# 1NC---Dartmouth---Round 6

## Off

### 1NC

Buddhism K:

#### Universal impermanence makes suffering inevitable, turning case and corroding value to life. Thus, radical acceptance of the status quo is a more virtuous choice than participating in the 1AC’s fantasy of control.

Meiklejohn ’19 [Brad; 2019; Alaska State Director for The Conservation Fund; Rewilding, “A Buddhist View of Conservation,” https://rewilding.org/a-buddhist-view-of-conservation/]

We suffer when we expect the world to be different from the way it is. “It shouldn’t be this way” is the perennial lament of conservationists. Here in the western world we are trained to be discerning, and we deploy our discernment to pick out all the things that are wrong in the world. And when we start looking, we start finding: climate chaos, species extinction, and the familiar list of worldly woes. It has long been this way, as the Roman historian Tirulean observed in 150 AD:

All parts of the earth are built over, trampled, full of commerce. Farms and fields drive back the forests. Even rocks are cultivated. Swamps are drained. Today’s towns outnumber yesterday’s houses. Everywhere on earth are residences, peoples, governments and human growth so clogs the world it can barely support us. And as our needs increase we struggle with each other for them and nature fails us.

When we hold an idealized view of the how the world should be, our happiness and satisfaction rest on an unattainable perfect future state. “If only we could stop the Pebble mine…if only we could save the Arctic Refuge…if only so-and-so were not president.” But “if only…” is a future that never arrives. Even when our wishes come true, we find something else to despair over, some other “if only” to pin our hopes on. Our default mode of finding faults has a corrosive effect on all aspects of our life.

Yet the world is the way it is. The world will always be imperfect. The world is not here to make us happy nor will it ever be the way we want it to be. How could it be otherwise? There are nearly 8 billion people who want the world to be a certain way, and only one world.

When we don’t accept things as they are, we suffer. This suffering comes in various forms for conservationists: frustration, outrage, anger, disappointment, despair, resentment, and stress are common among us. To be clear, we create this suffering. It is our choice to be frustrated, angry, or resentful, yet these states of mind do nothing to improve the situation and render us less effective. “The world is not coming at you, it is coming from you” as the Vietnamese Buddhist Thich Nhat Hanh says. What we think and feel is what we project. “With our thoughts we create the world,” said the Buddha.

The Buddhist way is not a path of resignation, however. It is a path of radical acceptance of things as they are. “It’s like this now” is a helpful refrain that short-circuits anger, frustration and despair. Acceptance can easily lead to indifference, though, unless it is harnessed to a higher purpose, such as the Bodhisatva aspiration “Beings are numberless. I vow to save them all.” The magnitude of this ambition, in full view of reality, takes the pressure off an impossible task. We do the work because it is the right thing to do, not to finish the job. Our path is endless. There is nothing to achieve and nowhere to go.

We cannot control the results of our efforts. The only thing we can truly control is our intention. When our intentions are wholesome, our work will produce wholesome results. If our actions are tinged with greed, hatred or delusion, we will reap the consequences. Dishonesty and deceit will undermine our own work. We can rest in the knowledge that those who pillage the environment will reap their karma, and we will inherit our own.

As conservationists we spend a lot of time communicating. I have often heard it said that we are conversationalists more than conservationists. But how are we communicating? Many conservationists come across as shrill, pedantic and righteous — not particularly attractive traits. What is the intention of our communication? Are we aiming to win, to convince, to belittle, to impress, to gain attention or are we merely stating what we know to be true? We must clearly set our intention before we communicate.

The Buddha placed particular importance on right speech, which for our purposes encompasses all forms of communication, including texts, tweets, phone calls, emails, grant applications, memos and letters. The Buddha defined right speech as speech that is true, timely, beneficial, endearing and agreeable. He placed special emphasis on truthfulness: “For the person who lies, there is no evil he might not do.” The German philosopher Nietzche said: “It’s not that you lied that bothers me. It’s that now I can never trust you.” Is all of our speech impeccably true, or do we exaggerate or shade the truth to bolster our side of the story? Is our speech harsh or divisive, or is our speech pleasing and intended to bring others together? Gossip, idle chatter, useless talk and speculation, all forms of wrong speech, were encompassed by the onomatopoetic term “sampapalapa” in the Pali language of the Buddha’s time.

Conservationists often divide the world into “us” and “them.” “They” are the problem and “we” have the solution. “If only they weren’t so greedy…so selfish…so ignorant…so lazy.” But there is no them, just us. We are all 99.99% the same. We all have the same impulses, emotions, and desires. We all want what is best for us and we all have our own answers to what is best for us. The Buddha identified the delusion of a separate self as a root problem, and today we are witnessing an epidemic of self that manifests in widespread anxiety, depression, drug addiction, and suicide. Our actions as conservationists should be selfless not selfish. By acting from compassion and generosity we transcend the polarization of “us” and “them.”

David Brower, a legend in conservation said, “All our victories are temporary and all of our defeats are permanent.” We know that conservation work requires (to borrow from another conservation legend, Brock Evans) relentless pressure, relentlessly applied, as we often fight the same battles over and over. The Buddha observed that impermanence is one of the three immutable characteristics of life. Change is constant; nothing lasts. “It is a bold thing for a human being who lives on the earth but a few score years at the most to presume upon the Eternal and covet perpetuity for any of his undertakings,” said wilderness warrior Howard Zahnhiser. We cannot ever achieve a permanent state of perfection or protection, and even the most devastating defeats give rise to future opportunities.

Conservation is a relay race, not a sprint, with the baton of obligation passed from one generation to the next. We cannot save all there is to save in our lifetimes. Trying to do too much too fast and too often brings on the dis-ease of “busy-ness.” Ask a fellow conservationist how they are and, more often than not, you get back the response: “Busy.” Busy has become the modern badge of self-worth, as if by proclaiming our busy-ness we fend off the nagging worry that we are not doing enough.

I would prescribe three things for modern conservationists: gratitude, immersion in nature, and meditation. Like a border collie that needs a job, we can give our discerning minds the task of finding what is right with the world, rather than all that is wrong. A daily gratitude practice of, say, making a list of five things you are grateful for, will bring benefits to your work and your life.

“Save it because you love it,” says western Dharma teacher Jack Kornfield. But you have to know it before you love it. I am always dismayed by how little time modern conservationists spend in wild nature. Every person working in conservation should take at least one 10-day trip into wild nature each year. And get paid to do it. Shorter trips just don’t cut it because it takes several days just to disconnect from the buzz of the modern world and reconnect with the slower, deeper rhythms of nature.

Deep time in the wildness will ground you in reality and will defuse the hecticity that renders most of us too distracted to be effective. Meditation provides the same grounding, and is a portable refuge that will make you more patient, more caring, more present, less angry, less stressed and less prone to burnout. If that is not enough, the Buddha also assured that mediation would improve your complexion, help you sleep better and draw rare, shy animals near! Don’t just take my word, or the Buddha’s. See for yourself.

#### Endorsing kuśala creates profound value as an act of personal meditation regardless of consequences---infinite value is impossible to consequentially evaluate and cultivating relationality is precious.

Hershock ’21 [Peter; 2021; director of the Asian Studies Development Program at the East-West Center; Buddhism and Intelligent Technology: Toward a More Humane Future, “Buddhism: A Philosophical Repertoire,” p. 38-41]

To embody wisdom and enact moral clarity requires attentive mastery. We will later discuss the roles played by focus- and flexibility-oriented meditation practices in realizing Buddhist ideals of personal presence. Here, anticipating critical engagement with the dynamics of the attention economy, it is enough to stress that attention training is integral to the processes of physical, emotional, and intellectual dehabituation that are needed to be freely responsive. The Pali and Sanskrit term for attention, manasikāra, simply means awareness that is concentrated or resolutely focused. This implies that one can be attentive with different degrees of concentration or focus. We can devote half our attention to cooking and half to conversing. But in addition to how much attention we are paying to our situation, Buddhism makes a distinction qualitatively between being attentive in ways that bind us to or that free us from conflict, trouble, and suffering.

It is possible, even without training, to be keenly attentive to our present circumstances. Young children avidly awaiting the ice-cream cone being prepared for them and adolescents in the throes of video game ecstasy are both clearly capable of highly concentrated attention. What is not so clear is whether they are freely attentive or compulsively so. Without training, our attention is readily and involuntarily attracted or distracted. In particular, we are especially susceptible to unwisely having our attention captured by the superficial, craving-inducing aspects of things (ayoniśomanasikāra). This, as we will see, is crucial to the workings of the new attention economy being realized through intelligent technology. Yet, with training, our attention can also be wisely concentrated—directed freely and intentionally in ways that are both sensitive to the interdependent origins of things and consistent with truing relational patterns (yoniśomanasikāra).

To the extent that Buddhist ethics consists in the goalless, nirvana-oriented practice of integrally cultivating wisdom, moral clarity, and attentive mastery, it is hard to place readily or without remainder into one of the standard categories of ethics grounded on definitive and generalized judgments regarding personal character (virtue ethics), duties (deontological ethics), or the consequences of actions (utilitarianism). Given Buddhism’s ethical insistence on pairing wisdom with compassion, a closer fit might be care ethics, with its emphasis on situationally apt attentive responsiveness. But Buddhist compassion is not reducible to the natural inclinations to care about and for others that are invoked by care ethics, much less to the abstractly mandated responses to suffering that are typically framed with reference to personal virtues or duties, or derived through a consequentialist calculus of harms and happiness. Rather, Buddhist compassion is exemplified in the ongoing intentional practice of dissolving the karmic causes and conditions of shared conflict, trouble, and suffering—a necessarily improvisational labor of shared predicament resolution in steadfast pursuit of increasingly liberating relational outcomes and opportunities.

What makes Buddhist ethics so difficult to place (and, potentially, so relevant today) is the fact that it offers only an open-ended training program—cultivating wisdom, moral clarity, and attentive mastery—and a set of “cardinal points” for discriminating qualitatively among relational outcomes and opportunities. Especially in early Buddhist contexts, the term used for the “true north” of liberating presence on the Buddhist “moral compass” was kuśala. Often translated as skillful or wholesome or good, kuśala actually functions as a superlative. Rather than connoting something that is good as opposed to mediocre or bad, it connotes virtuosity.

The ethical significance of aiming at kuśala outcomes and opportunities is neatly illustrated in an early Buddhist text, the Sakkapañha Sutta (DN 21). Like most early Buddhist suttas or recounted teachings of the Buddha, the Sakkapañha Sutta is structured as a dialogue. In this case, the Buddha is asked to explain how it can be that human beings generally want to live in harmony and without strife, and seem to have the resources for doing so, they almost always fail and end up embroiled in anger, hatred, and conflict. At first, the Buddha offers his standard psychological account of conflict and social strife as typically being rooted in jealousy and greed, which are in turn dependent on having fixed likes and dislikes, and these on being caught by craving forms of desires and tendencies to dwell on things. But this entire edifice of conditions, he finally explains, ultimately rests on conceptual proliferation (Pali: papañca; Skt: prapañca): compulsively dividing up what is present into ever more finely wrought units and relations among them, producing ever more tightly woven nets of fixed associations and judgments that at once support and entrap the craving- and conflict-defined self. To bring an end to conflict, interpersonal discord, and the suffering they entail, one must uproot prapañca.

