/05/19/courts-civil-contempt-trump-administration/)

The American experiment is driven by three branches of government. In this unprecedented moment, one of those engines has flamed out (looking at you, Congress), and another is barely sputtering (hello, executive). But there’s more power in the third than we realize. Though Alexander Hamilton called the judiciary the “least dangerous” branch, the courts’ centuries-old civil contempt authority makes it plenty mighty when it wants to be.

It’s a measure of how far things have gone that contempt has entered the conversation at all. The second Trump administration took office bent on radically reordering the federal government — sometimes with legal authority, more often without. Judges appointed by at least eight different presidents, including Donald Trump, have been drawn into the litigation that has followed. Those courts have acted like courts, restrained and institutionally conservative.

The executive branch has not returned the favor. Some court orders are legitimately tricky to effectuate, and judges are accustomed to good-faith give-and-take with executive officials. But what’s happening now is different. This administration has increasingly openly defied straightforward judicial commands. A leading example: the order that the executive make its best sincere efforts at securing Kilmar Abrego García’s return to the United States for the basic hearing he was due. Efforts to date have been neither best nor sincere.

Contempt sanctions give judicial orders teeth. Sometimes they’re levied as punishment, including prison for truly defiant officials. But such orders are executed by U.S. marshals, who sit formally within the Justice Department. And some have fretted that the marshals might in these times be less than eager to do their job.

The sort of authority used for punishment, to sanction past wrongdoing, is the criminal contempt power. But the version more likely to command executive attention is instead part of the civil law, and more forward-looking. It is immune from any power to pardon. It doesn’t rely on another branch to execute. And it’s less likely to be repurposed as a martyr’s badge of honor. All this makes civil contempt a more effective tool for extracting future performance.

Consider the matter of Abrego García, the legal U.S. resident who was wrongly deported to El Salvador. Administration officials first offered the mere pretense of compliance, with the departments of Homeland Security and State filing smug daily “progress reports” that reported no progress. Then Secretary of State Marco Rubio declared no progress report would be forthcoming — especially not to “some judge.”

What’s probably next is a specific, unmistakably clear court order aimed at a specific, named official — backed by the power of civil contempt. Imagine a $1,000 fine, to be paid personally and without indemnification by the official in question, doubling each day until the United States issues an official request for Abrego García’s return. The executive actor would have the “off” switch in their own pocket.

One thousand dollars doubling every day adds up to a total of $1 million in 10 days, $1 billion in 20 days and $1 trillion in 30 days. The structure should be the minimum necessary to produce compliance. But if more vigor is needed, nothing requires the fee to start that low or multiply that slowly.

No other branch of government is required for a levy like this to do its work. A court judgment is a legal debt from the moment it is issued, in which exponential compounding credibly threatens to destroy creditworthiness and supports the seizure or retitling of property to be sold in satisfaction of the judgment. If the marshals won’t do it, courts can appoint an executor who will.

#### An executive free from judicial checks causes extinction.

Koh 25, Sterling Professor of International Law and former Dean of Yale Law School, former Legal Advisor and Assistant Secretary of State at the US State Department (Harold Hongju Koh, May 2, 2025, “One Hundred Days of Lawlessness,” Project Syndicate, https://www.project-syndicate.org/onpoint/trump-100-days-of-lawlessness-what-to-do-about-it-by-harold-hongju-koh-2025-05)

Unilateralism Breeds Lawlessness

As executive power has become more concentrated, it has inevitably pressed the limits of law. Pressured executive branch officials do not think of themselves as dangerous, but rather as underappreciated public servants whose worthy motives have been misunderstood. Inside their bubble of “groupthink,” executives grow isolated, breeding a temptation to act alone, often in secret.

When executives’ power combine a capacity to act with a continual duty to react, it is only a matter of time before they see the advantages of going it alone. They find it better to ask for forgiveness than for permission. Or as Reagan reportedly said during the Iran-Contra Affair, “The American people will never forgive me if I fail to get these hostages out over this legal question.”

In time, feeling put-upon allows executives to convince themselves that their actions are justified by some external source of authority, such as competence or a “mandate,” derived from popular or legal legitimacy. They come to believe that because they can exercise executive power, they ought to. From there, it is just a short step to Nixon’s infamous claim that, “When the President does it, that means that it is not illegal.” Or as Trump recently put it, “He who saves his Country does not violate any Law.” The repeated exercise of executive power comes to validate itself.

This link between unilateralism and lawlessness has tightened with the two Trump presidencies. During his first administration, Trump’s activist impulses disrupted the global landscape with unprovoked trade wars, threat-based diplomacy, anti-immigration campaigns, and a wholesale denigration of alliances. He repeatedly relied on far-fetched claims of “national emergencies” to justify unilateral executive action in areas where the Constitution affords Congress primary authority – from immigration and war to international trade and the regulation of cross-border investments.

Trump, moreover, claimed legal power to terminate longstanding treaties at will, without even paying lip service to consultation with legislators. And he usurped Congress’s power of the purse by proceeding to build a border wall with funds that it had expressly withheld.

Along the way, Trump 1.0 amalgamated his predecessors’ worst national-security abuses. Like Nixon, he illegally used force abroad to kill Iranian General Qassem Suleimani in Iraq, and pressured his attorney general to weaponize the Justice Department against his critics. Like George W. Bush, he claimed a right to launch preemptive military strikes. And like Reagan, he condoned the privatization of foreign policy by allowing unaccountable cronies to intervene in official matters. His first impeachment – for turning an arms shipment to Ukraine into a de facto quid pro quo for his own political gain – recalled Marine Colonel Oliver North’s illegal diversion of proceeds from Iranian arms shipments to finance Nicaraguan guerrillas after Congress cut off funds.

Such a sustained presidential effort to dodge the rule of law could not have succeeded had constitutional checks and balances functioned as intended. Trump’s unilateralist project fed on the other branches’ willingness to normalize his aberrant behavior. Congressional Republicans repeatedly refused to assert their constitutional prerogatives, and the conservative majority on the Supreme Court deferred to fabricated presidential motives, particularly when it upheld the Muslim ban by accepting what Justice Sonia Sotomayor, dissenting, called a national security “masquerade.”

Then, in Trump v. United States (2024), the Court’s six-justice conservative majority weakened the former president’s accountability for any act that could be deemed “official.” In its obsession to avoid “enfeebling the presidency,” the Court never acknowledged the actual lawless acts undertaken by the once and future incumbent.

What made Trump’s first-term unilateralism constitutionally distinctive was his claim that “I have an Article II,” which “gives me the right to do whatever I want” as president. Trump and his supporters insisted that all of his actions were authorized, justified, and immunized from interbranch interference by his plenary constitutional powers. Under this sweeping theory of a “unitary executive,” any restraints coming from within the executive branch can be ignored, and any restraints coming from outside the executive branch can be treated as unconstitutional intrusions.

Ironically, this claim was bolstered by generations of executive branch lawyers who had sought to protect America by issuing opinions empowering the president to act as its prime defender against national-security threats. Until Trump arrived on the scene, those drafting such opinions could always assume that a president would have some internalized limit – a sense of public duty or shame that would dictate self-restraint. But Trump exhibits no such probity and has consistently shown contempt for legal constraints of any kind. Perversely, executive lawyers’ good-faith labors to empower the executive in the name of national security have helped transform the executive himself into a national-security threat.

Trump 2.0

During the first frenetic 100 days of his second term, Trump swiftly took executive unilateralism to new heights as he sought to nullify the rule of law for his own administration. While out of office, Trump was indicted in four separate cases and convicted on 34 felony counts. But after his re-election, these cases were all frozen or dismissed.

Moreover, after courts had issued hundreds of criminal convictions for those who had violated national-security laws and participated in the January 6, 2021, insurrection at the US Capitol, Trump used a “pardon whitewash” to grant amnesty to even the most violent offenders. He eviscerated checks and balances within the executive branch, firing 17 independent inspectors general, the director of the Office of Government Ethics, the chair of the Joint Chiefs of Staff and other military leaders, and key judge advocates general, who advise military officials on whether presidential orders are lawful.

Similarly, in the name of “government efficiency,” Trump has gutted the career civil service and concentrated power in the hands of his most loyal cronies. He has sought to dismantle congressionally established departments and independent agencies, mandating that only the president and his attorney general’s interpretations of law are controlling on the executive branch. He has deployed his billionaire backer Elon Musk to oust or place on administrative leave tens of thousands of federal employees, including agency heads, and question countless prospective employees about their loyalty to Trump.

As in his first term, Trump has favored impulse over strategy, transactions over relationships, hard power over diplomacy, and “resigning without leaving” over meaningful engagement with international institutions. He has continued to denigrate the truth and attack the press, international institutions, and government agencies in a rush to reverse Biden’s policies and confound longstanding bipartisan foreign-policy commitments. As always, he has sought to “flood the zone” with distracting daily initiatives designed to shift the “Overton Window,” so that the previously unimaginable quickly becomes the new normal.

But there are also important differences from the first term. Trump’s second administration, now comprised only of staunch loyalists, is even more vindictive, bellicose, and openly contemptuous of legal constraints. Trump has fully instituted government by decree, issuing 142 executive orders during his first hundred days – many advancing policies without any congressional authorization. He has also “paused” already appropriated expenditures for foreign aid to Ukraine and elsewhere, openly commandeering Congress’s constitutional power of the purse.

Even more ominous, Trump has threatened to invoke long-moribund statutes (like the Insurrection and Alien Enemies Acts) to deploy the National Guard and military domestically against claimed immigrant “invasions.” He has retaliated against perceived critics and enemies with bills of attainder, which the Constitution expressly forbids. To discourage collective resistance, he has targeted a long list of law firms, universities, and the media, cowing them into legally dubious “negotiated surrender” agreements. And he has deployed “shock and awe” tactics to encourage isolation, anticipatory capitulation, and self-silencing or exit by those who might otherwise defend the rule of law, undocumented immigrants, and career civil servants.

Trump 2.0’s early “foreign-policy” initiatives have amounted to an ad hoc sanctions policy, with the president invoking overstated claims of “national security” to demonize immigrants and promote mass deportations. Continuing the pattern, he has justified his disastrous tariffs against America’s closest trading partners on “national-emergency” grounds.

In his first term, Trump hesitated to use force; but in his second, he has already launched strikes on the Houthis in Yemen and advanced absurd territorial claims against Canada, Gaza, Greenland, and the Panama Canal. The same Trump who previously opposed nation-building now proposes that Gaza be transformed into an Atlantic City-style beach resort – though he cannot explain where the people of Gaza would go, or what role US armed forces might play in their displacement.

Meanwhile, Trump’s diplomacy has tipped even more heavily toward Russia. The administration is leveraging foreign aid and military intelligence to bully Ukraine’s government into surrendering territory without receiving any security guarantees. Trump has also vacillated between confrontational and conciliatory approaches toward China, as well as launching a systematic attack on America’s preparedness against natural disasters, global warming, future pandemics, cyberattacks, and crises that would demand the expertise and support of career bureaucrats and foreign alliances.

Throughout these chaotic 100 days, Congress has remained startlingly compliant, dutifully confirming Trump’s extreme – and often extremely unqualified – cabinet nominees. But the lower courts have pushed back, with more than 50 of them blocking early Trump initiatives across seven federal circuits. These decisions have come from judges appointed by five presidents, from both political parties.

As the current cases work their way through the appellate process, the burning question has become whether and when a majority of the Supreme Court will emerge to rebuff Trump’s unilateralist constitutional theory. Despite clear constitutional barriers, Trump has repeatedly raised the prospect of running for a third term, which the White House social-media team indulges with declarations of “LONG LIVE THE KING!”

What Is to Be Done?

For those who would defend the rule of law, the most pressing political challenge is deciding how collectively to stem the flood of lawlessness, while at the same time rebuilding the constitutional dam. A meaningful response would comprise a concerted sequence of revival, resistance, resilience, and reform.