When the Buddha is asked how we can stop engaging in conceptual proliferation and enact our intentions to live in peace and harmony, he significantly directs attention away from “inner” psychological conditions to “outer” personal and social consequences. To cut through prapañca, he says, we should continually evaluate our conduct (mental, verbal, and physical) in terms of whether it is bringing about kuśala or akuśala outcomes and opportunities, continuing on courses of actions only if they both decrease akuśala eventualities and increase those that are kuśala. Given that kuśala is a superlative, this means that resolving conflicts and freeing ourselves from trouble and suffering is not simply a matter of refraining from doing bad things and instead doing or being either harmlessly mediocre or what is considered good by current standards. These are all akuśala. Freeing ourselves from conflict, trouble, and suffering requires going beyond current conceptions of good and evil, realizing virtuosically shared presence with and for others. The course correction required is resolutely qualitative.

The aim of Buddhist ethics is to foster the cultivation of wisdom, moral clarity, and attentive mastery, establishing and then continuously enhancing commitments to and capacities for thinking, speaking, and acting as needed to realize superlative or virtuosic (kuśala) relational dynamics. The purpose of ethical deliberation is not to discover or devise absolute or universal standards of conduct. Just as virtuosic musical performances set new standards of musicianship, kuśala ethical conduct sets ever new standards of ethical excellence. A karmic ethics of compassionate virtuosity is an ethics of doing better at what we are already doing best, evaluating value systems and the ways that they are embodied personally and institutionally to realize ways of life that are progressively conducive to relating freely.

### 1NC

#### The United States federal government:

#### ---adopt a binding and covert policy prohibiting the initiation of armed forces into hostilities with Russian Federation, People’s Republic of China, Democratic People’s Republic of Korea, Islamic Republic of Iran, Bolivarian Republic of Venezuela, and Non-State Armed Group;

#### ---sanction any public disclosure of that policy with capital punishment.

### 1NC

Lack of agent specification is a voting issue---key to all politics ground and mechanisms CPs, ruining NEG fairness.

### 1NC

T-Subsets:

#### ‘Substantial’ excludes subsets.

Tax Court ’65 [U.S. Tax Court; July 23; Dudderar v. Commissioner of Internal Revenue. 44 T.C 632]

[\*\*13] If the statement were "all" not modified by the word "substantially," it would refer to either 100 percent or such a small variation from 100 percent that such variation might be said to be de minimis. The word "substantially," however, is an elastic word not so easily susceptible of definition. That term as used in a provision of the Internal Revenue Acts of 1918 and 1921 dealing with corporate affiliations has been stated to mean all except a "negligible minority" interest. Ice Service Co. v. Commissioner, 30 F. 2d 230 (C.A. 2, 1929), affirming 9 B.T.A. 385 (1927). In construing these same statutes the Supreme Court in Handy & Harman v. Burnet, 284 U.S. 136 (1931), concluded that 75 percent of the shares of a related corporation "did not constitute substantially all of its stock," citing in a footnote the following cases: Ice Service v. Commissioner, 30 F. (2d) 230, 231; Commissioner v. Adolph Hirsch & Co., 30 F. (2d) 645, 646; American Auto Trimming Co. v. Lucas, 37 F. (2d) 801, 803; [\*\*14] United States v. Cleveland, P.&E. R. Co., 42 F. (2d) 413, 419; Commissioner v. Gong Bell Mfg. Co., 48 F. (2d) 205, 206; Onondaga Co. v. Commissioner, 50 F. (2d) 397, 399. The cases cited in this footnote involve percentage ownership of stock in the related corporations by the individuals specified by statute in amounts ranging from approximately 68 to approximately 85 percent. Similarly in construing the provisions with respect to affiliation contained in the Revenue Acts of 1918 and 1921 we specifically held that the combined holdings of two stockholders which were not in excess of 85.3 percent of the outstanding stock of the company which it was proposed be considered as an affiliate was insufficient to meet the statutory requirement of "substantially all," Gulf Coast Irrigation Co., 24 B.T.A. 958, 967 (1931), and cases there cited. HN5 We do not consider that the words "substantially all" as used in section 264(b)(1) should be defined to be a precise percentage to be used in every case without reference to the surrounding facts. Nevertheless section [\*\*15] 264(b)(1) does deal only with a quantitative amount in that it deals with money payments and therefore the words "substantially all" as used therein [\*638] must be given their ordinary meaning of all but a small negligible amount. 5Link to the text of the note Considering the purpose for which section 264(b)(1) was enacted, its legislative history as well as the factual situation present in the instant case, we conclude that the 73-percent payment in the instant case did not constitute "substantially all" the premiums on the insurance contract here involved. Since some uncontested adjustments were made in the notice of deficiency, Decision will be entered under Rule 50.

#### They don’t affect all workers.

#### LIMITS and GROUND---subsets are unbounded and spike core disadvantages.

### 1NC

Capitalism K

#### Labor law is a tool of capitalist discipline. Legal protections subsume class struggle into the framework of capital accumulation, precluding class consciousness.

Breznik ’24 [Maja; 2024; Ph.D. in Sociology, University of Ljubljana; Industrial Law Journal, “Less or More Labour Law for Social Change,” vol. 53]

As just discussed, legal form theorists consider labour law to be ‘capitalist law’ in so far as any improvement in labour rights is only possible if it facilitates the accumulation of capital or prevents exit from capitalism.34 Adams sees labour law as a historical answer to the structural contradictions of capitalism.35 Labour law indeed seeks to enable the normal reproduction of labour power and, in turn, to improve working conditions, but for the sole purpose, or at least with the effect of protecting capital overall against the self-destructive competition of individual capitalists. Although capital as class benefits from the social reproduction of labour, competition between individual capitalist firms creates an inexorable pressure for wage reductions. This endangers labour as a production factor and thereby the accumulation of capital generally. Labour law responds to this functional need of capital. Since workers’ rights are framed as part of private law, they depend for their enforcement upon the power of state entities which, however, will ultimately prioritise the interests of capital.

<<TEXT CONDENSED NONE OMITTED>>

In an alternative approach, McLoughlin and Hürzeler propose two ‘legal forms’: bourgeois law and labour law. They find support for their stance in Marx, who indeed criticised bourgeois rights for being ‘an illusory account of the exploitative social relations’ yet also supported factory laws because he believed that the legal reduction of working time, for example, could play a key role in the revolutionary project.37 Alain Supiot sets out similar views in Critique du droit du travail, first published in 1993.38 Supiot’s work is an important point of reference since he is one of the few contemporary theorists of labour law to address Pashukanis’s position, prior to the recent re-emergence of the legal form debate. Supiot’s starting point is that labour cannot straightforwardly be a com- modity given that it cannot be separated from the physical ‘person’ of the worker.39 The content of the labour relationship is a paid service arising from the person’s physical and intellectual activity;40 the physical body is the place where contractual obligations are performed. This creates a con- tradiction between the legal form of the labour relationship, that reduces labour to a commodity, and the physical body, which is not part of the exchange since a worker cannot be a commodity. Had it been otherwise, workers would be slaves. The contradiction appears when workers sell their labour power and become subordinated to the employer because at that moment workers lose control over their bodies. The role of labour law is to protect the body and save the skin of workers (all aspects of their biolog- ical existence via regulations on safety and health at work), protect their livelihood (without it, their position would be worse than for slaves), pro- vide for continuity of income also when workers are unable to work (due to illness, unemployment or retirement) and, finally, the continuity of income for the family and all members of the public (through social policies).41 This explains why Supiot (in common with Otto von Gierke, Karl Renner and Hugo Sinzheimer before him)42 considers labour law to be social law and as such antithetical to civil law. The biggest difference between the two lies in the fact that civil law is individual law, whereas social law (and labour law) is collective law according to Supiot. It can also be claimed that labour law is class law,43 in contrast to the general character of civil law. The specific character of collective or class law finds expression in the new type of legal rationality, even a new paradigm, because labour law could not have evolved without the support of the social sciences, which shed light on the working and living conditions of working families. Accordingly, the special feature of labour law is that it combines ‘legal’ and ‘social arguments’. This characteristic brings it into conflict with the civil legal order: while the two co-operate on the level of ‘legal arguments’, they inevitably conflict in the area of ‘social arguments’.44 law) is collective law according to Supiot. It can also be claimed that labour law is class law,43 in contrast to the general character of civil law. The spe- cific character of collective or class law finds expression in the new type of legal rationality, even a new paradigm, because labour law could not have evolved without the support of the social sciences, which shed light on the working and living conditions of working families. Accordingly, the special feature of labour law is that it combines ‘legal’ and ‘social arguments’. This characteristic brings it into conflict with the civil legal order: while the two co-operate on the level of ‘legal arguments’, they inevitably conflict in the area of ‘social arguments’. The above argument highlights contrasting perspectives on labour law: some see it as a capitalist law, others as a social, collective or class law. With this in mind, let us now return to the initial question: How do these theories intervene in social reality and what kind of social change do they imply? Supiot admits, not without irony, that labour law supervises the subordination of workers. He then tries to resolve the contradiction between the formal equality of the contractual parties and workers’ actual subordination to capital. The problem is solved in such a way that the autonomy and freedom of workers, which have been lost through subordination, are supplemented by collective rights such as the right to collective association, strike and collective bargaining.45 In this way, autonomy lost on the individual level is reasserted at the collective level, which in turn means that ‘freedom and subordination became legally compatible’.46 An inevitable consequence is that workers can become free and legally equal persons only when they break away from isolation, become a political class, act as the working class against the capitalist class and begin to change the material conditions of their existence.47 Legal form theory has an answer for Supiot’s argument. In his analysis of workers’ collective organising, Knox emphasises the historical achievement of the labour movement, whereby the post-Second World War legal regime ‘created the conditions for a trade union movement that represented the working class as a whole’.48 From the 1980s onwards, neoliberal reforms radically altered this legal regime (e.g. with restrictions on secondary actions and closed shops in the UK). However, Knox does not see the solution as restoring the legal framework that existed before the neoliberal reforms because, by failing to address the roots of labour exploitation, the post-war trade unions remained within the bounds of capitalism.

<<PARAGRAPH BREAKS CONTINUE>>

What then is the issue? The problem is that workers’ collective rights are based on a definition of the worker derived from their status — that someone is a worker insofar as they are a member of a working collective and therefore of a company. A worker is defined a priori by belonging to an enterprise or employing organisation, not by belonging to a working class.

According to the legal form critique, while Supiot has resolved the contradiction on paper, his solution is unworkable in practice. The right to collectively organise cannot compensate for workers’ autonomy and freedom lost following their subordination to capital since access to these rights can only be exercised by workers with the status that arises from belonging to an enterprise organised along capitalist lines. As Knox and others observe, this means that collective organising has inevitably been transformed into self-interested, economic/corporate organisations. These organisations reinforce the divisions within the working class and the differences between workers. To take a contemporary example, they are more likely to augment the effects of the current economic restructuring, which has managed to break down the unity of workers through global production chains, cascades of sub-contractors and intermediaries on one hand, and a multitude of new legal forms of work on the other.

#### Capitalism is systemically unsustainable---extinction.

Derber ’23 [Charles and Suren Moodliar; 2023; Professor of Sociology at Boston College, Ph.D. from the University of Chicago; Managing Editor of the journal, Socialism and Democracy; Dying for Capitalism: How Big Money Fuels Extinction and What We Can do About It, “Introduction,” and “The Extinction Triangle: Capitalism, Environmental Destruction, and Militarism,” ISBN: 9781032512587]

To be sure, the world has entered a new stage threatening the very survival of humanity and all life species because of run-away climate change and endless militarism in the nuclear age. Both climate change and war now threaten extinction. Moreover, other threats in the DNA of our economic system multiply the extinction perils; the drive for endless profits and production is depleting scarce vital resources and extinguishing thousands of life species in an unprecedented existential crisis of biodiversity. The same forces help drive global pandemics such as COVID-19, which is also a global existential risk. These once unbelievable perils are a creation of our own hands – and of the leaders and systems we are taught to cherish.

<<TEXT CONDENSED, NONE OMITTED>>

A “triangle of extinction” that connects environmental death with war and capitalism – creates an emergency that humanity-as-a-whole has never faced before. The triangle operates with the greatest force and danger in the United States – and it needs to become the subject of conversation and activism of all Americans as well as all nations. The Earth Strike movement, a grassroots group focused on climate change, works to promote consciousness and activism about looming destruction of the earth.5 Among its actions are a general strike to save the planet. In coordination with unions against both governments and corporations, Earth Strike has carried out multiple global actions since 2019, including close coordination with labor unions on a May Day protest in 2019, leading up to a September protest on the anniversary of Rachel Carson’s book, Silent Spring, which prophesized the devastation of the environment. Likewise, the Sunrise Movement has been catalyzing a massive group of climate activists in the United States, involving many young people, indigenous nations and people of color, by holding wealthy elites accountable for sacrificing the future of everyone. Sunrise challenged Biden’s climate programs as far from adequate, sitting-in against Democratic Senators in July 2021 and calling for $12 trillion over ten years in green jobs and infrastructure, helping push the Democratic Party and President Biden to focus on the emergency and demanding new investment for resilient new infrastructure and climate adaptation. By late 2022, albeit with an unfavorable political arithmetic, elements of the Sunrise agenda made it through both houses of the US Congress in the form of the awkwardly named, Inflation Reduction Act.6 And we now also have “Birth-strikers,” women who refuse to have children because of the climate-devastated world they would occupy. A 33-year-old Blythe Pepino, a British founder of BirthStrike and a songwriter who began to read extensively about climate change, became more and more anxious after seeing government inaction. She felt she had to act, helping found BirthStrike and declaring the group’s primal fear: We’re too afraid to bring children into the world with future that’s forecast.7 Alexandria Ocasio-Cortez, one of America’s most influential progressive Democrats in Congress, and a self-proclaimed “democratic socialist,” says she understands the birthstrikers, commenting on Instagram Live: It is basically a scientific consensus that the lives of our children are going to be very difficult, and it does lead young people to have a legitimate question: is it OK to still have children?8 Meanwhile, the Bulletin of Atomic Scientists, a global community of nuclear physicists and other influential scientists, have moved their “Doomsday Clock” that they created after World War II closer and closer to midnight. Since the invention of the nuclear bomb, their Doomsday Clock has been set each year as a symbol of the looming end of the world, with the scientists changing the time reflecting their best estimates of the changing risk of total destruction. For the first time, in 2015, they began including the risks of climate change to the risks of blowing up the world in a nuclear war. In 2019, they moved the time on the clock to two minutes before midnight, noting that We are like passengers on the Titanic, ignoring the iceberg ahead in terms of climate and nuclear threats.9 Entering 2022, the clock stood at 100 seconds before midnight, reflecting accelerating climate and military extinction threats. In August 2021, the UN latest IPCC climate report, called “code red for humanity,” showed that the climate meltdown is already here and we cannot stop massive climate damage; instead, we have about ten years to make drastic changes to try to save civilized life on the planet. While such alarms by scientists have catalyzed a more widespread and fearful public awareness of the terrible damage already baked in, reinforced by the huge numbers of research studies and activist protests about the climate change crisis and nuclear war dangers, none of this has awakened a visceral or political response proportional to the catastrophic threat. For some, awareness of the extinction threat has produced a technological turn – the hope that new inventions and the rapid pace of technological change may help us solve the terminal threats. For example, the promise of fossil fuel-free and radioactive-free nuclear fusion energy periodically makes headlines. However, even in the most optimistic scenarios, commercial production of fusion energy is at best decades away. If humanity is to survive to enjoy the benefits of this allegedly limitless energy source, it will have to alter the way it organizes its economy and its approach to economic growth along the lines that we spell out in this book.10 As 2022 drew to a close, the war in Ukraine was correctly seen as increasing the likelihood of nuclear annihilation – with observers noting that the “usual methods for managing conflict between the United States and Russia in the Cold War have fallen into disrepair, and it is not clear that anything has replaced it.” Similar observations may be made for the novel and rapidly evolving Taiwan-centered confrontation between the United States and China.11 On January 23, 2023, the Clock was moved to 90 seconds before midnight, the closest to apocalypse since its creation in 1947. Bang, Crunch, Shriek, and Whimper: Varieties of Existential Threat and Extinction Because extinction is the most terrible and deadly destiny that humans now face, we need to be clear about the various forms of existential risks from which humanity cannot meaningfully recover. We need to begin then with some definitions that offer as much clarity as possible about the apocalyptic threats we face. Most discussions of climate change and nuclear war do not offer theories or even a definition of extinction. They simply tend to take the “common sense” view that extinction means the worst outcome that nuclear war and climate change might produce: the elimination of humans and other life species from the planet. An Oxford philosopher, Dr. Nick Bostrom, has developed a more rigorous definition of extinction. He argues that the commonsense view is too limited. It fails to recognize that there are many forms of existential risk and extinction that need to be named, understood and confronted. His definitions not only include total elimination of all life but also extend to a much wider set of catastrophic futures that humans now face.12 Bostrom offers the following definition: Existential risk – One where an adverse outcome would either annihilate Earth-originating intelligent life or permanently and drastically curtail its potential.13 Note that he includes not only risks of total annihilation of all life but of threats that would “permanently and drastically curtail” the potential of humanity for growth and further positive development. He is offering a definition that includes total extinction but extends to a variety of other existential risks. But he’s not just lumping into his definition every kind of catastrophic risk. He distinguishes existential or extinction risks from catastrophic “endurable” risks as follows: Existential risks are distinct from global endurable risks. Examples of the latter kind include: threats to the biodiversity of Earth’s ecosphere, moderate global warming, global economic recessions (even major ones), and possibly stifling cultural or religious eras such as the “dark ages”, even if they encompass the whole global community, provided they are transitory (though see the section on “Shrieks” below). To say that a particular global risk is endurable is evidently not to say that it is acceptable or not very serious. A world war fought with conventional weapons or a Nazistyle Reich lasting for a decade would be extremely horrible events even though they would fall under the rubric of endurable global risks since humanity could eventually recover.14 Bostrom identifies four categories of existential risk, which include not only total destruction but also permanently prevent the development of humanity toward its full potential and fulfillment, a state he calls “posthumanity, meaning a new stage of history where humans are either extinct or have lost the sensibilities we define as “human”: Bangs – Earth-originating intelligent life goes extinct in relatively sudden disaster resulting from either an accident or a deliberate act of destruction. Crunches – The potential of humankind to develop into posthumanity is permanently thwarted although human life continues in some form. Shrieks – Some form of posthumanity is attained but it is an extremely narrow band of what is possible and desirable. Whimpers – A posthuman civilization arises but evolves in a direction that leads gradually but irrevocably to either the complete disappearance of the things we value or to a state where those things are realized to only a minuscule degree of what could have been achieved.15 Bostrom offers examples of each category. An example of Bangs would be global nuclear war suddenly killing all life, consistent with the most common view of extinction. Interestingly, Bostrom, writing in 2002, adds the possibility of global pandemics becoming Bangs: What if AIDS was as contagious as the common cold? There are several features of today’s world that may make a global pandemic more likely than ever before. Travel, food-trade, and urban dwelling have all increased dramatically in modern times, making it easier for a new disease to quickly infect a large fraction of the world’s population.16 He was writing 17 years before COVID-19 erupted. At this writing, he might consider it a catastrophic but “endurable” rather than existential or extinction risk, but it remains unclear whether the virus could mutate or interact with other rising deadly viruses such as Highly Pathogenic Avian Influenza to permanently alter social interaction or a society consistent with full human potential. If that were to happen, it would become an “existential risk,” and possibly a Bang or Crunch. Bostrom also notes that “runaway global warming” could become a Bang. Based on current evidence since his 2002 analysis, he would almost certainly see it as an extinction risk that should be classified as a potential Bang or, if the world acts more decisively than now seems likely, a possible Crunch.17 An example of other Crunches, closely related to global warming is what he calls “Resource depletion or ecological destruction”: The natural resources needed to sustain a high-tech civilization are being used up. If some other cataclysm destroys the technology we have, it may not be possible to climb back up to present levels if natural conditions are less favorable than they were for our ancestors, for example if the most easily exploitable coal, oil, and mineral resources have been depleted.18 It seems clear that, if writing today, he would alter this paragraph and focus on climate change as well as “resource depletion.” He would likely view the depletion of oil and coal as not an existential risk but a basis for a new clean energy economy that might limit climate change to a Crunch rather than a Bang. Examples of Shrieks include a “repressive totalitarian global regime”: One can imagine that an intolerant world government, based perhaps on mistaken religious or ethical convictions, is formed, is stable, and decides to realize only a very small part of all the good things a posthuman world could contain.19 Here, we see an existential risk that would not extinguish human life but could potentially permanently curb the potential for human development and growth that he calls “posthumanity.” Orwell’s 1984 would constitute Bostrom’s Shreik. An example that Bostrom argues of Whimpers – one that current space wars and colonization are making more likely – is what he describes as a “colonization race.” Our “cosmic commons” could be burnt up in a colonization race. Selection would favor those replicators that spend all their resources on sending out further colonization probes. Although the time it would take for a whimper of this kind to play itself out may be relatively long, it could still have important policy implications because near-term choices may determine whether we will go down a track that inevitably leads to this outcome. Once the evolutionary process is set in motion or a cosmic colonization race begun, it could prove difficult or impossible to halt it. It may well be that the only feasible way of avoiding a whimper is to prevent these chains of events from ever starting to unwind.20 Of course, we have seen a version of such existentially risky colonization in the history of Western militarist colonial nations both in Europe and, especially since World War II in the postcolonial, intensely militarized US state. We shall see that US militarism and endless wars remain the most dangerous risk of ending the world through nuclear war. Beyond his colorful classification of varieties of existential risks and extinction, Bostrom offers two other relevant arguments. One has to do with the history and future of existential and extinction risks. There have been five prior extinctions, all before the existence of humans. He argues that the invention and use of the nuclear bomb in 1945 started a modern sixth extinction stage, in which humans both exist and play a role in creating new existential risks. He argues that these risks are multiplying with natural, technological and socioeconomic and political developments that will make the future ever more vulnerable to all his classes of extinction.

<<PARAGRAPH BREAKS RESUME>>

This leads to a second idea that he does not highlight but seems to recognize. In the sixth extinction, where humans exist, we can foresee what might be “systemic extinction.” This would emerge when humans design the world, whether deliberately or not, for total repression and destruction, as seen in his notion of a Shriek extinction based on elites constructing a global totalitarian regime.