Most immediately, we must revive traditional constitutional restraints on executive overreach, such as the Bill of Attainder Clause and Congress’s authority over the purse, foreign commerce, and immigration. At the same time, global human-rights and humanitarian institutions that Trump does not control can investigate his shipment of US detainees to extraterritorial prisons, his compliance with the laws of war in the Red Sea, and Russian or Israeli violations of international law in Ukraine and Gaza, respectively.

Medium-term strategies of resistance and resilience would use domestic and international law to push back on illegal initiatives. As Justice Louis Brandeis famously observed, the purpose of separation of powers is “by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

Such frictions are already beginning to be felt, not just from Democrats in Congress and statehouses, but also from factional clashes within Trump’s political base. Overconfidence has caused Trump to overplay his hand on issues such as immigration, government downsizing, tariffs, and tax cuts. Those policies are widely expected to hurt middle-class Americans and alienate those who voted for him unenthusiastically.

In time, what Albert O. Hirschman called “countervailing passions” will likely kick in, as the most extreme “movement supporters” clash with those who have merely sought to gain personally from Trump’s re-ascendancy. Trump’s undisciplined impulses will make it impossible for his administration to maintain a durable, coherent approach on any complex issue. If faced with sustained opposition, Trump’s focus will shift to easier symbolic targets.

Even more frictions will arise as institutional counterweights activate and coalesce. These include states and localities (especially on climate change and immigration); uncowed independent media; international institutions; and powerful interest groups (including some technology companies, former military leaders, and nongovernmental organizations promoting democracy and civil liberties). Bureaucratic resistance, leaking, and whistleblowers will help make executive branch actions more transparent.

On the international stage, Trump’s policies will face frequent and forceful pushback from democratic allies. As I described in The Trump Administration and International Law, the rule of law is sticky and bends more easily than it breaks. Because autarky is not the global norm, domestic and international law have become intertwined in a “transnational legal process” and patterns of law-observant behavior that even a willfully lawless president cannot easily discard.

This transnational legal process is bigger than Trump, and so are challenges such as climate change and pandemic prevention. International bureaucracies and alliances assume legality and therefore resist repeated insults to the rule of law. Violations tend to provoke global blowback, hamstringing the lawbreaker elsewhere. Trump’s perceived lawlessness will dilute American power and – as happened during his first term – turn his “America First” strategy into “America Alone.”

But rule-of-law advocates cannot be content with plugging leaks. Over the longer term, Americans will need to pursue thoroughgoing institutional reform. To that end, the final chapters of my latest book detail a long list of proposals. The US needs better congressional tools to restrain unilateral warmaking and clarify international lawmaking and unmaking. It also needs stronger intelligence oversight, information control, and protections for the electoral process.

After the twin debacles of Vietnam and Watergate, Congress enacted a series of framework statutes that reasserted its constitutional role in such areas as warmaking, emergency economic powers, budgetary matters, intelligence oversight, and international agreements. Today’s Congress could similarly start adopting legislative proposals to restrain government by secret law; maintain America’s adherence to international law; clarify constitutional restraints on unilateral abrogation of treaties and agreements; and encourage judicial readings of presidential power more in line with Youngstown than Curtiss-Wright.

The second Trump administration’s tumultuous opening has finally awoken the world to the existential dangers posed by America’s imperial presidency. US allies have now been thoroughly schooled about the risks of relying too much on responsible bipartisan foreign-policy leadership – something that the US political system may no longer be able to provide.

## OFF

### K – Psychoanalysis

#### Subjectivity is ontologically shaped by lacking enjoyment. The gap between the Symbolic and the Real leaves desire fundamentally incomplete. This Lack is unfillable because while desire takes an object, it has no object. That structures the political and the social around an insatiable search for enjoyment.

**Pohl and Swyngedouw 23**, \*PhD, researcher, Geography, Humboldt University Berlin, \*\*PhD, professor, Geography, University of Manchester, (Lucas\* and Erik\*\*, “Enjoying climate change: Jouissance as a political factor” Political Geography 101 (2023), <https://www.sciencedirect.com/science/article/pii/S0962629822002347>) rose

Jouissance is predicated upon a lack, a gap, or absence to be covered, an insatiable search for completeness and wholeness, and Lacanian psychoanalysis locates the origin of this lack in a constitutive loss of jouissance. After entering the symbolic (and mainly linguistically constituted social) order, which equals for Lacan the moment of becoming a subject proper, the subject is marked by “symbolic castra- tion”, deprived of its substance (which it never actively possessed) (Hook, 2006). The longing (or rather drive) to retrieve this primordial bliss is precisely what sets enjoyment in motion. While enjoyment functions on the one hand as the mythic and impossible pre-condition of the subject, which Lacan also calls “the Thing” (Lacan, 1992), it simul- taneously emerges as the forever failing attempt to fill out the gap, to become whole again, and will drive the subject forward. This (death) drive pushes the subject continuously “beyond the pleasure principle” (Freud, 1990 [1920]), the latter understood as a state of pure blissful existence without pain or suffering. Enjoyment – in contrast to pleasure – is this insatiable, anxiety-ridden and often painful, but incessantly failing attempt to suture the void opened up by symbolic castration.

Since the subject is incapable of facing the loss qua Thing-in-itself, because the Thing solely functions as a purely negative reference point, the only possibility for the subject to engage with its loss is by raising another object “to the dignity of the Thing” (Lacan, 1992, page 112). The void that structures the subject’s psychic apparatus becomes stained with a spectral presence, which Lacan denotes as “the object-cause of desire” or “object a”. This type of object is essential for Lacan, because it allows the subject to ‘give body’ to the lack (of enjoyment) that perpetuates its existence. While the Thing is purely absent, the object a is a sort of ‘present-absence’, it is “a-thing” (Lacan, 2007, page 159), which functions as a rem(a)inder of the lost enjoyment the subject strives for. Object a is the phantasmagorical ‘little thing’ that sets desire into motion and promises fulfilment and completion, but ultimately never really satisfies fully. Desire is thus the “other pole” of enjoyment (Lacan, 2017, page 236). While the latter emerges out of a gap, a void, a nothingness, the former circulates around a real or imaginary ‘small a’ that animates the subject in the pursuit of a ‘little’ or partial satisfaction, one that is never fully really ‘it’. Indeed, to preserve their possibility for enjoyment, the subject clings to loss and to the suffering it entails. As Jodi Dean (Dean, 2006, page 4) explains:

[E]njoyment (jouissance) refers to an excessive pleasure and pain, to that something extra that twists pleasure into a fascinating, even unbearable intensity. … it is a special kind of agony, an agony that makes us feel more alive, more fully present, more in tune with what makes life worth living, and dying for, than anything else. Enjoy- ment, then, is this extra, this excess beyond the given, measurable, rational, and useful.

Enjoyment is centrally about “I can’t get no, or rather not enough, satisfaction!” Hence, subjects become caught in the circular and repet- itive process of attaining each time again the ‘thing’ that fails to do what fantasy promised, because the presumed qualities of the object (object a) to finally ‘complete’ the subject does not originate from the object itself (although its particular characteristics are invoked as carriers of possible satisfaction), but from the fantasy structure it is placed in. Take, for example, the commodity as the entity (according to Marx) that is pre- sumably full of phantasmagorical possibilities and promises, yet, when acquired, loses its appeal, and becomes again the mundane thing that sustains capitalist social relations. As soon as the subject comes too close to it, the supposed rem(a)inder of the Thing loses its function as an object-cause of desire. While enjoyment is fantasmagorically circulating around an object-cause of desire (object a), this ‘thing’ never really satisfies fully, which is why Lacan (2007) considers the notion of ‘sur- plus enjoyment’ as fitting perfectly to the discourse of capitalism, which provides an endless (but never fulfilled) promise for ever new in- carnations of the object a (Lacan, 2007; see also McGowan, 2016). Enjoyment therefore requires and is embedded in a fantasy configura- tion closely associated with the position of the subject in the social bond (see Swyngedouw, 2022a). It is crucial, not only for the individual, but also for the organization of society. As Dylan Evans (1999, page 20) puts it:

jouissance is not merely a private affair but is structured in accor- dance with a social logic, and … this logic changes over time, pre- sumably by virtue of some economic or other determinant … Lacan seems to be saying something like this: jouissance is as much a problem for society as it is for the individual.

From a Lacanian standpoint, the field of the social, or society, is organized through the Symbolic (and the Imaginary). In Althusserian terms, the Symbolic hails the subject into taking particular subject po- sitions and associated identities through what he defined as ‘ideological state apparatuses’ (Althusser, 1971). Slavoj ˇZiˇzek transformed this perspective further by insisting that everyday life itself is structured as fantasy. Ideology therefore does not function as a smokescreen or false representation that covers a hidden, but recoverable, reality (and its truth), but is the actual lived experience through which social order is produced (ˇZiˇzek, 1989, page 45).

Society can only be properly taken into account if one not only en- gages with the forces that stabilize and sustain its social order, but also with what sticks out, resists, and prevents the subject from fully assuming the symbolically prescribed subjective position. This is where Lacan’s enigmatic notion of the Real comes into play. For Lacan, the world of the symbolic order is always lacking. It is an unstable, shifting, and necessarily incomplete register. There is always excess, a remainder or reminder, a hard kernel that sticks to the world like a fishbone in the throat and exerts an unalienable scratch, pull, or lure (Pohl & Swynge- douw, 2021a). This is the Real, a complex, shifting spectral presence that “resists symbolisation absolutely” (Lacan, 1991, page 66). There is always a gap between the Real and any attempt at its symbolic assimila- tion. Within this slippery and inconsistent configuration, the Imaginary covers this split or inconsistency, and provides an illusionary sense of unity, coherence, or completeness of the world.

#### Playing the game of fantasy allows for disavowal, where the subject objectively separates themselves from what they do with their imagined agency – this manifests a fantasy of control that structures enjoyment around participation in the game.

**Jagodzinski 19**, PhD @ U-Alberta, Education Prof. @ U-Alberta (Jan, “Between War and Edutainment,” Chapter 9 in Schizoanalytic Ventures at the End of the World (Palgrave Macmillan, 2019). <https://doi.org/10.1007/978-3-030-12367-3_9>) //AD [bracketed for gendered language]

In his groundbreaking book, The Sublime Object of Ideology, Žižek (1989) comes up with a stark reversal—a ruse that he uses often. When discussing Freud’s interpretation of dreams, he maintains that it is never the content that is of importance as much as the form. The relationship between content and form (manifest and latent thought in a dream) misses the place of ideology. It is not the ‘form’ of the video game—that is, the actual shaping of content into a particular form—rather, it is the unconscious desire of the game itself. The question to ask is: what are the satisfactions these games are providing? In a world that we can’t control, we are presented with a world where we believe eventually we can. It feeds a fundamental fantasy of being solely in control, of being able to pick oneself up after failure: an avatar dies, the game stops, but we can start again. Eventually, we become triumphant, satisfying a sense of fullness and power. This is the dissimulated desire. This is the disguised ideology: to develop flexible subject who can ‘flow’ with capital, who can potentially solve complex interrelated problems. This particular desire as embedded in their form emerges from the anxieties of the postmodern age: terrorism, postadolescene, early sexual experimentation, perceived violence (even when it is dropping), and visible minorities ‘taking over,’ and so on. Because the demand to enjoy is no longer repressed, these games are like inverted dreams where everything seems possible. One is reminded here of Terry Gilliam’s Brazil (1985), where the fantasy escape becomes more than a dream, a dream that becomes materialized. The transcendental subject that the video game generates is one of flows, a decentered subject who is able to parcel him or herself into so many virtual worlds that can be distinctly maintained, able to live in a virtual game city and tolerate menial jobs above ground, so to speak, reversing H. G. Wells’ Time Machine fantasy between the Morlocks and the Eloi. The game players, through their hours and hours of play, are much like the submarines moving about in the water in Matrix, generating electricity to run the supercomputer—the gaming industry.

It is within the interaction between console players and the avatars where ideology concerning the exchange occurs; the abstractness of this action is beyond the realization of the console player because his or her very consciousness stands in the way. A repressed social dimension of the interactivity emerges as a form of non-knowledge in the way the console player is reconfirming the Ideal ego of the symbolic order’s imperative to ‘enjoy!’ The exchange process of this VR interactivity is only possible on the condition that the players are not aware of the ontological consistency of the symbolic order. If they ‘come to know too much,’ to be aware of the structuring nature of social reality that demands this subject position, such a reality would dissolve itself. The player would quit playing. Ideology is social reality ‘whose very existence implies the non-knowledge of its participants as to its essence’ (Žižek 1989, 21, original emphasis). In one of his famous reversals Žižek says, ‘Ideology is not false consciousness, rather the social reality is the ideology that is supported by false consciousness’ (ibid.). The subject can ‘enjoy’ his symptom (the pseudo-production of video games) as long as the logic of ‘why’ escapes him or her [them].

Interactivity is the point of breakdown for maintaining agency; at the same time, it is necessary for video games to accomplish its closure. The point of ideology is surprisingly the interactivity itself—as pseudo-productivity. By initiating interactivity, the console player paradoxically loses agency, gives it up! The real content of this free act of agency is in accepting the preordained structure of the game world. Play is now hi(jacked) for the subjective formation of designer capitalism delivered as entertainment.

What is the irrational element in game culture? Gamers are acting ‘as if’ the fantasy world they are interacting with possess their undivided attention. They fetishize interaction: ‘I know that this is only a game of fantasy, but nevertheless I am playing it as if it were “real” or made a difference to my life.’ What they ‘do not know’ (misrecognize) in the act of doing—in their social activity of interacting with the one-person shooter avatars—is that social reality itself is guided by illusion, by a fetishistic inversion; namely that the social reality is guided by fetishistic illusion—as their activity, as their doing. Overlooking the illusion, which is structuring our real, effective relationship to reality—is an ideological fantasy. So what is the unconscious fantasy that structures the desire to play video games? They know that, in their gaming activity they are following an illusion, but still they are doing it. They know that their idea of violence is masking a particular aggression, yet that is their social symptom. The very exaggeration in the video games—be it war or first shooter persons regulates the libidinal functioning of an effective designer technological capitalism. Video games are human–non-human assemblages of productive microdesires that liberate, at the very same time they effectively capture affect to channel the exchange for the participation of enjoyment that is manufactured into profit. They are the perfect capitalist machine: deterritorializing and reterritorializing at the same time in good schizo fashion.

As Žižek maintains, belief is exterior, embodied in the practical, effective procedure of the people. Belief supports the fantasy that refutes social reality. We find reasons confirming our beliefs because we already believe. I myself am gaming through the medium of the avatar. The beauty is that I can be getting the most obscene thrill out of killing people vicariously—however, whenever I think objectively, I can still maintain that I am simply only playing a game. This is what Lacanians like Pfaller and Žižek maintain: My most intimate emotions such as compassion, crying, sorrow, and laughter, can be transferred, delegated to others without losing my or their sincerity. As a player I can come to the screen, worried, full of problems, without being able to feel the fears and compassions of ‘true’ violence. There is no need to worry, the avatars will look after all your emotions. You just need to go through the required motions. You are relieved of all your worries, even if you don’t feel anything, the avatars will. The console player transfers his or her [their] emotions to the avatars and cathartically relives [themself] him or herself. The video game turned ‘smart machine’ is simply sophisticated form of ‘canned laughter.’

#### Vote negative for the process of analysis as an incomplete project of refusal.

**Dean 6**, professor in the Political Science department at Hobart and William Smith Colleges (Jodi, “Žižek’s Politics” Routledge, 2006, xviii-xix) rose (bracketed for gendered language)

Žižek emphasizes that Lacan conceptualized this excessive place, this place without guarantees, in his formula for “the dis- course of the analyst” (which I set out in Chapter Two). In psycho- analysis, the analyst just sits there, asking questions from time to time. She is some kind of object or cipher onto which the analysand transfers love, desire, aggression, and knowledge. The analysand, in other words, proceeds through analysis by positing the analyst as someone who knows exactly what is wrong with him and exactly what he should do to get rid of [their] his symptom and get better. But, really, the analyst does not know. Moreover, the analyst steadfastly refuses to provide the analysand with any answers whatsoever. **No ideals, no moral certainty, no goals**, no choices. **Nothing**. This is what makes the analyst so traumatic, Žižek explains, the fact that she refuses to establish a law or set a limit, that she does not function as some kind of new master.7 Analysis is over when the analysand accepts that the analyst does not know, that there is not any secret meaning or explanation, and then takes responsibility for getting on with his life. The challenge for the analysand, then, is freedom, autonomously determining his own limits, directly assuming his own enjoyment. So, again, the position of the analyst is in this excessive place as an object through which the analysand works through the analytical process.

Why is the analyst necessary in the first place? If she is not going to tell the analysand what to do, how he should be living, then why does he not save his money, skip the whole process, and figure out things for himself? There are two basic answers. First, the analysand is not self-transparent. He is a stranger to himself, a decentered agent “struggling with a foreign kernel.” 8 What is more likely than self-understanding, is self-misunderstanding, that is, one’s fundamental misperception of one’s own condition. Becom- ing aware of this misperception, grappling with it, is the work of analysis. Accordingly, second, the analyst is that external agent or position that gives a new form to our activity. Saying things out loud, presenting them to another, and confronting them in front of this external position concretizes and arranges our thoughts and activities in a different way, a way that is more difficult to escape or avoid. The analyst then provides a form through which we acquire a perspective on and a relation to our selves.

Paul’s Christian collectives and Lenin’s revolutionary Party are, for Žižek, similarly formal arrangements, forms “for a new type of knowledge linked to a collective political subject.” 9 Each provides an external perspective on our activities, a way to con- cretize and organize our spontaneous experiences. More strongly put, a political Party is necessary precisely because politics is not given; it does not arise naturally or organically out of the multiplic- ity of immanent flows and affects but has to be produced, arranged, and constructed out of these flows in light of something larger.

In my view, when Žižek draws on popular culture and inserts himself into this culture, he is taking the position of an object of enjoyment, an excessive object that cannot easily be recuperated or assimilated. This excessive position is that of the analyst as well as that of the Party. Reading Žižek as occupying the position of the analyst tells us that it is wrong to expect Žižek to tell us what to do, to provide an ultimate solution or direction through which to solve all the world’s problems. The analyst does not provide the analysand with ideals and goals; instead, he occupies the place of an object in relation to which we work these out for ourselves. In adopting the position of the analyst, Žižek is also practicing what he refers to as “Bartleby politics,” a politics rooted in a kind of refusal wherein the subject turns itself into a disruptive (of our peace of mind!) violently passive object who says, “I would prefer not to.”10 Thus, to my mind, becoming preoccupied with Žižek’s style is like becoming preoccupied with what one’s analyst is wearing. Why such a preoccupation? How is this preoccupation enabling us to avoid confronting the truth of our desire, our own investments in enjoyment? How is complaining that Žižek (or the analyst) will not tell us what to do a way that we avoid trying to figure this out for ourselves?11

## OFF

### P – Plan Spec

#### The 1ac should specify the actions the plan mandates to strengthen collective bargaining rights.

#### Vote neg for Ground. Not specifying makes establishing links, PICing out of plan mandates, and establishing topicality violations impossible.

#### Independently, presumption – normal means of the plan text under GOP leadership would be anti-worker measures labeled as “strengthening bargaining rights” that don’t solve plan advantages.

**McFerran 25**, former chairman of the NLRB, senior fellow at the Century Foundation, “The GOP Is Trying to Rebrand Its Anti-Worker Agenda. Don’t Believe Them” The Century Foundation, November 20th, 2025, <https://tcf.org/content/commentary/the-gop-is-trying-to-rebrand-its-anti-worker-agenda-dont-believe-them/>) rose

In the wake of passing a budget bill that [sacrificed the well-being of working families](https://www.clasp.org/press-room/press-releases/senate-budget-reconciliation-bill-sacrifices-the-well-being-of-working-families-to-give-tax-breaks-to-billionaires/) to support tax giveaways for corporations and billionaires, Republicans on Capitol Hill are trying to recast themselves as the party of working people. As part of this effort, last week Senate HELP (Health Education Labor and Pensions) Committee Chair Bill Cassidy (R-LA) introduced a [slate of proposals](https://www.help.senate.gov/rep/newsroom/press/chair-cassidy-colleagues-unveil-bills-to-strengthen-workers-rights-deliver-president-trumps-pro-worker-agenda) supposedly intended to “strengthen workers’ rights” and “deliver on President Trump’s pro-worker agenda.” Cassidy has also held [hearings](https://www.help.senate.gov/hearings/labor-law-reform-part-2-new-solutions-for-finding-a-pro-worker-way-forward) on labor law reform, touting the need to find “A Pro-Worker Way Forward.”

While this newfound focus on workers’ rights should be a positive development, unfortunately, a closer look reveals that the new Republican “pro-worker” agenda is largely a repackaging of many of the same anti-worker and anti-union ideas that big corporations have been pushing for quite some time. While this rebranding includes a few new ideas, there is nothing that will make significant progress to help workers succeed, and many ideas that will set workers back. Calling this legislative package “pro-worker” brings to mind a quote from the famed philosopher [Inigo Montoya](https://www.youtube.com/watch?v=dTRKCXC0JFg): “You keep using that word. I do not think it means what you think it means.”

## OFF

### K – Complicity

**Refuse all labor for Trump. Complicity in the system degrades moral capacity, enabling the evil that the 1AC claims to resist.**

**Samuel 25**, senior reporter for Vox’s Future Perfect, MFA in creative writing from the University of British Columbia, BA in philosophy from McGill University. (Sigal, April 24, 2025, “I’m doing good work in my government job. Should I quit anyway?” Vox, <https://www.vox.com/future-perfect/405207/federal-government-employee-resignation-quitting-ethics>, Ulven)

I work for the federal government in a policy role. I took the job before President Trump won the election and I didn’t expect that he would triumph. Since he’s come into power, I’ve been **wrestling with** the question of **whether to quit or stay**.

I strongly disagree with this administration’s politics and don’t want to be complicit in them. But I think I’m doing good and valuable work in my particular lane — work that could improve things for people in this country and abroad. How do you decide whether to participate in an admin you disagree with or whether to walk away in protest?

Dear Concerned About Complicity,

Why did you choose this career to begin with? It sounds like it was because you — like lots of other people who go into government — sincerely care about doing good. So let’s use that as our lodestar here.

If your goal is to do good, the most obvious potential reason to stay in your job is that you believe it still gives you a unique opportunity to do just that. Even though you disagree with this administration’s politics, it’s possible that you can still do more good by staying put than you could do by leaving government and avoiding the taint of politics.

There are a number of ways that could be true. One is if your particular role is relatively removed from the administration’s more controversial moves: if you work for the Environmental Protection Agency, say, not the Justice Department. Another is if you believe you can create positive impact from within — for example, by making the case for better policies at critical moments — in a way that wouldn’t happen if you resigned and got replaced.

And then there’s the simple fact that, well, this is how the system of liberal democracy works. When a president is democratically elected, it’s the job of government employees to heed the president’s decisions, and not just the ones they personally agree with.

There are really good reasons to want to uphold that system. One of liberal democracy’s great defenders, the British philosopher Isaiah Berlin, argued in his essay “Two Concepts of Liberty” that human values are inherently diverse, sometimes incompatible, and impossible to rank on a single scale. That means no single political arrangement can satisfy all legitimate human values simultaneously. So, he reasoned, we need to embrace political pluralism and respect competing perspectives.

However.

All of the above assumes that staying in your job would allow you to achieve the overarching goal. Remember, that **goal is to do good**.

So, what if you find that you **cannot** actually **create** any **positive impact** from within? What if your arguments are suppressed at every turn? What if there’s so much intimidation that it leaves you both powerless and traumatized? What if you are pressured to do harm?