Systemic extinctions are existential risks that arise from the major institutional systems – whether economic or political – created by humans. Bangs of global nuclear war and run-away climate change would represent systemic extinction. They arise out of military and “security” systems as well as fossil fuel driven capitalist societies leading toward both of these forms of “Bangs.” Indeed, our book focuses on “systemic extinction,” and, more specifically, on United States and global capitalism that we argue is destined to create inevitable extinction unless we undertake urgent systemic change.21

<<TEXT CONDENSED, NONE OMITTED>>

Extinction Denialism Despite the growing and more widely discussed prospects of extinction, and the rise of “systemic extinction,” we are witnessing, in many conservative movements around the world and, in extreme form in the Republican Party of the United States, what can be called Extinction Denialism. The denial of man-made climate change in the Republican Party leadership has led the world-famous critic, Noam Chomsky, to argue that We might stop for a moment to ponder on most extraordinary fact. A major political organization in the most powerful country in the world’s history is quite literally dedicated to the destruction of much of life on earth. That might seem to be an unfair comment but a little reflection will show that it’s not.22 Donald Trump became the emperor without clothes here, openly ridiculing climate change and arguing – in relation to extinction by nuclear war – that “it makes no sense to have nuclear weapons if we aren’t ready to use them.”23 During the deep freeze of the Midwest in early 2019, something climate scientists showed was extreme weather predicted by their climate change models, Trump saw it as a huge joke about the fear of climate change, saying “we could use some more global warming right now.” In 2017, Trump also ordered all agencies of the federal government to expunge the words “climate change,”24 punishing any employee using the words. Extinction denialism includes tendencies among both conservatives and liberals to diminish the concerns about nuclear war that were present in the public discourse during the Cold War. And the denial of the existential dangers of unfettered economic growth and profit-seeking in a finite world is even deeper. Such denial is central to sustaining the profits and power of the “masters of the universe” running the global capitalist system’s largest banks, corporations and states. This hints that extinction, much like racism, is “systemic,” a function not just of rotten leaders but of the way we organize our ruling economic and political institutions. And the denial is systemic too, built into not just the Republican Party but much of the corporate and political world, as we show in later chapters. Millions of people, nonetheless, are beginning to wake up, especially, in the United States, after the election of President Biden and President Trump’s defeat. A new awakening about climate change began to spread not only among activists fighting pipelines and fracking but among millions of ordinary Americans supporting Biden’s climate agenda. The astonishing extreme weather of 2021 – filled with once-in-a-millennium floods, record drought, fires, and record heat – reaching 130 degrees in Death Valley and a record 121 degrees in British Columbia, Canada – made many realize climate disaster is not a future threat; it is here in spades right now. Western opinion polls in 2021 showed rapidly growing concern among the majority of Americans about climate change.25 But even for the emerging majority scared by the experience of the COVID-19 pandemic and now frightened by the extreme weather, climate change for the majority does not deeply intrude into their daily thoughts or behavior – or propel them into urgent political action. Even for those believing in human-caused climate change and a possibility of major nuclear or cyber conflict, or a pandemic that races out of control, the extinction nightmare is more a cognitive concern than a gut-level obsession. And for many, including politicians, who back a political response, it is often too slow; as climate author and activist Bill McKibben has said on climate, “winning slowly is the same as losing.”26 Ask yourself these four questions about your reaction to the extinction threat, whether of climate change or nuclear war: Does it keep you up at night? Do you cry about it? Does it make you ask whether it’s moral to have kids? Does it mobilize you to act politically to save life on the planet? You can be aware of the truth of climate change and the nuclear threat – and the perils of run-away capitalist growth – and still answer “no” to any or all these questions. If so, you are still living in a kind of Extinction Denialism. If would be as if you were told you had cancer, but don’t respond as if the knowledge made any difference. Or you simply can’t deal with it emotionally or feel you’ll be dead by the time extinction truly kills us. Either way, that’s a way of being in denial. There is a spectrum of denialism ranging from complete disbelief, to partial awareness, to full cognitive understanding without the knowledge getting into your gut and driving you to urgent action. Unless you act, you are in denial! While elites in many nations, including President Biden in the United States and President Xi in China and leaders in Europe, recognize the existential threat and are proposing major new climate and COVID-19 agendas, they are not sounding the emergency alarm and activating the all-out emergency public mobilization and far-reaching agenda that is required. Leaders have to encourage a culture where people answer “yes” to the four questions above, but that would have big consequences. It would threaten ruling elites and the system of power they benefit from in the here and now. We have seen this movie before. British journalist and influential climate change author, George Monbiot notes that ruling elites historically have typically been more likely to promote than prevent collapse because of the shortterm gains for themselves, writing that one scholar: The social science professor Kevin MacKay contends that oligarchy has been a more fundamental cause of the collapse of civilizations than social complexity or energy demand. Control by oligarchs, he argues, thwarts rational decision-making, because the short-term interests of the elite are radically different to the long-term interests of society. This explains why past civilizations have collapsed “despite possessing the cultural and technological know-how needed to resolve their crises”. Economic elites, which benefit from social dysfunction, block the necessary solutions.27 Ruling elites – what we now call the 1% – perpetuate systems that will eventually destroy them and everyone else, to protect their short-term interests. Monbiot notes that: The oligarchic control of wealth, politics, media and public discourse explains the comprehensive institutional failure now pushing us towards disaster. Think of Donald Trump and his cabinet of multi-millionaires; the influence of the Koch brothers in funding rightwing organisations; the Murdoch empire and its massive contribution to climate science denial; or the oil and motor companies whose lobbying prevents a faster shift to new technologies.28 The denialism of much of the corporate 1% and their conservative political allies, especially the Trumpist GOP, is still on full display. Virtually all GOP leaders and millions in their base – as well as their apologists on Fox News, such as Tucker Carlson who rails against climate policy as socialism and COVID-19 vaccines as government tyranny – continue to deny man-made climate change. They demonize and ridicule the Biden climate and COVID-19 proposals as well as the activists seeking even bolder action on climate, nuclear war or even COVID-19. And conservative leaders in Brazil, the Philippines, Hungary and many other countries continue rule with their own versions of denialism. Moving beyond extinction denial is the first step in any movement to save all life. It is an integral part of the new politics of extinction that can preserve the planet. It is also the first step away from collective insanity. To deny the threat of extinction of all life at this stage of history is delusional and unbelievable – it reflects a madness that goes beyond anything even George Orwell could imagine. It also indicates how the widely viewed rationality of capitalism is ultimately irrational – a system dependent on maintaining madness to perpetuate itself. Earth’s survival is going to depend on the resonance of the emergency calls by people like the now world-famous teen climate activist, Swedish teenager, Greta Thunberg, who thunders at adults that “you are stealing our future.” She won’t eat meat, fly in a plane, or do anything else that creates major carbon emissions. She leads school strikes by kids that have mushroomed round the world – with revolutionary calls to her generation aiming not only to mobilize millions of children and teenagers but also shame genocidally complicit adults, especially wealthy elites, into emergency action: You only talk about moving forward with the same bad ideas that got us into this mess, even when the only sensible thing to do is pull the emergency brake. You are not mature enough to tell it like it is. Even that burden you leave to us children … Our civilization is being sacrificed for the opportunity of a very small number of people to continue making enormous amounts of money … It is the sufferings of the many which pay for the luxuries of the few … You say you love your children above all else, and yet you are stealing their future in front of their very eyes … We cannot solve a crisis without treating it as a crisis … if solutions within the system are so impossible to find, then … we should change the system itself. We have not come here to beg world leaders to care … We have come here to let you know that change is coming, whether you like it or not. The real power belongs to the people …29 Money and Madness: Talking about Capitalism With the fresh eye of a teenager, Thunberg is onto the role of money, profits, and corporate elites in driving extinction. She is ahead of most adults. While some parts of the environmental movement and antiwar movement have discussed the climate dangers of corporate capitalism, the idea that capitalism fuels extinction is mainly off the table. Indeed, many American liberals as well as conservatives view US-style capitalism as the solution rather than the problem, the only system capable of bringing technological innovation or global integration in a way that can ultimately prevent extinction. Even those who see a connection between capitalism, climate change, pandemics, and war may be reluctant to talk about capitalism, believing that any focus on changing our economic system is such a long and difficult proposition that to focus on it will simply drag out and intensify the extinction threat. And many progressive Americans, who worry about climate change, recognize that just a mention of the word “socialism” will turn off millions of people, with leaders such as Trump and many Republican politicians today using it as the bogey-man of all evil and the end of freedom. The social critic Naomi Klein titled her best-seller on climate change, This Changes Everything. 30 When all life is threatened with being snuffed out, something people have never before experienced in human history then, yes, it does change everything. And that includes changing what we can and must talk about, including the formerly sacred subject of capitalism. Since the economic system is so deeply intertwined with the extinction threat, everything about our economics and politics is now on the table – and as extinction looms closer and larger, subjects like changing capitalism itself, even in capitalist America, will no longer remain taboo. We see it even in the United States, where talking critically about capitalism is harder than in most other countries. Yet millions of US young people have already opened their hearts and minds to a critical conversation about capitalist economics and saving the planet. This new conversation must catch fire and create transformative action now because it is already almost too late.

<<PARAGRAPH BREAKS RESUME>>

Capitalism and Survival

In the chapters that follow, we flesh out in some detail why corporate capitalism, particularly the neoliberal type in the United States, now threatens survival and makes extinction perils systemic, for five reasons briefly mentioned below.

First, capitalism is a system organized around profit as the central goal. Any effort to put other goals above profit, including social and environmental protection, is in tension with capitalism itself. As a system breeding ever more inequality, class divisions between billionaires and struggling workers take on a more life-and-death quality. This helps de-sensitize decision-makers to the broader extinction of all life through climate change or war.

Second, maximizing profit requires removing limits to growth.

Any company that puts limits on its growth will eventually reduce profit margins and succumb to competitors who seek maximum growth. Yet because we live on a finite planet, a system that cannot accept limits to growth, and is always hungrier to extract oil and exploit more workers, is incompatible with human and planetary survival.

Third, maximizing profit has always required capitalist wars. European colonial wars led to mass death but did not create the threat of total life extinction. But with World War II, invention of the nuclear bomb made war itself an extinction threat, because any war can now escalate to nuclear conflict, a major threat of extinction.

Fourth, capitalism seeks to privatize and sell virtually everything in global markets – both are inherently destabilizing imperatives. But a sustainable and peaceful society requires massive investment in public goods, which are aimed at maximizing the well-being and health of people and all life species rather than maximizing profit. The ultimate public good is sustaining human survival itself.

Fifth, capitalism generates consent – and vests itself with moral legitimacy – by calling the market the source of freedom and cultivating fear and hatred of government. But survival now requires an affirmative view of expansive government and public goods at all levels; it is the only way to create essential public goods.

The United States and Survival

Extinction is a global threat, rooted in a globalizing capitalism system, as well as the global political elites and culture tied and subject to that system. But while global systems continue to grow, we also continue to live in world of national states. While extinction is inherently a global crisis, every country plays its own role in shaping the threat and prospects for sustaining survival of life.

The hard truth is that the United States is the leading “extinction nation,” a fact that every American needs to understand in his or her gut. More than any other nation, American policies are fueling the existential threat to human civilization. The United States lead the race to extinction partly because it is indisputably the most powerful nation on the planet. It has a larger role than any other nation in setting the global rules of the game. America’s unique brand of capitalism, neoliberalism, also plays a central role. It requires US elites to slash public goods, cut taxes, reduce welfare, deregulate corporations, sell off public lands, and other policies that make neoliberalism an engine of extinction dangers.