For that matter, what if your boss tells you to carry out a policy that’s actually illegal? What if the administration, despite being elected through the machinery of democracy, goes on to hack away at democracy itself — the system you’re committed to upholding?

Well, then, Hannah Arendt might have a thing or two to say to you.

Arendt, a German-Jewish philosopher known for her post-Holocaust theorizing on the banality of evil, published a short essay in 1964 called “Personal Responsibility Under Dictatorship.” Writing from firsthand experience (she lived in Germany during the rise of Nazism until fleeing in 1933), she notes that a lot of Germans who **collaborated with** the **Nazis** later **said they’d “stayed** on the job in order **to prevent worse things** from happening; only **those who remained** inside had a chance to mitigate things and to help at least some people … whereas those who did nothing shirked all responsibilities and thought only of themselves, of the salvation of their precious souls.”

Arendt is not impressed by this argument. She **cautions against** people’s **tendency** to convince themselves that, if they continue to serve power, they’ll be doing more good on net — or choosing the lesser of two evils:

Politically, the **weakness** of the argument has always been that **those who choose the lesser** evil **forget** very quickly that **they chose evil** … Moreover, if we look at the techniques of totalitarian government, it is **obvious** that the argument of “the lesser evil” — far from being raised only from the outside by those who do not belong to the ruling elite — is one of the **mechanisms built into** the machinery of **terror** and **criminality**. Acceptance of lesser evils is **consciously used** in **conditioning** the government officials as well as the population at large to the **acceptance** of evil as such.

Arendt’s point is that if you choose the “acceptance of lesser evils” route, you’re playing a game in which the deck is stacked against you. You’re incentivized to stay, because quitting can be socially, professionally, or financially ruinous, and bit by bit — like the frog in the boiling pot — you can become acclimated to worse and worse policies. “The **extermination** of Jews,” Arendt writes, “was **preceded** by a **very gradual sequence** of anti-Jewish measures, each of which was accepted with the argument that refusal to cooperate would make things worse — until a stage was reached where nothing worse could possibly have happened.”

So, if you’re going to play this game, you need a way to make sure that you won’t fall into the traps. You might think the best way to do this is to get very clear on your own personal rules — to establish in advance, ideally in writing, at what point you’ll just say, “I’m out.” There’s some merit to that idea, because the mind has a way of shifting the goalposts as things progress, saying, “But that’s not really so bad, right? I’ll wait just a little bit more…”

The law can be a useful heuristic device here — you want to keep following it, even if people start pressuring you to do something illegal. Moral rules can also be a powerful heuristic device — think “thou shalt not kill,” for starters.

But Arendt emphasizes that **legality** and **morality** can **fall short in extreme political situations**. That’s because the illegal can become legalized overnight. The whole state machinery can start enforcing what were previously considered crimes, and moral norms can be changed along with them. The public can be swayed into accepting the new reality.

So how do you safeguard your integrity? Arendt observes that what was special about those who refused to collaborate with the Nazis wasn’t that classic rules about right and wrong were firmly established in their conscience, but that their conscience didn’t work by automatically applying any pre-learned rules. She writes:

Much more **reliable** will be the **doubters and skeptics**, not because skepticism is good or doubting wholesome, but because they are used to examine things and to make up their own minds.

**Empowering cogs in the machine causes dehumanization and degradation of morals. Vote negative for deliberate withdrawal and non-state-based resistance.**

Retag to say no one should work.

**Gratton 25**, Ph.D., Assistant Professor of History and Political Science at Southeastern Louisiana University. (Peter Michael, May 5, 2025, “The Banality of Complicity: Arendt's Guide to Moral Resistance in the Age of Trump,” Liberal Currents, <https://www.liberalcurrents.com/the-banality-of-complicity-arendts-guide-to-moral-resistance-in-the-age-of-trump/>, Ulven)

After living more than 10 years under an assumed name in Argentina, Adolf Eichmann, a former high official in the German army, was abducted by the Israeli Mossad and transported to Israel in May 1960 to face charges of crimes against the Jewish people, crimes against humanity, and war crimes. The next year, Eichmann was tried as the mastermind of the Final Solution. His defense was meager—Eichmann would claim that he was **simply following orders**, a defense that had been tried at Nuremberg but failed—and the result of the trial seemed predetermined from the moment of his abduction. Eichmann would hang for his responsibility in the Nazi slaughter of six million Jews.

The trial is most remembered today for giving rise to Hannah Arendt’s Eichmann in Jerusalem: A Report on the Banality of Evil (1963), originally a series of essays for the New Yorker magazine. The book became the subject of highly charged debates that served as a proxy for adjudicating the responsibility of many two decades earlier. Arendt was attacked by those who mistook her account of Eichmann’s banality as a person to mean somehow his acts were such; by those who thought she underplayed Eichmann’s virulent and murderous antisemitism to render him as a cliché-addled bureaucrat; and by those who felt her far too critical of those, including members of the Jewish councils (Judenräte), who cooperated with the Nazi regime. In particular, critics were inflamed by Arendt’s claims of Eichmann as “banal” while pointing her ire in many passages on “victims” of the regime. Critics accused her of not having enough of an understanding of the realities of life under Nazi occupation. But while there’s room to argue with Arendt’s historical claims and her depiction of the character of Eichmann, the idea that she didn’t understand the plight of living under such a regime was a contemptible lie.

While still in Berlin, Arendt had secretly carried out research for Kurt Blumenfeld, secretary general of the Zionist Federation of Germany, on the antisemitic propaganda being rushed to print by various German business and civil groups believing in or at least wanting to be seen to parrot the new regime’s views on World Jewry. Arrested by the Gestapo for her efforts, she was interrogated over eight days (she told the police only a parade of lies about those with whom she had been in contact), and upon her release fled with her mother without travel documents on a perilous journey to Prague (whose Jewish population ballooned as it was a stopping point for those escaping persecution), then Geneva, and then to Paris. In Paris, she would live as a stateless refugee working for Jewish organizations working to find safety for the many refugees fleeing Nazi Europe. In May of 1940, Arendt's life would be upended again as the Vichy regime in France, collaborating with Nazi Germany, classified her and other Jews as “enemy aliens.” She was interned at Gurs concentration camp and forcibly separated from her husband Heinrich Blücher, who was detained in a camp near Paris. In mortal danger, Arendt managed to escape from Gurs in July and eventually reunited with Blücher, who had also fled his internment. The couple spent four harrowing months in hiding, at risk of being discovered by Vichy authorities, before securing emergency American visas. Their journey to freedom took them through Lisbon, where they waited several months before finally reaching the U.S. in May 1941. (The writer Walter Benjamin attempted the same route shortly after, but facing arrest at the French-Spanish border, he took his own life rather than face what the Nazis had in store for him.)

Thus, while many critics asked who she was to judge those who remained in Germany and made many compromises to survive, Arendt knew from **direct experience** the **dangers faced from** the fast-changing **morals of societies**—first Germany, then France—that had fallen under humanity’s worst. As for who is in a position to judge such things, Arendt provided an extended answer in the form of a lecture in 1964, “Personal Responsibility Under Dictatorship,” while still reeling from much of the public controversy over the Eichmann book.

To read it now is to be assailed on all sides by the claims on each of us under the Trump regime, and that there is no twisting free of these responsibilities. **Any excuses** we might hear **for bending the knee to** the second **Trump** administration are held up and **whither instantly** under her criticism. The essay reads is uncanny in precisely identifying the psychological and moral patterns of capitulation and cooperation we see playing out today.

That said, what makes her work so powerful isn’t its prescience but her profound understanding of how such authoritarian systems **corrupt** us **from within**. Arendt observes the alarming speed with which moral standards can be inverted overnight. “All our experiences tell us that it was precisely the members of respectable society, who had not been touched by the intellectual and moral upheaval in the early stages of the Nazi period, who were the first to yield,” she says in the lecture. “They **simply exchanged** one system of **values** against another.” These supposedly **“good citizens” didn't resist** but **adapted** with disturbing ease to new, corrupt norms.

Equally troubling is Arendt's insight into how readily people surrender individual judgment to systems. By transforming themselves into **mere “cogs”** in a larger machine, they **absolve** themselves of **personal responsibility**. This **psychological abdication** offers both a self-rationalization and a defense. Perhaps most surprising is Arendt's observation that it was neither the elite who had greater power to resist nor those with the strongest previous moral convictions—these groups often fell quickly into line. Rather, **resistance** frequently **came from skeptics** and others who seemed to lack any previous strong commitments at all. Their **moral clarity emerged** not from established ethical frameworks but from a **fundamental, uncompromising sense** of what they could live with—and what actions would make it impossible to live with themselves.

The lecture isn’t some grandstanding harangue about the need for heroism. Instead, she makes clear that resistance begins not with heroic action but with the simple refusal to participate in the regime and its lies, as well as the comfortable self-deceptions that make complicity possible.

What critics misunderstood about Eichmann in Jerusalem was seeing it as critical of those who had to suffer under Nazi rule instead of an empowering treatise on resistance, with its constant reminder that even in seemingly powerless positions, the choice to withdraw one’s support from corrupt systems remains a meaningful assertion of humanity. As such, the historical context for the lecture is as crucial as the biographical background of the controversies around Eichmann: Arendt was addressing the **moral questions** that arose during the postwar trials of Nazi officials, particularly how **ordinary people** were **complicit in extraordinary evil**.

Today, most Americans who think of postwar punishments of the Nazis recall the trials and verdicts at Nuremberg. However, Arendt’s lecture was given in the years when a pattern had emerged in which former Nazis responsible for unspeakable horrors were given appallingly light verdicts. For those who look to the judgment of history as a kind of emotional salve during dark times, this period serves as a clear rebuttal to any belief in inevitable moral progress toward a point when history will judge the past rightly. That future, too, has to be fought for.

In the last 1950s and early 1960s, German judges insisted that Nazi-era crimes could be tried only according to the standards of law valid at the time they were committed, which usually led to acquittals or minimal sentences. The fact that it was Israel, not Germany, that brought Eichmann to justice highlights precisely what Arendt was arguing. In this context, Arendt's lecture becomes even more palpable—not only had countless ordinary Germans supported the regime through their actions, but the postwar legal system then provided another layer of protection through its narrow interpretation of culpability. If you’re worried that a future U.S. administration will again argue for turning the page on the crimes committed in our name, Arendt’s lecture is there to share your scorn.

At the beginning of the lecture, Arendt describes a deep disappointment many had as they watched an entire population capitulate so quickly:

I had somehow taken it for granted that we all still believe with Socrates that it is better to suffer than to do wrong. This belief turned out to be a mistake. There was a widespread conviction that it is impossible to withstand temptation of any kind, that none of us could be trusted when the chips are down, that to be tempted and to be forced are almost the same.

At this point, Arendt quotes Mary McCarthy as saying, “If someone points a gun at you and says ‘Kill your friend or I will kill you,’ he is tempting you, that is all.” Though the scenario can seem histrionic or, indeed, irresponsible, it wasn’t. Here is a passage from Arendt’s Origins of Totalitarianism where she discusses how the terror of Nazism produced a **singular dehumanization** that’s as impossible to fathom as it is a historical reality:

Totalitarian terror achieved its most terrible triumph when it succeeded in cutting the moral person off from the individualist escape and in making the decisions of conscience absolutely questionable and equivocal. When a man is faced with the alternative of betraying and thus murdering his friends or of sending his wife and children, for whom he is in every sense responsible, to their death; when even suicide would mean the immediate murder of his own family—how is he to decide? The alternative is no longer between good and evil, but between murder and murder. Who could solve the moral dilemma of the Greek mother, who was allowed by the Nazis to choose which of her three children should be killed?

Against all this, McCarthy’s example at least offers some level of humanity left. And while certainly extreme, anyone who considers the dilemma for a moment realizes what it would mean to choose a loved one’s death over yours—to choose, per Socrates’ dictum, causing harm to another over having it done to you. Given this starting point, it isn’t difficult for Arendt to show all the **petty inconveniences** one might **throw up as excuses**—a giant law firm might lose clients, a university complaining too loudly about what’s happening to its students could lose too much in funding, etc.—are **profoundly unserious** by comparison.

She then moves one by one through the claims of those downplaying the responsibility of those caught within the “moral collapse” of the Nazi regime: that one is but a cog in a much larger machine; that one was just following orders with no real agency or responsibility; that there was collective guilt for the Germans (which manages to make no one in particular responsible and thus makes no one guilty); that one was simply swept up in the "spirit of the times" or caught in historical forces beyond individual control; that one was a “law-abiding citizen”; that one’s acts wouldn’t make a difference; and, finally, that one was simply acting out of fear for one’s safety, which Arendt notes was rare—**surprisingly few**, in fact, **had guns to their heads**, at least among those she’s discussing.

Arendt then points out that it wasn’t as if the moral status of the regime was a problem for onlookers:

We were outraged, but not morally disturbed, by the bestial behavior of the storm troopers in the concentration camps and the torture cellars of the secret police, and it would have been strange indeed to grow morally indignant over the speeches of the Nazi bigwigs in power, whose opinions had been common knowledge for years.

She doesn’t mean, of course, that Nazism wasn’t a moral horror; it’s just that few things are easier than deciding upon the morality of Nazis. The moral weight upon each person came from elsewhere:

The moral issue arose only with the phenomenon of “coordination,” that is, not with fear-inspired hypocrisy, but with this very early eagerness not to miss the train of History, with this, as it were, honest overnight change of opinion that befell a great majority of public figures in all walks of life and all ramifications of culture, accompanied, as it was, by an incredible ease with which lifelong friendships were broken and discarded. In brief, what disturbed us was the behavior not of our enemies but of our friends, who had done nothing to bring this situation about. …. Without taking into account the almost universal breakdown, not of personal responsibility, but of personal judgment in the early stages of the Nazi regime, it is impossible to understand what actually happened.

No doubt, this passage has some very prominent examples from these past few months racing through your mind. Particularly dispiriting in Arendt's account is how quickly she says one’s conscience can be co-opted by an authoritarian regime. “It was of great political relevance," she had written in Eichmann in Jerusalem, “to know how long it takes an average person to overcome his innate repugnance toward crime.”

A crucial rationale used early in the Nazi regime and one heard today was that, as Arendt puts it, “if you are confronted with two evils… it is your **duty to opt for the lesser one**, whereas it is irresponsible to refuse to choose altogether.” Yet Arendt quickly notes the **catastrophic morality of this** position: “those who **choose the lesser evil forget** very quickly that **they chose evil**.” More insidiously, the “lesser evil” argument **didn’t just provide** external **justification** but was “one of the **mechanisms built into** the machinery of **terror and criminality**.” Authoritarian regimes deliberately employ this logic as a **conditioning tool**, implementing horrors incrementally, she argues. This kind of “psychological grooming” allowed ordinary **citizens to participate** in extraordinary evils while maintaining their self-conception as morally good—after all, they didn’t choose the worse evil—effectively dismantling their ethical resistance one compromise at a time.

Pretty soon, you’re replacing an imagined set of commands for your own conscience. In crucial passages from Eichmann in Jerusalem, Arendt worked through parts of Eichmann's interrogations where he discusses elevating the laws of Hitler to the status of a perverse moral imperative. For Kant, the categorical imperative requires that one act only according to maxims that can become universal laws—principles that would make sense if everyone followed them, regardless of personal desires or circumstances. But Eichmann told his Israeli interrogators that, rather than following his own moral reasoning, he viewed his moral responsibility to be acting as if the Führer were there to approve what he was doing. Thus, bureaucratic functionaries need not feel guilty for carrying out atrocities if they’ve simply replaced a fantasy of a leader’s decisions for their own. This is what **enables** ordinary people, not the fantastic monsters of horror films, to participate in **evil**—such **acts become** matters of **duty and professional obligation**.

With such complicity in the background, one might be surprised by Arendt’s relative sympathy for those who typically receive much of the criticism: the “nonparticipants” who chose **internal withdrawal**—what Germans called “Innere Emigration.” These were the intellectuals, artists, and ordinary citizens who **remained physically** in Germany during the Nazi period but **deliberately withdrew from public life**, abstaining from supporting the regime in every way possible. While outwardly an abdication of political responsibility, their stance puts the lie to the claims of many that complicity with the regime was inevitable.

To those who think we need the punishment of the judgment of history for those tempted to comply with authoritarian regimes, Arendt offers something far more personal and down to earth, describing those who resisted as “ask[ing] themselves to what extent they would still be able to live in peace with themselves after having committed certain deeds.”

Having knocked down the last of the excuses of the complicit—what else was I to do?—Arendt can move to the central claim of the lecture: that “**obedience**” **always amounts to support**, no matter what we tell ourselves to sleep at night.

We have only for a moment to **imagine** what would happen to any of these forms of government **if** enough **people** would … **refuse support**, even without active resistance and rebellion, to see how effective a weapon this could be. It is in fact one of the many variations of nonviolent action and resistance—for instance the power that is potential in civil disobedience.

This redescription of **obedience and complicity** as support **is** perhaps the most **salient** point for us **today**. We should refuse the comfort of passive language that allows individuals to distance themselves from their actions. The **bureaucrat who processes deportation** orders, the **lawyer who drafts** legal **justifications** for renditions to El Salvador, the **writer who normalizes extremism** with cheery prose about administration moves—all are **actively supporting systems** they claim merely to serve.

But so, too, are those who think there’s nothing to be done, that the future is a fait accompli. Arendt is scathing about something Adam Gurri, Josh Marshall, and others have critiqued as the “doomerism” of some on the left—the savvy know-it-alls ready to pipe in about how they saw all the horrors of today coming years ago and now dismiss any talk of elections in 2026 as a naive distraction from the ineluctable consolidation of authoritarian rule. In Origins of Totalitarianism, Arendt argued that such “savvy” takes show a fundamental misunderstanding of reality:

Comprehension [of what’s happening] does not mean denying the outrageous, deducing the unprecedented from precedents, or explaining phenomena by such analogies and generalities that the impact of reality and the shock of experience are no longer felt. It means, rather, examining and bearing consciously the burden that events have placed upon us—neither denying their existence nor submitting meekly to their weight as though everything that in fact happened could not have happened otherwise. Comprehension, in short, means the unpremeditated, attentive facing up to, and resisting of, reality.

Acceding to the inevitable—“doomerism”—is just another means of supporting the unsupportable. No doubt, such fears of our collective futures aren’t unfounded, but they shouldn’t be allowed to cohere into what amounts to support for what we face today. It’s simply another way of switching to the historical or inhuman scales when, in fact, the **true moral question** is **about** the weight of **responsibility that falls upon each of us**, while acknowledging that we exist within a web of relations with others. What makes Arendt’s “Personal Responsibility Under a Dictatorship” essay so profound is that she **locates resistance** not in grand gestures requiring extraordinary heroism, but **in preserving one's capacity** to think independently and **refuse complicity in evil** even when everyone else has capitulated.

We cannot control the circumstances we inherit—so many never asked for this—but **we always retain** the **power to withhold our support** from systems that violate human dignity. And in that **vital first act of defiance lies** the **seeds** for resisting the reality in which we find ourselves today.

## OFF

### CP – Distinguish

#### The United States Federal Government should rule compelled speech violates the first amendment and distinguish this precedent from collective bargaining cases.

#### Solves their precedent advantage.

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Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of “confining a case to its facts,” courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, “correct” principle.5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined.6 Confining thus splits a doctrinal area in two. When a confined case’s facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts’ desire not to disturb reliance interests ordinarily functions as a brake on legal correction.8 Confining eases off this brake by enabling certain reasonable expectations— those formed in reliance on the particular facts of the confined case—to remain unaffected by a principle’s repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court’s avowed commitment to overruling a case only when it can articulate a “special justification” for doing so—one that transcends mere disagreement with the case’s reasoning. This requirement has not been understood to apply to confining,9 even though confining eviscerates everything a case stands for except its precise result.10 Similarly, although each federal court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining.11 By labeling these deviations from precedent “confining,” in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court’s prohibition on “prospective overruling”—i.e., continuing to treat a case as good law only with respect to conduct predating its overruling.12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court’s doctrinal course-corrections.13 The Court’s retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations.14 But this is precisely what happens with confining.15 This discrepancy— oddly—appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: “Supreme Court Overrules Smith v. Jones” or “Supreme Court Confines Smith v. Jones to Its Facts.” Confining’s relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A confining judge can say “with a straight face, ‘I didn’t vote to overrule it. I simply limited the earlier decision to its facts.’”16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable— and strangely underexplored—threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public’s ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority.17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect—even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as “good law” in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself.18

## Advantage 1

### 1nc – Solvency

#### Collective bargaining rights are enforced through the NRLB – that means rights are ineffectual even if granted.

**McFerran 25**, Senior fellow at the Century Foundation, former chairman of the National Labor Relations Board “Trump Executive Order Could Prevent Independent Agencies from Protecting Workers’ Rights,” The Century Foundation, February 21, 2025, <https://tcf.org/content/commentary/trump-executive-order-could-prevent-independent-agencies-from-protecting-workers-rights/>) rose

On February 18, President Trump issued an [executive order](https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/) purporting to assume control over [independent administrative agencies](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=44-USC-496203623-1695366633&term_occur=999&term_src=title:44:chapter:35:subchapter:I:section:3502), including those that hear and decide individual cases involving workers’ rights and protections, such as the [National Labor Relations Board](https://www.nlrb.gov/) (NLRB). Independent agencies were carefully designed by Congress—decades ago—to ensure that they can act in accordance with the law, unaffected by political influence or presidential favoritism. Giving the White House such direct and unprecedented control over independent agency leaders’ decisionmaking—including the ability to override their legal judgments and defund their work on specific matters—destroys these agencies’ neutrality.

In terms of the workplace, this radical assertion of White House influence strongly suggests that critical worker rights and protections could go unenforced—or even that particular White House allies could effectively be treated as exempt from accountability for the laws that protect American workers.

The Executive Order Functionally Eliminates These Agencies’ Independence

The order, entitled “Ensuring Accountability for All Agencies,” purports to “improve the administration of the executive branch” and “increase regulatory officials’ accountability to the American people” by asserting unprecedented new presidential powers to control the operations and decisionmaking of agencies designed by Congress to be insulated from political influence. These new powers include:

giving the president and the U.S. attorney general the ability to override the agency’s own interpretation of the law it administers;

giving the director of the Office of Management and Budget (OMB) the authority to control expenditure of the agency’s funds, including defunding “particular activities, functions, projects or objects”;

requiring independent agencies to submit any new regulations to OMB for substantive review;

requiring all “agency heads” (including, it would seem, each individual member of bipartisan boards such as the NLRB, whether Republican or Democrat) to employ a “White House Liaison” as a senior staffer in their offices;

requiring independent agency chairmen to “regularly consult with and coordinate policies and priorities with the directors of OMB, the White House Domestic Policy Council and the White House National Economic Council”; and

giving the director of the OMB the authority to establish and evaluate the “performance standards and management objectives” for independent agency heads.

The scope of the order’s impact on the ability of independent agencies to make policies or regulations is clear on its face: instead of exercising independent, expert judgment (as Congress intended), these agencies would now make policy on behalf of the White House and serve their statutory missions only when expressly given White House permission. While the order purports to restore “sufficient accountability to the President,” it is more accurately viewed as a clear intrusion on the authority of Congress to determine that insulating such agencies from political control over their day-to-day decisionmaking serves the public welfare. Indeed, the full scope of the White House’s efforts to intrude on independent agencies’ autonomy is made clear by a [second order](https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency-regulatory-initiative/), issued the next day, requiring all federal agencies—including independent agencies—to work with their “DOGE team leads” and OMB and identify for possible elimination all existing agency regulations that are not, in the view of these external actors, based on the “best reading” of the underlying law. Independent agencies have not historically been subject to such a highly politicized regulatory review process, because they have, up until now, been treated as actually independent.