<<TEXT CONDENSED, NONE OMITTED>>

Aggravating matters – all these rollbacks fuel far-right forces of reaction, the very alienated and aggrieved voices animating Republican political projects in the United States and the world over. While the United States is a declining hegemon or empire, its politics, and ideas still have enormous impacts on the world as a whole. As the threat of US authoritarian and fascist movements – exploding in the January 6 attempted coup and continuing in the ongoing Trumpist Republican Party attack on democracy itself – took center stage in the United States, parallel Far Right movements emerged throughout much of the world. The extinction threats of climate and war are paralleling and intensifying the threat of the extinction of democracy in the United States and elsewhere. Indeed, these two categories of existential threats are intertwined, feeding and fueling each other, as we show later in this book. In the final chapter, we address how it is that the Far Right, an enduring presence through much of American history (and subject of several books by Derber) may be countered by a Front for Survival, one which is global in scope but necessarily also anchored the United States. The good news for the United States is that as the country most responsible for endangering survival, it has great power to turn things around. This is not to say that the United States can solve the crisis because that will take new and powerful global change: the rise of new global social justice movements, cooperation, treaties, and governance. But global solutions are not likely to happen fast enough without the US seizing the moment, something that many Americans hope the Biden Administration will do, pushed hard by millions of new activists in popular movements for justice, democracy, and survival itself. In Part I, we offer an analysis of how the history and spread of global capitalism are putting us on the road to disaster. In Part II, we turn to the United States, showing how it is the most powerful country putting the pedal to the extinction medal. And finally, in Part III, we look to the solutions, focusing on the new “abolitionist” movements, briefly discussed below. Toward a New Abolitionism Survival requires a new abolitionist movement. The famous US 19th-century abolitionists, such as Frederick Douglass, the former slave who became the most famous orator of his era, and William Lloyd Garrison, organized to abolish slavery centering their efforts, first and foremost, on the suffering and rebellions of the enslaved themselves. We now need to abolish carbon emissions and nuclear weapons, and transform the economy driving them and perpetuating other extinction threats including those of over-production and rapidly shrinking biodiversity. And, while this seems a nearly impossible dream, much like the abolitionist call for ending slavery, it is potentially within our reach. Indeed, the United Nations and the US Democratic Party have already called for abolishing the creation of fossil fuel pollution by 2030. And a significant number of scientific and grassroots peace groups have been organizing for several decades to eliminate all nuclear weapons on earth. Moreover questions about the morality and legitimacy of an economic system producing billionaires while neglecting the needs of most working people for basic housing, health care, and a living wage have begun to energize a new politics among young people women, people of color and progressives throughout the world. The United States must play a major role, but other nations have already advanced their own abolitionist movements – and may be the leaders in global abolitionism. But it cannot succeed without US engagement, and there are signs from history that US abolitionism is possible. Indeed, none other than President Ronald Reagan in 1984 called for the abolition of nuclear weapons: After his reelection in 1984, President Ronald Reagan sat for an interview with Time magazine. “I just happen to believe that we cannot go into another generation with the world living under the threat of those weapons and knowing that some madman can push the button some place,” he said. “My hope has been, and my dream, that we can get the Soviet Union to join us in starting verifiable reductions of the weapons. Once you start down that road, they’ve got to see how much better off we would both be if we got rid of them entirely.” In his dealing with the Soviets, Reagan’s two terms were almost those of two different presidents. Both the hard-liner and the peacemaker were present throughout, but the balance shifted so decisively from one to the other as to create a discontinuity. The man who had denounced the nuclear freeze as Soviet propaganda was now suggesting not just reduction but elimination of all nuclear weapons.31 If the ultra-Conservative Ronald Reagan could overcome denialism and become a nuclear abolitionist, there is hope that a majority of Americans could become new abolitionists. Reagan’s evolution is worth noting: What explains Reagan’s remarkable transformation from Cold War hawk to nuclear peacemaker? His nuclear abolitionism had deep roots, going back to a flirtation with pacifism in the early 1930s. His antiwar side was connected to narratives and images that deeply affected him: seeing the British antiwar play Journey’s End in 1929, being shown footage from the liberation of Auschwitz in 1945, and watching the ABC television movie The Day After in 1983. A projection that stuck with him was that at least 150 million Americans – two-thirds of the population in 1980 – would be killed in an all-out nuclear war, though he believed for some reason that Soviet losses would be limited to a much smaller percentage. Advisers who “tossed around macabre jargon about ‘throw weights’ and ‘kill ratios’ as if they were talking about baseball scores” appalled him. In his diary and to aides, Reagan even worried that the biblical prophecy of Armageddon was at hand.32 While Reagan’s “conversion” is a sign of hope, it is misleading as a solution to the extinction crisis. Even if we were able to abolish nuclear weapons – in the spirit Reagan suggested – they would probably have been rebuilt without a larger shift in our politics away from the ruling system based on war and corporate expansion. We need a broader change to truly end the extinction threat, much as the 19thcentury abolitionists needed a transformation in the entire economic and political system of the United States, including the North, to put a permanent and sustainable end to slavery, something yet not fully achieved in the institutionalized racism pervasive in prisons, housing, inequality, and geographic distribution of pollution. The abolition of nuclear bombs and even carbon emissions is essential to preventing extinction. But to be a sustainable change, it cannot happen without deeper change. This challenge to change the larger system – particularly in a short period – seems an impossible agenda in light of the urgency of the extinction crisis. But history has offered other examples where humans have mobilized to transform whole systems of destruction and death in relatively short periods, beyond just the anti-slavery abolitionist movement itself. One might think of the successful movement to eliminate apartheid in South Africa, which required transforming the entire political and cultural systems and power elites running the country for many decades. Or the successful change to end the British Empire by Gandhi and the anti-colonial movement in India, along with many other former colonies rising to push out their rulers in the anti-colonial revolutions of the 1950s, 1960s, and 1970s. In this book, we will use the example of the abolitionist movement that worked to do the impossible: abolish the institution of slavery that had existed thousands of years and was integral to the economic and political system not only of the South but the entire United States. Before the Civil War, the North had slave-owners and made some of its greatest profits off the slave trade and the sale of cotton produced by Southern slaves. Abolitionism undermined the immorality that sustained the South and enriched much of the North, fighting for what could only have been seen originally as a utopian and hopeless cause. Nonetheless, abolitionism moved from a tiny movement of “dreamers” to a mass movement that created a new moral consciousness awakening millions to ultimately do the impossible: eliminate slavery. It did so by strategically undermining the “immoral morality” that gave slavery legitimacy and challenging the economic and political power of the tiny number of elite planters who dominated the slave South and owned the vast majority of slaves.33 Abolitionism achieved the unimaginable: helping to awaken an entire society to the death culture, wrapped in a culture of God and glory, at the center of the Confederacy. The abolitionists also awakened millions to the barbaric economic institutions that enriched slave holders and made clear that overthrowing the system was the greatest moral imperative of the age. The abolitionist movement is just one of several transformative movements in US history that offer hope. In the 19th century, the populist movement, bred by a collapse in the farm economy and the rise of the Robber Barons, fought for popular control over the nation’s financial system and broader economy.34 Populism of that era could be seen as an anti-extinction movement waged by farmers to save the agrarian economy and US democracy. While the populists didn’t succeed, it led to progressive movements culminating in the 20th century in the New Deal, which had its own elements of an anti-extinction movement. In the Great Depression of the 1930s, the US economy collapsed and a long-term unraveling of the American experiment seemed possible. This can be seen as a type of national extinction threat – and FDR saw his New Deal as essential to saving the nation from collapse. His New Deal progressives, allying with a new fiery labor movement, advocates for the homeless and hungry and for old people without social security, including outright socialists and Communists, came together to stop the extinction threat of that era and ultimately succeeded in helping the nation survive. The New Deal showed that the abolitionists’ emancipatory struggle had an enduring legacy, passed down from the abolitionists themselves to the 19th-century populists and then the early progressives and New Dealers of the 20th century. The activist movements of the 1960s can be seen as another stage where the emancipatory torch of the abolitionists was seized by a new generation. The perpetuation of Jim Crow threatened to tear the nation apart, and the civil rights movement took up the abolitionist struggle to unite the nation again by abolishing segregation and creating a new America based on principles of racial equality. Likewise, in the shadow of the Cold War that threatened nuclear extinction, activists against the war in Vietnam challenged the morality of US militarism in the name of anti-Communism and tried to stop an unjust war while preserving the world from blowing itself up. Martin Luther King picked up the torch of abolitionism when he linked civil rights with struggles for peace and social justice, calling for a transformation in the ruling capitalist system as essential to racial justice and survival in the nuclear age. In fact, King equated the evils of capitalism with those of racism and militarism in his famous “Three Evils” speech, adding that, Capitalism was built on the exploitation and suffering of black slaves and continues to thrive on the exploitation of the poor – both black and white, both here and abroad.35 King became the most important leader of 20th-century anti-extinction struggles that called for visionary transformation of US race relations, war, and capitalism. King’s legacy is being re-awakened through the rise of the massive anti-racist protests focusing not only on deaths caused by police brutality but on “systemic racism.” Black Lives Matter (BLM), now supported by millions of whites as well as Blacks and other communities of color, is increasingly seeing and protesting the intertwined crises of racism, militarism, environmental destruction, and capitalism. COVID-19 helps expose the deadly deficits of public health and other public goods that are integral to US capitalism and threaten survival in the age of COVID-19 and climate change. Today we face a new moral crisis of the ruling system and corporate elites of our era, which has created 21st-century full-blown threat of extinction. But while the system proclaims itself as the bastion of morality and liberty – something also claimed by the early Southern planter class – we have now a political and economic system hurtling toward the possibility of total human extinction, cloaked in a moralism of prosperity and freedom by our ruling corporate and capitalist system. Just as the abolitionists of the past united peoples and movements in a universal moral cause against the “morality” of slavery and the plantation system it served, so today, we need to embrace a new abolitionism that challenges the enslavement of our societies and most people in the world to corporate power and markets whose blindness and greed now lead inevitably toward climate or nuclear extinction. The moral crisis of extinction, as of slavery, cannot be challenged and overturned without attacking the centers of power in the economy and state. While drawing on the history of the abolitionist movement and later movements to help inspire a movement to make the impossible possible, we need to recognize the limitations of all prior historical movements. No historical movement has ever had to confront today’s totalistic threat of extinction of all life, since that threat has never existed before. But history may still be our best guide, since there are earlier dire threats which movements have sought to meet. Movements that confronted enormous moral challenges – such as abolitionism – had to mobilize systemic change and offer solutions to intertwined crises of capitalism, environment, pandemics, and war. We hope to show that 21st-century abolitionism is already emerging and may yet unlock the secret to human survival. Part I The Hidden System of Extinction 1 The Extinction Triangle Capitalism, Environmental Destruction, and Militarism Human extinction is now a very real possibility with underlying causes rooted in the deepest systems of our society. However, while parts of the extinction crisis are in clear view, most people around the world have not put together a clear map of the “extinction system,” which has been denied or obscured by many of the world’s most powerful people and institutions, particularly in the United States. In this chapter, we discuss the hidden triangle, a causal chain showing how the looming prospect of extinction is driven by three major intertwined threats to all life. The triangle is a global system, and imperils life across the entire world, with national triangles also existing in each country. It is largely invisible in most nations, and especially in the United States, a matter of overwhelming importance since the United States is the dominant global power and creates the most toxic triangle. Saving humanity, saving ourselves, cannot happen without exposing the triangle and overcoming it – in the United States and the entire world. As discussed in the Introduction, we are not defining existential threats and extinction as only those leading to the total destruction of all humanity and life on the planet. Following Bostrom’s analysis, we look at a range of catastrophic threats which, in Bostrom’s definition, “would either annihilate earth-originating intelligent life or permanently and drastically curtail its potential.”1 The “bang” form involves sudden total destruction of all life, but the “crunch, shriek and whimper” threats are more prolonged and varied, allowing some survival but restricting life and human development to the point that they can be seen as a “softer” form of extinction. 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 because 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 climate 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 driving extinction is the journalist, George Monbiot. He writes that: Ecologically, economically and politically, capitalism is failing as catastrophically 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 almost 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 mainstreamed the idea that large parts of the society should be separated from profitmaking 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 liberty, 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 hurdles, 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 nuclear 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 corporation …. 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 imminent. It’s widely recognized that we have entered the period of the sixth mass extinction.4

<<PARAGRAPH BREAKS RESUME>>

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 society 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 corporations 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).