The Executive Order Will Especially Compromise Adjudicative Independent Agencies

The implications of such a radical takeover of independent agency autonomy are especially critical for the small group of independent agencies that do business primarily by adjudication—in other words, agencies that make law through the consideration of individual cases affecting specific parties, rather than through generally applicable rules or policies. The NLRB is one such agency, along with others such as the [Federal Mine Safety and Health Review Commission](https://www.fmshrc.gov) or the [Occupational Safety and Health Review Commission](https://www.oshrc.gov). Presidential control of the day-to-day decisionmaking of these agencies compromises the entire adjudicative process, denying the people involved in these cases the ability to get a fair and impartial consideration of their claims. For workers who rely on the NLRB and other independent worker protection agencies to protect [critical workplace rights](https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights), this directly impacts the ability of individual workers to get justice without bias from outside political influences; hypothetically, the president could affect the outcome of a charge filed against a company owned by political ally to the president, or prevent a union from being certified or a worker being reinstated to their job at a company owned by a donor to the president. The possibilities for abuse are alarming to contemplate.

In simplest terms, the NLRB is an agency with two separate functions: prosecuting (through the general counsel) and adjudicating (through the five-member board) complaints alleging unfair labor practices, such as when an employer disciplines or fires workers who speak up about their working conditions, or when an employer refuses to bargain with the workers’ union. The general counsel also oversees elections where workers determine whether they want union representation, and the board decides disputes that arise out of the election process.

While members appointed to the NLRB are all [politically accountable](https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act)—they are nominated by the president and confirmed by the Senate—the NLRB (and other independent agencies) was clearly intended by Congress to serve as an impartial, expert administrator of the law, free from political influence. The NLRB and other independent agencies were never envisioned to be supervised by the White House, much less function as a tool of the president.

To be sure, the new executive order does not expressly give the White House authority to dictate, decide, or override the outcome of individual cases before independent agencies like the NLRB. However, the unprecedented level of control that the White House is now asserting over these agencies could certainly be used that way. It is not hard to imagine how dangerous abuses could arise. To use the NLRB as an example, such abuses could include:

denying the NLRB general counsel the ability to use agency funds to prosecute particular types of complaints filed by workers, or even complaints against particular industries or parties;

instructing the NLRB chairman to “coordinate policies and priorities” with the White House by prioritizing consideration of cases brought by employers against unions over cases that would give backpay to discharged workers or affirm the results of union elections;

refusing to allow the agency to defend itself and its decisions in federal court if challenged by outside parties or industries that are friendly with the White House, or if the White House disagrees with the agency’s resolution of the case; and

working through the newly appointed “White House Liaisons” in each board member’s office to influence which cases are prioritized or compromise the confidentiality of the deliberative process, especially for minority board members from the political party opposing the president’s.

#### Rights can’t deter or control employers.

Magner 20, JD, Field Attorney at National Labor Relations Board (Brandon, “Does the NLRB Actually Matter?,” Labor Law Lite Substack, https://brandonmagner.substack.com/p/does-the-nlrb-actually-matter)

The National Labor Relations Board, the United States’ sole enforcer of federal labor law, turned 85 this year. It has few friends or allies. Conservatives condemn it as a nuisance that hinders corporate decision-making; libertarians want it abolished. The Left views it as an ineffectual and outdated hall monitor; liberals have long mostly ignored it.

The NLRB began its existence as arguably the most radical and successful agency of the New Deal, enthusiastically enforcing the National Labor Relations Act against many of the most powerful corporations in the country until it was red-baited into submission. The Labor Board’s statutory scheme has underwent only one major revision since its inception; its powers and procedures otherwise remain virtually frozen into their World War II-era structure.

For the uninitiated, that framework is as follows. The NLRB is empowered with overseeing and enforcing federal labor law. Its two primary functions are (1) the supervision of union representation elections to establish collective bargaining relationships and (2) the investigation and prosecution of unfair labor practices committed by employers and unions. The General Counsel acts as a prosecutor, sending cases to a five-person board which serves in a quasi-judicial role on appeal from decisions rendered by administrative law judges. The Labor Board’s headquarters lie in D.C., but the bulk of the investigative and case handling work is performed in its 48 individual field offices stationed around the country.

The agency’s workload has risen and fallen with the fortunes of the labor movement. In 1980, the Labor Board docketed a record 44,063 unfair labor practice charges and employed 2,921 full-time permanent staff. In 2019, those numbers stood at 18,552 charges and 1,286 personnel. Some of that decline is due to internal sabotage by Republican appointees, but the Labor Board undoubtedly has less to do when private-sector union density stands at 6.2%.

This decline in responsibility and prestige was predicted by the NLRB’s most frequent customer: organized labor. As early as 1984, then-AFL-CIO President Lane Kirkland—noting the many restrictions placed upon unions under the NLRA—argued that unions would be better off if the Act were repealed and replaced with the old “law of the jungle.” The current federation President, Richard Trumka, expanded upon this reasoning in a 1987 law review article written during his time leading the United Mine Workers. These arguments must be contextualized within the labor movement’s general disgust with the exceptionally anti-union Reagan Board, which Trumka artfully described as “that gulag of Section 7 rights.” But they were also part of unions’ increasingly negative rhetoric following the Labor Law Reform Act’s death-by-filibuster during the Jimmy Carter administration, which had promised to cut down on employers’ wanton violations of the NLRA primarily by bolstering the NLRB’s available remedies.

Those shortcomings persist today. As decreed by the Supreme Court, the Labor Board is without power to order punitive damages against violators of the law. It cannot compel parties to agree to any contract provisions, even ones that employers deliberately stonewall negotiations over. It cannot ban the use of permanent replacements, offensive lockouts, or management rights clauses. It cannot prevent employers from closing their plants for explicitly anti-union purposes and must allow the vast majority of partial closings to be completed without any sort of bargaining input from the affected unions. It must cede authority to commercial arbitration, federal immigration laws, and the vast universe of employers’ state property rights.

#### Decisions won’t go the way of labor, and if they do, they’ll take forever which kills unions.

**Tameez 25**, writer at Nieman Journal Lab, Harvard. (Hanaa’, “What will a conservative National Labor Relations Board mean for news unions?” Nieman Lab, January 30th, 2025, <https://www.niemanlab.org/2025/01/what-will-a-conservative-national-labor-relations-board-mean-for-news-unions/>) rose

A right-ward power shift on the already cash-strapped and short-staffed NLRB will likely make the agency more employer-friendly and union organizing [more difficult](https://www.law360.com/employment-authority/articles/2287984/unions-to-face-hurdles-organizing-under-trump-nlrb), the labor board’s observers say. Workers across industries, including in journalism, will have to be their own best advocates if they can’t expect enforcement of federal laws.

But first, what does the NLRB do exactly?

The NLRB is a “[quasi-judicial](https://www.nlrb.gov/about-nlrb/who-we-are)” body made up of presidential appointees (confirmed by the Senate) that upholds federal labor laws. It hears and decides cases on labor law violations under the [National Labor Relations Act](https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act), administers union elections, investigates unfair labor practice charges (ULP) by employers, workers, and unions, and can help mediate disputes between employers and employees.

In the news industry, that has looked like: [ruling](https://thenewsguild.wpenginepowered.com/wp-content/uploads/2021/07/BDO.02-CA-262640.DBD_.02-CA-262640.NBCUniversal-Final.docx-1.pdf) NBCUniversal couldn’t roll back staff wage increases in 2020; declaring McClatchy couldn’t impose pageview quotas on its journalists while [settling](https://newsguild.org/nlrb-rules-for-idaho-newsguild-pageview-quotas-are-not-allowed/) an unfair labor practice charge from the Idaho Statesman News Guild in 2021; and [seeking](https://onlabor.org/tracking-attacks-on-the-nlrb-mixed-result-in-dc-agency-wins-elsewhere/) an injunction against the Pittsburgh Post-Gazette in 2024 to stop alleged unfair labor practices while its unionized workers are on strike and trying to negotiate a contract.

The agency has 26 field offices across the country that [investigate](https://www.nlrb.gov/resources/nlrb-process) cases in their corresponding regions. If warranted, the regional office files a complaint and then an administrative law judge hears the case in a regional hearing to make a decision. Either party in the case can appeal the decision to a federal appellate court, which can decide to enforce or overturn the NLRB’s ruling. The NLRB itself can’t enforce its own rulings and its stances usually [correlate](https://www.jstor.org/stable/26356886) with those of the ruling party of the time.

The agency has been [chronically underfunded](https://www.epi.org/publication/bidens-nlrb-restoring-rights/) and [understaffed](https://www.theguardian.com/us-news/2022/aug/17/us-labor-agency-union-activity) with a [steadily increasing](https://www.nlrb.gov/news-outreach/news-story/union-petitions-filed-with-nlrb-double-since-fy-2021-up-27-since-fy-2023) workload in recent years, which has weakened its impact and reliability. It can take months or even years for the NLRB to issue a decision in a case, leaving workers in limbo.

[Hamilton Nolan](https://www.hamiltonnolan.com/) is a longtime labor journalist who covers unions, the labor movement, and inequality for In These Times. As a reporter for Gawker in 2015, he was part of the union organizing committee for the Gawker Media union. He said that with a Republican-led NLRB, newsroom unions in disputes with their employers will be less likely to rely on the government as a good-faith referee.

“It will be bad in the sense that Trump is breaking the government machinery that oversees the union organizing process,” Nolan said. “Republicans are making it bureaucratically harder to enforce labor law and get new unions certified. But the fact is that this will only be temporary, and it shouldn’t hold any workers back from organizing. We need unions now more than ever.”

According to [new data](https://www.bls.gov/news.release/union2.nr0.htm) from the Bureau of Labor Statistics, there were 14.3 million unionized workers in the United States in 2024, making up just 9.9% of eligible wage and salary workers. That’s a slight decline from [10.8%](https://www.bls.gov/news.release/archives/union2_01222021.pdf) in 2020 and [10.7%](https://www.bls.gov/news.release/archives/union2_01262017.pdf) in 2016. But according to [Jon Schleuss](https://www.linkedin.com/in/jonschleuss/), president of The [NewsGuild-Communications Workers of America,](https://newsguild.org/) the organization saw a huge wave in media union organizing during the first Trump administration. About 3,400 media workers unionized with The NewsGuild-CWA alone between 2017 and 2020, during Trump’s first presidency. Since 2016, nearly 8,000 media workers from 146 companies have unionized with The NewsGuild-CWA. Schleuss said he expects another wave of organizing during Trump’s second term.

“This is a moment when workers, regardless of industry, are going to be trying to reduce the chaos in their lives and especially at work,” Schleuss said. “They’re going to want to form unions, probably at a higher rate.”

Several media organizations in recent years have voluntarily recognized unions formed by their newsrooms. Among those are the [Texas Tribune](https://newsguild.org/the-texas-tribune-guild-formally-recognized-as-a-union/), [Politico](https://newsguild.org/politico-ee-staffers-win-union-recognition/), [The Atlantic](https://www.nyguild.org/front-page-details/the-atlantics-business-and-technology-workers-win-voluntary-recognition-of-their-union), [Grist](https://newsguild.org/grist-union-wins-voluntary-recognition/), and [ProPublica](https://newsguild.org/propublica-guild-wins-voluntary-recognition/), to name a few.

However news publisher resistance to the National Labor Relations Act of 1935 — the federal law that protects employees’ rights to unionize, collectively bargain, and advocate for better working conditions without retaliation — has been part of the story from the beginning. The 1937 Supreme Court ruling in [Associated Press v. Labor Board](https://supreme.justia.com/cases/federal/us/301/103/), for example, declared that the AP had illegally fired journalist Morris Watson in 1935 for his union organizing activity, and that “the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.” That type of hostility continues today, Media Guild of the West president [Matt Pearce](https://bsky.app/profile/mattdpearce.com) said.