<<FIGURE 1.1 OMITTED>>

<<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 destruction 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 reduce the quality of life and pose civilizational risks.

#### The alternative is an economic commitment to a planned economy. It’s mutually exclusive.

Nieto ’22 [Maxi; January; Professor and Researcher of Macroeconomics at Miguel Hernández University; Science and Society, “Market Socialism: The Impossible Socialism,” vol. 86]

4.1. The capitalist mode of production as an “organic system.” Faced with the superficial conceptions of conventional economics and market socialists, which did not address theoretically the constitutive structure of bourgeois society, Marx understood the capitalist mode of production as an “organic system” (Grundrisse) in which the different elements that compose it implicate and presuppose each other, forming a whole that is not simply the sum of its own parts, but an articulated totality with a specific operating logic that establishes the necessary conditions for its continuous self-reproduction and development. The process of exposition followed by Marx — clearly differentiated from the process of research — takes the form of a conceptual development by which categories are derived from one another in a logical sequence, beginning with the simplest and most abstract notions and advancing to the most complex and concrete. From this theoretical-methodological perspective, Marx shows that the market and capital are two organically connected instances that presuppose one another, so that they cannot exist separately. Understood as the universal circulation of commodities, the market is the form of manifestation of an atomized production structure where autonomous business units compete with one another seeking to maximize their profits (which is to say seeking to valorize their investments as capital, the final goal of all production).

Indeed, Marx demonstrates in Capital that the “simple circulation of commodities” (colloquially, “the market”) does not constitute an isolated or autonomous sphere of social reality, and much less does it refer to some form of precapitalist organization, a system of independent producers that never really existed. On the contrary, it represents a certain dimension or particular moment of an organic totality, such as the capitalist mode of production (unity of production, distribution, exchange, and consumption), which has its own operating logic and specific laws of motion. In Marx’s analysis, the sphere of commodity circulation appears as immediately visible on the surface of capitalist society itself, therefore presupposing it to be a structural totality. Only on the basis of fully developed capitalist production does the exchange of products become a truly universal phenomenon (as opposed to the restricted character it experienced in all previous societies). Thus, Marx’s research begins from a specific aspect of bourgeois society — such as exchange relations, but abstracted for methodological reasons from the existence of capital, which appears in a second phase of theoretical construction.

In the chain of logical-theoretical implications that leads to the notion of capital in Marx, there are two fundamental steps that occupy the first two sections of Volume I. First, it is established that the general circulation of commodities requires the category of money as a universally equivalent and autonomous form of value. Then it is shown that money can only become a truly autonomous form of value if it functions as capital (that is, as “self-valorizing value”), increasing throughout its circulation thanks to the generation of surplus value in production.

Marx thus derives the category of “capital” from the simple circulation of commodities, as an ulterior development of the determinations of the category of “money” and the functions recognized in that sphere. He offers this deduction as a transit from the “C–M–C circuit,” representing simple circulation, to the “M–C–M’ circuit,” which describes the circulation of money as capital. In the first circuit, money is only an intermediary in a process whose final goal is beyond mere circulation, in the consumption of commodities and therefore the satisfaction of needs. Money loses its autonomous existence the moment it is transformed into commodities, and its circulation is interrupted. From here it follows that money can only be an autonomous form of value if it never leaves circulation, and this happens only if it becomes the very aim of circulation, as in the M–C–M’ process. This second circuit requires a transit from the sphere of circulation, in which changes are registered in the form of value (between C and M), to that of production, the only terrain where surplus value can arise — a quantitative difference between the initial and final magnitude of value.

Thus, in its most abstract and essential determination (called the “general formula” by Marx), capital is a continuous process or movement: that of the “valorization of value” or “value in process,” and as such it constitutes an end in itself, an automatic process devoid of term or limit, to which individuals and their needs are subjected. It can then be said that the subject of the economic process is not people or social agents but capital itself, which must expand indefinitely, at an ever-increasing scale, leading Marx to speak of the valorization process as an “automatic subject.” Economic life is therefore governed by an abstract, impersonal, and ~~blind~~ power that imposes its need for self-reproduction on the will and needs of people. For Marx, this automatism alien to human consideration is most characteristic of the market process, and an essential reason behind his understanding that the market can never provide a basis for the construction of socialism, which is a project of social emancipation consisting precisely of conscious and democratic control of the economic process by a population seeking the satisfaction of its needs.

Universal exchange of commodities and capital would thus be internally and necessarily connected, presupposing each other within the same structural unit. The cycle of capital — the process of expanding an initial sum of value expressed in money — includes within a general economic interrelation both the phases of circulation (buying and selling) and of production (organization of work and generation of surplus). For this reason, circulation cannot be an autonomous sphere of the economic process but the expression of a particular aspect or moment of itself. Market relations are the necessary form of articulation of an atomized production system in which labors are carried out independently of each other, without submitting to any consideration or overall plan, and whose immanent purpose is expansion of value. In short, circulation (markets) and production (capital) make up two faces or spheres of a single economic structure. It should also be noted that this competitive framework, inherent in the fragmentation of social labor into private units, not only requires profit-seeking as an end in itself but also induces compulsive accumulation, and the need for constant productive reinvestment, which determines the ungovernable and turbulent functioning of the regime of market production.

Note that in this general characterization of capital as “value in process,” “self-valorizing value,” or “automatic subject,” labor-power as a commodity has not made an appearance, and therefore neither does the social relationship between the wage laborer and the owner of the means of production — which is what market socialists consider the essential characteristic of capitalist production. From the point of view of the essential determination that we are examining, the concrete agent in which valorization can be embodied is in fact entirely secondary. Hence, Marx conceived the figure of the capitalist owner as a mere “personification of an economic category,” “capital personified,” not as a true protagonist or subject of the economic process. In this sense, the capitalist will be “merely a cog” (Marx, 1976, 739) who executes the abstract logic of capital.

Although what has historically fueled this valorization process has been, of course, the exploitation of wage labor, this could also be accomplished by different sources: for example, by cooperative workers who must supply more work than its cost of reproduction to a process they do not control, which coercively imposes upon them the blind and external force of competition. Neither the legal status of the companies nor the type of social relations (vertical or horizontal) established within them will alter in any way this market logic or the general economic dynamics that derive from it. As long as the economy continues to be based on markets, production cannot be oriented toward satisfying social needs but must be directed to the valuation of investments.

Thus, at the level of abstraction considered here, the true presupposition of capital is not labor-power (or a free worker) as a commodity, but rather competition, which “subordinates every individual capitalist to the immanent laws of capitalist production, as external and coercive laws” (Marx, 1867, 739). This leads to the tendency to lower costs, to lengthen the working day, and to accumulate or extend markets. It is competition, in short, that forces production units to extract surplus labor from the producers (whether salaried or not) in ever-increasing quantities, in order to continually consign it to the automatic movement of “accumulation for the sake of accumulation, production for the sake of production” (Marx, 1867, 742), a requirement on which survival in the market depends.

In summary: understood as the universal exchange of commodities, the market necessarily expresses an economic structure based on private control of the means of production; and it presupposes the fragmentation of the productive apparatus into autonomous business units that, in order to survive in competition, need to maximize surplus value and continually reinvest it. The fragmentation of social labor requires that investments generate more value than the production costs incurred by them.

### 1NC

#### Pro-labor rulings trigger vehement backlash and institutional retaliation.

Madland ’21 [David; May 15; Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress; Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States; “Creating the New System,” p. 158]

Importantly, these factors do not need to stay aligned for very long in order for reform policy to have a lasting impact. If the new labor system is ever able to become law, it is likely that powerful opponents would seek to weaken or undermine its implementation through a variety of strategies, just as they did when the NLRA was passed in 1935. Administrative budgets and regulations would be heavily contested, political supporters targeted, lawsuits filed, studies and news reports on the policy’s supposed harms produced, and new “reform” legislation introduced. These efforts would likely have significant financial backing and after some time would probably succeed in at least watering down the original law. The current pro-business makeup of the courts makes it seem very likely that at least some elements of the new labor system would be undermined.56

#### Salient, unpopular rulings trigger court curbing, nullifying enforcement---presumption.

Bridge ’24 [Dave; 2024; PhD, Associate Professor of Political Science at Baylor University; Pushback: The Political Fallout of Unpopular Supreme Court Decisions, “Theory,” Ch. 2]

I argue that in certain instances, instead of resolving the internal tension in the coalition, the court exacerbates it. That is, factions within the majority party who feel they have suffered injustice will not always blindly accept judicial rulings that go against their secondary preferences. They might push back against the court—both at its rulings and at its institutional independence. Moreover, dissatisfied members of the majority coalition may be joined by opportunistic members of the minority coalition. This cross-partisan combination may even form a majority.

This is key—when the cross-partisan alliance constitutes a majority, it can effectively push back against judicial decisions. While the regime politics paradigm has done much to dispel the myth of the countermajoritarian difficulty, the Supreme Court can still behave in countermajoritarian ways. The majority, however, might be different from our traditional notions. In other words, in some cases, we must look beyond using partisan labels as a proxy for political preferences. Once again: not all Democrats (or Republicans) are the same. And there are instances in which Democrats and Republicans (legislators and/or voters) might ally with each other to form a cross-partisan majority intent on curtailing the judiciary and the ideas it espouses. I discuss possible consequences in detail below, but in short, cross-partisan majorities might prove successful in delaying or thwarting the implementation of judicial decisions; curbing the court; and/ or shifting the electorate so as to bring a new majority coalition into power.

All told, the court is not exempt from reflecting and responding to the developmental challenge of factional in- fighting. When the court upholds the preferences of one faction, the losing factions become understandably upset. And they act on those feelings. Put simply, when the Supreme Court “chooses sides,” it does not mend the coalition’s fault lines; rather, the court awakens the fault lines. Ultimately, the court’s actions can lead, ironically, to the demise of its own institutional authority and its own affiliated coalition.

<<TEXT CONDENSED, NONE OMITTED>>

Expectations In this section, I use the regime politics assumptions, political party assumptions, and theory to generate predictions regarding cross-partisan countermajoritarian decisions.13 Here, it is helpful to describe two types of majorities that the Supreme Court could counter. I derive terms from Key.14 First, the “majority in the government” comprises members of Congress from both parties who are dissatisfied with the court. Second, the “majority in the electorate” comprises dissatisfied voters (again, from both parties). Now, nearly all judicial decisions on constitutional issues engender some reaction from dissatisfied factions. But the reaction is more likely to have a significant effect—an effective pushback—if a national majority (either in the government or in the electorate) comes together to oppose the court. Granted, it is tough to measure these kinds of majorities with complete precision.15 Still, were a cross-partisan majority in the government and/or majority in the electorate to emerge, we might expect some observable qualities. I discuss those qualities below and use the introductory chapter’s example of the 1950s communism cases as an example to show how the expectations play out in actual political development. Details of the cases are interesting; but more important than their individual contents was the collective result.16 In the first set of cases in 1956–57, the Warren Court repeatedly ruled in favor of communists’ rights. It had declared that public officials could only prosecute communists based on acts (or plans to act) and not on political beliefs. Legislatures, administrative bureaucracies, and public service professions had to clear high bars to, respectively, investigate, fire, and deny employment access to suspected communists. Thus, the public’s (and Congress’s) interpretation of the 1956–1957 decisions was that “fourteen communist leaders had been freed, two suspected communists apparently had been allowed to practice law … and state and congressional investigations had been frustrated.”17 Expectation #1: Surface-level Indicators To start, I offer two “surface-level” indicators of a cross- partisan countermajoritarian Supreme Court decision. While both indicators are intuitive expectations, I qualify their effectiveness in measuring countermajoritarianism. First, perhaps the most obvious indicator of a countermajoritarian decision would be public opinion polls showing that a national majority opposes the ruling. If the court’s decision reflects the sec ondary preferences of the dominant coalition’s lead faction, and if a representative sample of the national majority nevertheless opposes the decision, then we should suspect a cross-partisan majority. Public opinion polls from the 1950s show that most Americans probably would have disagreed with the court’s decisions on communism.18 The National Opinion Research Center (NORC) conducted a national poll in 1954 entitled “Communism, Conformity, and Civil Liberties.” It found that 75 percent had a “very favorable” or “favor able” view of “committees investigating communism” (e.g., the House on Un- American Activities Committee). When asked about “some of the bad things (if any) that you feel these committees have done,” 60 percent gave the nonlisted response “not putting enough communists in jail.” Only 2 percent thought the committees created “a general atmosphere of fear and suspicion.” Some of the poll’s questions asked about issues that were raised in Supreme Court cases: 94 percent of respondents approved of universities firing communists (Slochower v. Board of Education, 1956); 72 percent disapproved of communists making public speeches (Pennsylvania v. Nelson, 1956); and 60 percent believed communists should be jailed (Yates v. United States, 1957).19 The problem with relying solely on public opinion polls is that the court’s decision itself may temporarily sway the public. Thus, we might say that the anticommunism majority was not organic; instead, it was a reactionary result of the court’s rulings on the issue. This objection is tough to overcome because it is hard to identify why respondents believe what they do. That said, the fact that the NORC poll was taken before 1956–57 might give it some independence from the court’s decisions.20 Second, I look for claims by members of the minority party and the nonleading faction(s) of the dominant party that the court has acted in a countermajoritarian fashion or that the justices are unaccountable. If these members of Congress claim a countermajoritarian difficulty or an accountability problem, perhaps there is one. After the communism cases, one Republican member of Congress fumed against “the extreme liberal wing of the United States Supreme Court,” which had struck down laws favored by the majority.21 Southern Democrats, too, relayed concerns, such as James Davis’s (D- GA) claim that the court was like a king who was “independent of the will of a Nation.”22 In total, these two surface- level indicators are just that: surface-level. They are inconclusive and have their respective drawbacks. However, they are intuitive checks for a reason. In fact, they are likely the first indicators we would want to see before moving into the two more complicated expectations below. Public opinion polls and congressional rhetoric are not sufficient to identify countermajoritarianism, but when combined with other observable effects, they help triangulate on cross- partisan countermajoritarian Supreme Court decisions. They are informative pieces of the observable effects puzzle. Therefore, I look for public opinion and legislators’ rhetoric and the following expectations. Expectation #2: Nonleading Faction Response When the Supreme Court rules in favor of the secondary preferences of the dominant party’s lead faction, then we might expect nonleading factions to try to push back. Going beyond theatrical rhetoric denouncing the decision as countermajoritarian, members of Congress have another powerful weapon in their arsenal: court-curbing proposals. These “attacks” aim to undermine judicial authority and independence. If dissatisfied with the court, nonleading faction members can introduce attacks that seek to alter the court and its opinions. The appendix to this book discusses the extension of a database that registers thousands of court-curbing proposals.23 The database provides clues (i.e., home state and partisan affiliation) about each attacker’s factional affiliation. Note that outside a few high-profile examples (e.g., Sixteenth Amendment), court-curbing legislation rarely passes or works. Nevertheless, attacks against the Supreme Court indicate a possibly countermajoritarian court. Indeed, for the purposes of identifying such rulings, it does not matter whether a court-curbing bill passes. Its mere introduction suggests that its sponsor is unhappy with the judiciary—precisely the type of information I seek to discover.24 In fact, members of Congress likely know that attacks are practically futile. They introduce them to send important signals to various targets. We do not know the full extent of the reasons behind various attacks, but if combined with other cross-partisan countermajoritarian indicators, then they add another piece to the observable effects puzzle. Obviously, they are a position-taking device that allows members of Congress to grandstand for constituents.25 But if linked to other behavior, then maybe legislators attack to say something to the court (“back off this issue”), copartisans (“this is an ideological fault line within the coalition”), or the opposition party (“there is a cross-partisan alliance opportunity”). Lastly, dissatisfied nonleading faction members of the majority coalition have a final option available: switching parties. This is an extreme measure, and we should not expect to see it often. Supreme Court decisions alone are unlikely to cause such a defection, but they might trigger, or add to the mounting frustration behind, a polit ical figure deciding to move to the opposition party. One example arises from the communism cases. Ronald Reagan’s feelings towards radical leadership within the Screen Actors Guild played a role in him switching to the GOP.26 By the mid- 1950s, Reagan held strong anticommunism stances that aligned with the Republican Party.27 T hough infrequent, even a handful of switches might imply that the court has upset some element(s) of the dominant coalition. If combined with Expectation #3, there is reason to suspect a cross-partisan majority. Expectation #3: Minority Party Response Like members of the nonleading faction of the dominant party, we should also expect members of the minority party to alter their behavior. For starters, they too can propose court-curbing bills, such as William Jenner (R- IN) and John Butler’s (R- MD) cosponsored bill seeking to strip the court of jurisdiction over cases involving communists’ rights. On a grander scale, the minority party could also move to take advantage of the apparent fault line in the dominant coalition. If conscious of the opportunity, the minority party can attract wavering members of the dominant party. The “issue evolution” strand of the political parties literature explains how minority parties can use newly arising issues to enlarge their coalition.28 To attract new partisans, minority parties must provide early policy cues—position-taking stances that signal the electorate as to how their party views a new political issue. In addition to providing a clearer sense of the parties’ stances, politicians also keep the issue on the agenda, giving it a higher likelihood of being more salient. In time, the consistent blitz of position-taking signals may cause voters from one (or more) faction of the dominant coalition to move to the opposition coalition. These signals may take many forms: “policy proposals, conventions, speeches, campaign ads, public demonstrations, letters to the editor, talk shows, and so on.”29 Court-curbing attacks certainly qualify as an appropriate, and understudied, issue evolution mechanism, especially since members of Congress are “the most consistently important and recognizable source of partisan cues.”30 I do not mean to say that attacks are the only—or the most important—cue. Indeed, I look to other signaling devices, such as speeches by lawmakers, party plat forms, internal party strategy memos, and presidential addresses. In all of these, we would expect to see the minority party changing its focus, rhetoric, and strategy on issues raised by the Supreme Court. Put simply, we would expect the minority party to recognize a split in the opposition party, and for the minority party to try to widen that split to win more voters. Regarding communism, some Republicans doggedly focused on the court’s decisions. For example, Craig Hosmer (R- CA) candidly announced that the GOP leadership “instructed [members of Congress] . . . to press vigorously for the enactment of the [court- curbing] legislation before adjournment.”31 Admittedly, this could have been a policy concern rather than a coalition- building effort. In fact, there was not much of an attempt to enlarge the GOP after the communism decisions. Because court-curbing proposals had their intended effect, Republicans had no opportunity to push the communism issue or formally curb the court. Throughout the book, I return to the interplay of court-curbing and judicial responses.

<<PARAGRAPH BREAKS RESUMES>>

Pushback

If a cross-partisan majority opposes a Supreme Court ruling, then that majority may have recourse. Again, any court decision that involves secondary preferences will lead to some factions being dissatisfied; and those factions, too, have recourse on their own. But when the coalition of objectors encompasses a cross-partisan majority, the options available to that alliance are more likely to have an effect than when a smaller minority faction opposes the court on its own. Even so, a cross-partisan majority alliance will face obstacles. Nonleading factions of the dominant party may not believe that a judicial decision warrants an alliance with the opposition party, or vice versa. Even if the parties are united, it is difficult to overturn a court ruling. Still, if the entire cross-partisan majority is so strongly opposed to the court that members of one party are willing to ally with those from another, then we should see some manifestations of that alliance. I present three different types of pushback, depending on the nature of the majority in the government or majority in the electorate.

1. Grassroots pushback. Local citizens and local decision-makers (e.g., sheriffs, school boards) undermine the court’s effectiveness. Supreme Court decisions go unenforced, or the extent of those decisions’ enforcement are limited by local communities who do not agree with the court’s opinion.32

2. Congressional pushback. The minority party reaches across the aisle to dissatisfied factions in the majority party to undermine the court’s judicial independence. The legislature introduces bills that target the court itself (e.g., restricting jurisdiction) or its rulings (e.g., overriding a judicial opinion). In addition, Congress need not explicitly target the judiciary. Instead, Congress can pass bills that scale back the implementation of a decision.33

#### Domestic judicial independence is modelled, unlocking global development.

Greene ’8 [Norman; January 2008; Graduate of Columbia College and New York University School of Law, member of the firm Schoeman Updike & Kaufman LLP, New York, N.Y.; Denver Law Review, “Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?” vol. 86]

I have learned through multiple conversations and extensive study that American writers on domestic judiciaries and American writers on foreign judiciaries seem to be on separate paths. They often publish in different places, and if they read each other's work, it is not obvious from some or perhaps much of what I have read. Not too long ago, I was on one of those separate paths myself (the domestic one) until I was told, in substance, by a friend who was on the other one (the international and rule of law one) that "the issues on both paths are really the same, don't you know?" This simple but perceptive thought gave me an entirely new perspective. The objectives of this article include joining the two paths, applying to the domestic sphere perspectives from the field of rule of law and international economic development, inspiring further scholarship, and starting on the road toward positive change.

This article will consider whether a relationship exists between good business and a fair and impartial judiciary; if so, whether a compelling domestic economic rationale for American judicial reform may be identified; and if so, how it may be achieved. It will begin by focusing on the international principles of rule of law originating in work sponsored by international financial institutions and other governmental and non-governmental organizations, which have disbursed billions of dollars to improve judicial systems in developing countries. These principles include key components of the rule of law, such as judicial impartiality, independence,3 competence, and accountability; 4 and they are applicable to the United States as well as to other countries.5 This article will also consider the basis for linking the rule of law and economic development, various causation controversies affecting the linkage, and the likely economic consequences of rule of law violations. It will then assess state court judicial elections in the United States in light of the rule of law, whether the American practice of judicial elections is consistent with the rule of law, and the potential economic implications.