“What we’re returning to is a kind of pre-1930s period where employer-labor relations were much more volatile, with more strikes and more disruption to commerce,” Pearce said. “The rules were put in place for a reason. And it’s entirely possible we’re all going to relearn what those reasons were.”

Long wait times

The NLRB has seen a [steady increase](https://www.nlrb.gov/news-outreach/news-story/union-petitions-filed-with-nlrb-double-since-fy-2021-up-27-since-fy-2023) in its workload in recent years; the NLRB received 3,286 union election petitions between October 1, 2023 and September 30, 2024, a 27% increase from the previous year and more than double since 2021. It also received over 21,000 unfair labor practice charges, up 7% from the year before. There are currently over 26,000 open unfair labor practice charges, according to the NLRB’s case search portal.

But the agency’s [chronic underfunding](https://www.epi.org/publication/bidens-nlrb-restoring-rights/) and [understaffing](https://www.theguardian.com/us-news/2022/aug/17/us-labor-agency-union-activity) have limited ~~handicapped~~ its ability to enforce labor laws in a fair and timely manner, labor leaders say. The NLRB went nine years without a budget increase between 2014 and 2023. The agency’s budget was $299 million in 2024, and requested an increase to $320 million for FY 2025, which the NLRB’s own union has said “[does not come close to providing us with the resources we need to enforce federal labor law](https://x.com/TheNLRBU/status/1767617322473206051).”

In 2023, the average processing time for a union petition request for an election was 37 days, while the processing time between a petition filing and the certification of election results was 56 days, according to a 2024 report [the agency issued](https://www.nlrbedge.com/p/nlrb-processing-times-have-dramatically). The average processing time for an unfair labor practice charge to be investigated and disposed (concluded) is 124.2 days (four months), up 50% from the year before.

“Sometimes **it’s as if there’s no NLRB at all**,” Pearce said. “Part of my skeptical reaction is that there’s not going to be much difference, because even if you have a conservative board, it could take a long time for charges to get processed even if you’re going to get rejected by a more employer-friendly, Trump NLRB board.”

Regardless of the board’s partisan slant, those long wait times have real-life implications, putting workers and their livelihoods at risk.

“If the employer is retaliating against employees – if it’s firing employees illegally or implementing changes to benefits or pay without negotiation – that’s harmful,” Schleuss told me.

The dangers of long processing times are already playing out in Connecticut. In August 2024, more than 100 Hearst Connecticut reporters, photographers, editors, and digital producers [formed](https://newsguild.org/newsletter-introducing-connecticuts-whale-union-%F0%9F%90%8B/) the Connecticut News Guild. Because Hearst said it would not voluntarily recognize the union, the union had to file a petition for its regional NLRB office to administer an [election](https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections#:~:text=Alternate%20path%20to%20union%20representation,filed%20within%20those%2045%20days.). As of this writing, the regional NLRB office still hasn’t set an election date. A union can’t bargain for a contract with an employer until after election results are certified by the NLRB.

According to Connecticut News Guild organizing committee member [Martha Shanahan](https://x.com/martha_shan), the No. 1 question she gets from guild members is when the election will be. She can’t give them an answer. “As it drags out longer and longer, people are going to get tired of hearing that,” Shanahan said.

“Our election being delayed this long is affecting us because it’s just getting much more likely that we might lose people’s hearts or people might get discouraged,” she added. “Our support is still strong, and we do still feel confident that we’ll win the election when we get there. But every week and month that goes by, it’s just that much more time for people to lose momentum.”

## Advantage 2

### 1nc – No Precedent

#### Fully precedential rulings are no more durable---courts overrule all the time.

Schauer 18, David and Mary Harrison Distinguished Professor of Law at the University of Virginia. (Frederick, 2018, “Stare Decisis—Rhetoric and Reality in the Supreme Court,” The Supreme Court Review, pp. 121-143, <https://www.journals.uchicago.edu/doi/pdf/10.1086/702560>, Ulven)

Justice Scalia’s skepticism, the relative newness of stare decisis in the common-law world, and the rarity of stare decisis in the full panoply of decision-making environments should come as little surprise. For stare decisis to be of genuine importance, it must tell decision makers to make decisions they think mistaken on first-order substantive grounds. Stare decisis is little more than excess baggage for a decision maker who believes a previous decision to be correct and wishes to follow it for that reason. And thus, as Justice Kagan has recently put it, “[r]especting stare decisis means sticking to some wrong decisions.”30 This is not to say that there are not second-order institutional (and possibly subconstitutional) reasons for a decision-making environment to adopt and enforce a stare decisis norm, and thus to encourage or compel decision makers to make what they believe to be mistaken decisions in order to serve larger institutional goals. The arguments from settlement and reliance are familiar,31 and in addition there may be the less familiar virtues of cross-temporal integrity and consistency, virtues that may at times produce strong community-building or community-reinforcing practices.32 But all of these virtues compete, from the perspective of the putatively constrained decision maker, with the virtues of getting things right, and of rendering a substantively correct judgment. It should come as little surprise, therefore, that the virtues of stare decisis are hardly self-evident to the decision maker who is urged to make what she perceives to be an incorrect decision. And thus it should also come as little surprise that stare decisis is a virtue, as the following section will explain, that is far more often preached than practiced.

III. The Evidence

The concluding phrase of the previous section was but an introduction to an examination of what the empirical evidence tells us about the existence of actual stare decisis constraint, especially in the Supreme Court. So if we pose the question as just framed, we then need to inquire how often Supreme Court Justices actually do suppress their own best legal (and, at times, constitutional) judgment in deference to past judgments by the Court that they now believe (and may then have believed) are legally mistaken. That, after all, is what a norm of stare decisis would require, but the question is about the extent to which that norm is in fact followed, or, to put it differently, about the extent to which such a norm actually exists.

The conventional empirical answer to that question as provided by those who study Supreme Court decision making systematically is well captured by the title of a book by two of the leading political scientists who have examined Supreme Court decision making. Stare Indecisis is what political scientists Saul Brenner and Harold Spaeth entitle their 1995 book,33 and the title conveys their conclusion that a stare decisis norm seldom causes the Court as a whole or individual Justices to prefer the stare-decisis-indicated outcome to what would otherwise be their preferred legal or constitutional outcome. And because the Brenner and Spaeth research builds on Spaeth’s earlier conclusions that the votes of individual Justices are more determined by the Justices’ prelegal ideologies and policy preferences than by the legal factors of text, precedent, history, and the traditional methods of legal reasoning,34 it is fair to conclude that their research points to these prelegal ideologies playing a larger role than stare decisis in determining and predicting Supreme Court outcomes.

Not surprisingly, the Brenner and Spaeth findings have spawned a substantial research agenda for both themselves and others. But with few exceptions,35 the basic conclusions of the attitudinal model, both with respect to Supreme Court decision making in general and with respect to the role of stare decisis in particular, have withstood scrutiny. Indeed, the most extensive subsequent study, Thomas Hansford and James Spriggs’s The Politics of Precedent on the U.S. Supreme Court, published in 2006, although focusing primarily on the way in which the strength of policy preferences influences the Court’s tendency to broaden or narrow an existing precedent,36 and although acknowledging a role for the so-called legal variables, nevertheless starts with the premise that the “[r]esearch consistently indicates that the justices’ policy preferences are the primary determinant of their votes on the merits of cases.”37 Similarly, an important study by Jack Knight and Lee Epstein concludes that a genuine stare decisis norm influences how cases are argued, how opinions are written, and how Supreme Court decisions are received by lower courts, but does not disturb the conclusion that the stare decisis norm has little effect on the Justices’ actual votes.38

These findings from the quantitative research are largely consistent with the conclusions that can be drawn from a more qualitative and anecdotal examination of the Supreme Court’s recent and not so recent decisional history. What that history strongly suggests is that in cases in which either the Court as a whole or individual Justices are inclined, precedent aside, to make a particular decision, the presence of an opposed precedent is rarely a barrier to reaching the precedent independent outcome. Forty years ago, Henry Monaghan lamented the unwillingness of the Supreme Court to take its own previous decisions seriously,39 and with characteristic bluntness he observed that the Court’s observations about the lesser weight of stare decisis in constitutional cases40 “usually means that stare decisis has no weight when the constitutional law on a particular subject seems, to a majority of the Court, to be in need of correction.”41

Little evidence suggests that Monaghan’s observations are less relevant or accurate today. As long as there are available in the decisional toolbox of the Justices multiple ways of rationalizing the avoidance of a seemingly applicable previous decision, the existence of that decision seldom stands as a significant barrier to what seems now to the Court or to individual Justices as the better decision to make, precedent aside, for the case before them. Sometimes this avoidance will be justified by efforts to distinguish the obstructive precedent, but just as often that precedent will be pushed aside or explicitly overturned because it is believed that conditions have changed,42 or because it is thought that the precedent has proved itself unworkable,43 or because it has been effectively overruled by intervening decisions,44 or because its theoretical or doctrinal foundations have been eroded,45 or because the precedent is simply a rule of procedure,46 or because the precedent is not recent,47 or because the precedent is constitutional and not statutory,48 or simply because the Court or Justice who rejects the precedent believes it to have been wrongly decided or badly reasoned.49 Indeed, the foregoing list—lengthy though it may be—is likely incomplete, for there appears to be little limit on the range of justifications that the Court has used and can continue to use in order to justify ignoring, overriding, rejecting, overruling, distinguishing, or otherwise refusing to follow a previous decision that it finds mistaken. And thus it is difficult to take issue with then-Justice Rehnquist’s assertion in his dissenting opinion in Garcia v San Antonio Metropolitan Transit Authority50 that the willingness of the Court to reject a previous decision is simply a function of whether there is a majority of the Court willing to take that course.51

The tissue-thin character of the stare decisis constraint in the Supreme Court is further exemplified by the general unwillingness of dissenting Justices to abandon their dissents in subsequent cases.52 If stare decisis operated as a serious constraint, we would expect Justices who were not on the prevailing side in some previous case to accept that the case that they thought wrongly decided was nevertheless an authoritative precedent despite their views about its correctness. And thus if there were in place a strong norm of stare decisis, we would expect those Justices to abandon their dissenting posture in deference to what had become the law over their objections. But we know that such a course is highly unusual, and the ubiquitous practice of persistent dissent53 provides further support for the conclusion that stare decisis is a norm far more often touted than followed.

There are, of course, exceptions to the foregoing generalizations. Among the most prominent of these exceptions is Justice Stewart’s approach to, first, Griswold v Connecticut54 and then Roe v Wade. 55 As is well known, Justice Stewart memorably dissented in Griswold, observing that a law being “uncommonly silly” offered insufficient basis for invalidating it in light of the fact that, to him, there was no “general right of privacy.”56 But eight years later, in Roe, Justice Stewart was willing to join the majority because of what he took to be the controlling force of a precedent with which he disagreed,57 even though there was no indication that even by 1973 Justice Stewart had disavowed or regretted the position that he took eight years earlier in Griswold.

The empirical virtue of Justice Stewart’s Griswold-Roe path derives from the fact that Justice Stewart was plainly on record as having disagreed with an outcome that he was then plainly willing to accept on stare decisis grounds. To the same effect is Justice White’s decision in Edwards v Arizona, 58 where he wrote for the majority in both applying and extending Miranda v Arizona, 59 a decision from which he had dissented.60 Similarly, Justice Kennedy, in Ring v Arizona, 61 joined the majority opinion even as he made clear his continuing disagreement62 with Apprendi v New Jersey, 63 the decision on which the majority opinion in Ring, and thus Justice Kennedy’s concurrence, was based.

Although there are other examples of the same phenomenon,64 they remain extraordinarily rare. Far more common are instances in which Justices who refer explicitly to stare decisis as a justification are Justices who did or would have agreed with the earlier decision, thus making, for them, the reference to stare decisis as causally inert for their conclusions and little more than makeweight in their opinions. In CBOCS West, Inc. v Humphries, 65 for example, Justice Breyer relied heavily on stare decisis in upholding a civil rights action based on a claim of retaliation,66 but it seems highly improbable that Justice Breyer disagreed on the merits with the decision67 whose stare decisis effect he argued demanded the result in CBOCS West. Similarly, Justice Powell appealed explicitly to stare decisis in his opinion for the Court in the Eleventh Amendment immunity case of Welch v Texas Department of Highways and Pubic Transportation, 68 but the role of stare decisis is undercut by his observation that the earlier decisions on whose stare decisis effect he purported to rely were ones in which the underlying substantive conclusion was one that had, he believed, “ample support.”69 And, most notably, although perhaps least clearly, the now-prominent70 stare decisis analysis of Justices O’Connor, Kennedy, and Souter in Planned Parenthood of Southeastern Pennsylvania v Casey71was offered in support of the stare decisis effect of Roe v Wade, but we do not know how any of those three Justices would have voted in Roe itself in 1973, nor do we know whether in 1992 any of them thought that Roe was rightly decided, nor how any of them would have decided Roe has it been first presented for decision in 1992. All we do know is that the joint opinion, despite its reliance on stare decisis, reads like an opinion defending the relevant parts of Roe on the basis of its merits and not its provenance, and thus that, at the very least, it is far from clear just how much causal influence stare decisis in fact exerted in the case.72

It would be misleading to conclude from the foregoing that stare decisis does absolutely no work in Supreme Court decision making. First, there are the examples, noted above,73 rare but not nonexistent, in which Justices with reasonably clear first-order substantive preferences have set them aside in the service of second-order stare decisis preferences. Second, we simply do not know the extent to which a causally effectual stare decisis norm influences votes to grant or deny certiorari. Third, and related to the second consideration, we do not know and cannot know the extent to which the selection effect distorts some of the large n empirical conclusions about the seeming noneffect of a stare decisis norm.74 And, fourth, we cannot know the extent to which stare decisis considerations, even when not vote- or outcome-determinative, nevertheless shape opinion writing in ways that may have longer-term incremental effects—incremental effects that may, over time, ultimately shift at least some votes or some outcomes away from where they otherwise would have been.75

All that said, however, it is difficult to escape the conclusion, supported both by the systematic empirical research and the more qualitative examination of numerous examples, that the stare decisis norm, even if one exists, is far weaker than most of the commentators and most of the Justices appear to have asserted. And this conclusion is reinforced by two decisions from the 2017 Term, decisions in which stare decisis rhetoric played a prominent role but in which, again, that rhetoric may have had less effect than the Justices who used it encouraged their audiences to believe.

IV. Two Cases

These skeptical conclusions about the existence of a genuinely consequential stare decisis norm find support in two recent Supreme Court decisions in which stare decisis rhetoric figured prominently. One of these, Janus v AFSCME, 76 held, by a 5–4 majority decision, that requiring public employees to pay union agency fees to support collective-bargaining activities violated the First Amendment rights of dissenting employees to refuse to support speech-related activities with which they disagreed. In doing so, the Court reversed its earlier decisions in Abood v Detroit Board of Education77 and, less directly, Keller v State Bar of California, 78 both of which had been understood to stand for the proposition that compelling union members to support political activities with which they disagreed violated the First Amendment, but that requiring those members to pay agency fees to support collective-bargaining efforts lay outside the First Amendment’s prohibitions.

I will leave to others the substantive analysis and evaluation of Janus. 79 In the context of this article, what is especially germane is not the debate about the merits of the First Amendment claims, but the way in which the majority and the dissent treated the question of stare decisis. Writing for the majority, Justice Alito predictably acknowledged the “importance of following precedent,”80 but immediately added that this importance would not prevail when there were “very strong reasons”81 for not following a precedent. He then proceeded to list five such reasons, concluding that all of them applied here. Perhaps principal among these reasons, for Justice Alito and the majority, was that Abood, the case that Janus explicitly overruled, was “poorly reasoned.”82 But the majority had much more to say about stare decisis, including the conclusion that stare decisis was also not dispositive when the earlier decision involved free-speech rights, when the potential stare decisis import of an earlier decision was undermined by other decisions and subsequent empirical developments, when practical problems in application made clear that the early decision was not workable, and when there had been little reliance by primary actors on those decisions.83 And having announced these as grounds for overruling a precedent, Justice Alito then framed the balance of his opinion around demonstrating that each of these factors applied to Abood, 84 thus leading to the necessity, for him, of it being overruled.

Justice Kagan’s dissent, joined by Justices Breyer, Ginsburg, and Sotomayor, angrily accused the majority of reaching a decision that “subverts all known principles of stare decisis.”85 “The majority has overruled Abood for no exceptional or special reason, but because it never liked the decision,” Justice Kagan wrote. “It has overruled Abood because it wanted to.”86 And to support such strong language, Justice Kagan proceeded to frame her opinion in exactly the same way as had the majority, tracking the majority’s application to the issue in Abood and Janus of each of the majority’s grounds for overturning a precedent, and finding that none of them applied to this case and to this issue.87

In addition to presenting a sharp debate so focused on stare decisis, and offering a lengthy catalog of the many ways in which the constraints of stare decisis could be overcome, Janus is notable for the majority’s conclusion that all of these ways applied to the case before the Court. In doing so, the majority not only avoided confronting the admittedly challenging but arguably more honest process of weighing the reasons for following a precedent against the reasons for rejecting it, but also, and potentially more importantly, appeared to reaffirm that any of the reasons for rejecting a precedent might be available in future cases. After Janus, it would appear to take an especially unimaginative Court, or an especially unimaginative Justice, to find that not one of these reasons justifying overruling applied to some case that the Court or a Justice thought required overruling. Although none of the justifications in Janus for disregarding or overruling a precedent was entirely new in that case, the very act of listing and purporting to use all of them lays the groundwork in future cases for a further weakening of whatever strength a norm of stare decisis may hold.

Of potentially even greater importance to the issue of stare decisis was the Court’s decision in South Dakota v Wayfair, Inc., 88 which overturned the Court’s previous decisions in National Bellas Hess v Department of Revenue89 and Quill Corp. v North Dakota, 90 and accordingly held that states could impose and collect taxes on sales to state residents by out-of-state sellers who had no physical presence in the taxing state.91 But lurking behind the merits of the decision was the Court’s familiar assertion that stare decisis was strongest for statutory cases because of the ability of Congress to step in and correct a decision it deemed mistaken, and, conversely, that the constraints of stare decisis were weaker in constitutional cases because of the inability of Congress to correct an erroneous constitutional decision.92 Although a Dormant Commerce Clause decision such as South Dakota v Wayfair is subject to revision or rejection by congressional action and thus resembles a decision interpreting a statute, it is also a decision that is based on the Constitution and not on a statute. For Justice Kennedy, this aspect of the earlier cases entitled those cases to less stare decisis respect, and thus made the path to their overruling especially easy to traverse.

In some respects, Justice Kennedy’s opinion for the Court in Wayfair is of a piece with Justice Alito’s in Janus. Like Justice Alito, Justice Kennedy relied heavily on the perceived wrongness of the decisions that were overruled, criticizing National Bellas Hess and Quill as having been based on an “incorrect interpretation of the Commerce Clause.”93 And Justice Kennedy also made much of the way in which the earlier decisions had failed the test of workability,94 had not induced legitimate95 detrimental reliance,96 and, most importantly, had been undercut by intervening cases and by intervening technical developments, especially the rise of Internet commerce.97

As in Janus, Justice Kennedy’s opinion in Wayfair lists and uses so many different grounds for rejecting a precedent that it is difficult to imagine an “incorrect” previous opinion that would be able to withstand all of these grounds. And because the way in which Justice Kennedy places a ruling that can be overturned by Congress on the constitutional side of the constitutional/statutory divide, there is some risk that Wayfair further weakens stare decisis considerations of whatever force they may ever have had. Taken together, Wayfair and Janus thus hardly inspire confidence that the Court views stare decisis as a serious and sometimes insurmountable hurdle, however often the Justices mention stare decisis and however often claims for its virtue appear in the Court’s opinions.98

V. “Weaponizing” Stare Decisis

In her discussion of the merits of the First Amendment arguments in Janus, Justice Kagan described the challengers to the agency fees at issue as having “weaponized” the First Amendment.99 In doing so, she appeared to be arguing, following the lead of then Justice Rehnquist’s dissent in Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc., 100 that the First Amendment was being opportunistically and strategically deployed to serve argumentative purposes other than those that lie at or near the First Amendment’s core goals, functions, and justifications.

In light of what we know about the actual constraining capacity of precedent, we might well conclude that the norm of stare decisis itself has been weaponized. Justices and commentators who disagree with the merits of some proposed change in Supreme Court doctrine will in similar fashion weaponize the idea of stare decisis as a way of adding rhetorical emphasis to their disagreement, and they will typically be met with an equally weaponized justification for avoiding or overruling a previous decision drawn from the capacious arsenal of available stare-decisis-avoiding justifications. And at the end of the day, there is a standoff, with stare decisis rarely, and these days hardly ever, awarding victory to one side or another. At least within the array of currently-sitting Justices, there do not appear to be any who have demonstrated the ability to combine their accusations of ignoring stare decisis with a willingness to adhere to stare decisis when its effect is to reinforce or perpetuate decisions they believe mistaken, or to support their sometimes vehemently professed adherence to stare decisis with a willingness to relinquish their own proclivity to persistent dissent.

Once we see that the essence of a stare decisis claim is a content independent appeal to respecting mistaken decisions despite their being mistaken, we can understand that a stare decisis norm, if one were to exist, could do its work only if those who wield the weapon of stare decisis would be willing to accept the bitter with the sweet. A stare decisis norm that is available to support the results that one believes sound on first-order substantive grounds but that is easily rationalized away when it would perpetuate results that he or she believes unsound on first-order substantive grounds is in reality no stare decisis norm at all. Perhaps regrettably, this conclusion is consistent with what the empirical political science research on stare decisis tells us, it is consistent with what more qualitative and anecdotal observations of the Court’s decisions tell us, and it now appears consistent with what even the most recent appeals to stare decisis by the Justices reveal.

VI. Conclusion: The Rhetoric and the Reality

For generations, judges and scholars have argued for the virtues of horizontal precedential constraint—stare decisis.101 And for a long time, even if not for quite as long, empirical political scientists have concluded that such constraint is not to be found in the reported decisions of the Supreme Court of the United States.

These two bodies of thought are not logically inconsistent. Like world peace and nonfat bacon, there are things we would like to have exist but which do not yet exist, and genuine precedential constraint in the Supreme Court may well be one of them. Although my claims in this article are located in the vicinity of the traditional legal realist skeptical take on precedent and its ability to constrain,102 my con clusions are more modest. The claim here is not that stare decisis constraint is impossible, which some of the realists sometimes tended to believe. Nor is it that stare decisis constraint is not desirable, which some of the realists—Jerome Frank particularly103—on occasion also contended. Rather, it is simply that for the Supreme Court of the United States, with its small and self-selected docket heavily populated by issues of high moral and political valence, there does not appear to be in place a stare decisis norm—a norm pursuant to which most of the Justices most of the time would feel compelled by internal belief or external pressure actually to adhere to past decisions even when those Justices believed those decisions to be mistaken. In a different world such a norm might exist and have substantial force, but that is not our world. And it does not appear to have been our world for some considerable period of time. Moreover, although such a genuinely efficacious stare decisis constraint might be desirable, it might not. Especially for the Supreme Court, given the ideological nature of most of the cases to which the Court gives plenary consideration, and given the increasingly public political role that the Court seems to play, the arguments for getting things right (from the perspective of the decider) rather than deferring to those who got things wrong in the past seem far from frivolous. Still, it would be mistaken to infer from the nonexistence of a robust stare decisis norm for the Supreme Court that such a norm is either impossible or undesirable.

### 1nc – Rant

#### Associational freedoms don’t solve nuclear war. Their card says it allows petitioning the government. Why would the government listen.

#### It also doesn’t solve far right terror – that was CX>