The article concludes that a sufficient connection between the rule of law and sustainable economic progress (whether called development or growth) has been demonstrated to warrant the concern of governmental and nongovernmental policymakers, both at home and abroad; that the principles of the rule of law and economic development apply domestically as well as internationally; that state court judicial elections create or appear to create rule of law violations in the United States; and that Americans most concerned about the welfare of our economy should work for the elimination of state court elections in the United States.

I. THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT

A. The Enormous International Commitment to Promoting Rule of Law

The notion that the rule of law promotes economic development is built on various factors, including common sense, practical assumptions, logic, and to some extent, empirical studies.6 Based on this level of knowledge, policymakers have made decisions and taken action, including disbursing extraordinary sums of money to promote the rule of law as a key component of international assistance to developing countries.7 Policymakers are on a timetable: they need to make decisions now on the basis of the knowledge that they have to try to improve or not improve foreign legal systems. If they decide to take action, they must decide what kind of action to take and where.

<<TEXT CONDENSED, NONE OMITTED>>

At the same time, an academic debate proceeds over what we know about the subject, including: what is the rule of law; what is economic development; do improvements to the rule of law promote economic development; what is the measure of each; does economic development in turn bring about a demand for the rule of law; does it do so everywhere; are there exceptions; what caused the exceptions; do they matter; and how do we know and prove the connection between the rule of law and economic development. Is the connection just an association, perhaps a correlation, or is there demonstrated causation? Is there empirical evidence of this; if so, how much; and how much is necessary? If not, what evidence should we obtain and how should we obtain it? The academic discourse is divided, sometimes tentative, other times assertive, and often calls for further research, but it forms a vast literature. The effort in the "field of law and economic development ... has been lead [sic] by the international financial institutions (TFIs)-the World Bank, the International Monetary Fund (IMF), the Asian Development Bank, etc.-by the aid and development arms of the U.S. government and the European Union, and to a lesser extent by NGOs.... In this context, the Rule of Law is understood as being related to economic development and the workings of a market economy, rather than as a set of normative political commitments." 8 These and other organizations, such as and including the Inter-American Development Bank, the United States Agency for International Development (USAID), and the American Bar Association (ABA) through its Rule of Law Initiative (ABA ROLl) 9 and its diverse activities, have disbursed or overseen the disbursement of billions of dollars.10 The many activities of ABA ROLl appear on its website and are too extensive to catalog, but cover numerous countries and projects in the area of legal reform, including gender equality projects. 1 For example, according to a 2002 report: The World Bank, the Interamerican [sic] Development Bank, and the Asian Development Bank have extended over $800 million in loans for judicial reform .... [T]he United Nations Development Program, the European Union and its member states, and the American, Australian, Canadian, and Japanese governments have provided significant grant aid to help developing nations improve the operation of the judicial branch of government. 12 The World Bank reports having lent $273.2 million in 2002, $530.9 million in 2003, $503.4 million in 2004, $303.8 million in 2005, $757.6 million in 2006, and $424.5 million in 2007 on rule of law initiatives.1 3 As one commentator noted, there has been a "massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars. The World Bank alone reports that it has supported 330 'rule of law' projects and spent $2.9 billion on this sector since 1990.,14 The Millennium Challenge Corporation (MCC) is a United States government corporation that provides aid to countries meeting certain levels of satisfactory standards of good governance. 15 Founded in 2004, the "MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people." 16 Eligibility for grants depends, among other things, on whether the country meets certain thresholds in particular categories. These categories include: "Ruling Justly" indicators, consisting of "Political Rights" and "Civil Liberties" (measured by Freedom House indexes); "Control of Corruption;" "Government Effectiveness;" "Rule of Law;" and "Voice and Accountability" (measured by World Bank Institute indexes). 17 Using these indicators, the MCC evaluates countries on, among other things, "public confidence in the ... judicial system; ... strength and impartiality of the legal system; . . . independence, effectiveness, predictability, and integrity of the judiciary; . . . [and the training of judges] in order to carry out justice in a fair and unbiased manner.',18 Eligibility does not require minimum scores in all indicators. 19 The purpose of the indicators is "to identify countries with policy environments that will allow Millennium Challenge Account funding to be effective in reducing poverty and promoting economic growth. 20 Rule of law reform includes both judicial reform and overall legal reform.2 ' What falls into the category of judicial reform or legal reform "blurs at the margin," but the "core of a judicial reform program typically consists of measures to improve the operation of the judicial branch of government and related [or supporting] entities such as bar associations and law schools. 22 This includes "changes in the ways in which judges are selected, evaluated, and disciplined to ensure that decisions are insulated from improper influences. 23 Overall legal reform may include drafting and revising legislation as well. 24 Increasing compensation and respect for the judiciary are also concerns.25 Reforms need not involve transplanting "complicated legal systems that work well in rich countries" to poorer countries "without significant modification., 26 The subject of legal transplantation-what is successful or unsuccessful and why-is one of some complexity; however, merely transplanting an institution from one place to another does not insure that the institution will be functional or effective when it arrives at its destination.27 The "'hasty transplant syndrome' is a critical problem in legal reform assistance, which 'involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture.' ' 28 B. The Linkage Between the Rule of Law and Economic Development at Home and Abroad 1. Definition of the Rule of Law The concept of the rule of law has been traced to "political theorists like Aristotle, Montesquieu and Locke, who were concerned with devising limits to the power of the government., 29 In the case of Aristotle, the concept appears in the sense of "judging the case rather than the parties" and showing impartiality. 30 The phrase "rule of law" itself has been attributed to British jurist Albert Venn Dicey in 1885.31 The phrase is susceptible to varying definitions from the limited to the substantial. For example, definitions of the rule of law have been described as broad and variable; it has been called a "notoriously plastic phrase., 32 The phrase "rule of law" is not a "legal term of art.",33 Commentators have varying views of its utility. One extreme view is that the phrase has no meaning: "The 'rule of law' means whatever one wants it to mean. It's an empty vessel that everyone can fill up with their own vision., 34 If rule of law just means the "rule of good law," the term is useless, since "'we have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph."'' 35 "Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding., 36 "The rule of law... stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means. 37 One commentator observed that "[w]hen an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it."'38 Another commentator noted the following: Our tradition has produced no agreed definition of the Rule of Law, and there is no important tradition of academic analysis and explication of the term .... Few American law students study jurisprudence (legal philosophy), and it is safe to say that the overwhelming majority of American law students never address the Rule of Law concept in any systematic way.39 The rule of law should not be the rule of any law, regardless of its content, however. Although that may enhance predictability, such a rule of law would be "compatible with a regime of laws with inequitable or evil content"; and it "may actually strengthen the grip of an authoritarian regime by enhancing its efficiency and by according it a patina of legitimacy. 40 The World Justice Project has identified four "universal" principles comprising its "working definition" of the rule of law, embodying, among other things, fairness, accountability, independence, and competence: 1. The government and its officials and agents are accountable under the law; 2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; 3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient; 4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve 41 Another view likewise ascribes to the rule of law three elements, which generally require that the courts should be accessible, independent, impartial and accountable: The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: first, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; second, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.42 In turn, judicial impartiality and independence are captured by the notions that decisions "are reached on the factual and legal merits of the issues before the court, uninfluenced by considerations that are extraneous to those merits, such as personal relations between the judge and one of the parties, corruption, cronyism, political interference or coercion in particular decisions, especially those affecting the government of the day or its officials." 43 Judicial accountability, among other things, includes such matters as the quality of the decision-making process, compliance with judicial codes of conduct, and the efficiency of judicial administration.44 Different concepts of the rule of law are peculiarly referred to as "thick" or "thin," depending on the number and kinds of requirements they contain, and have been shown in a sliding scale. 45 The thickest versions contain individual rights, including some social welfare concepts.46 For example, the World Justice Project's concept of the rule of law is not merely one of formalistic legality, but expressly includes concepts of fairness, competence, and the protection of "fundamental rights." Its definition appears to fall within the "thicker" part of the scale. The notion of the "rule of law, not of men" has sometimes been considered an alternative view of the rule of law.47 This is subject to the caveat that human participation cannot be divorced from the operation of law since laws do not apply or interpret themselves.48 It is a valuable reminder that judges should "apply a relevant body of rules to a situation," rather than "do as they please ...without regard to rules. 4 9 Without specifying what the rules should be, the concept calls for government to "sublimate their views to the applicable laws."5° Finally, the World Justice Project recently developed a Rule of Law index that has been and will be applied to a number of countries, including the United States, to measure the extent to which a country acts in conformity with the rule of law.51 A pilot study performed for the Project by the Vera Institute measured the rule of law to a limited extent in three cities outside the United States and in New York City to "gauge the extent to which all people, particularly those who are poor or otherwise marginalized, experience and benefit from the rule of law. 52 2. What is Economic Development? Although the rule of law obviously applies to the United States as well as other countries, the phrase is still most commonly used these days in the field of international development work. 53 For example, starting in the early 1990s, the World Bank and LMF "began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries," justified in order to "provide a secure environment for investments, property, contracts, and market transactions. 54 Over the past couple of decades, this has grown to be a professional field, whose practitioners use funding from international development institutions, such as USAID, to promote the rule of law in developing countries and post-conflict environments.55 Many articles refer to the rule of law and economic development; however, little is said in those articles about the definition of economic development, as if all readers knew what this term meant. Sometimes the word "economic growth" is used instead of "economic development," as if both words were the same; and sometimes the words "development" and "growth" both appear in the same definition, as follows: Outside the U.S., the concept of local economic development (LED) refers to a broad set of financial and technical assistance provided to less developed countries (LDCs) to reduce global poverty. In this sense, policies and programs focus on a comprehensive approach to economic growth that includes capacity building for citizen, public and private sector participation and collaboration. These efforts may focus on improvements to political, legal, financial, transportation, communications, education, environmental, or healthcare systems. Business or employment specific aspects of LED may focus on entrepreneurial development, foreign direct investment, and the development and maintenance of efficient production and distribution systems for goods and services. 56 Although the subject is not free from doubt, development is sometimes perceived to be the broader term and more representative of permanent economic progress. Nonetheless, nothing precludes the rule of law from supporting less extensive forms of economic progress. The definition of economic development may differ from country to country and context to context, especially to the extent that it depends on priorities. For example, for a country with insufficient housing, power plants, highways, and jobs, it might mean more houses, power plants, road construction, and new jobs. For a country with lots of housing, power plants and roads, it might mean, among other things, more hospitals and manufacturing, if those were deficient. If the country lacked certain goods and services, development might mean the production of those goods and services. The definition depends on what is needed in each case.58 Furthermore, whether development in particular areas should be left to market forces in laissez-faire economies or otherwise directed or encouraged is a fair ground for discussion in a country-by-country context. As an alternative or supplemental tool for assessing economic development, one might consider large measures of wealth, such as gross domestic product or per capita income. To the extent that they do not take into account disparities in wealth within a country, however, those measures may be insufficiently meaningful. Therefore, to counterbalance this, one might need to reflect on the "Gini coefficient of inequality." According to the World Bank, the Gini coefficient "is the most commonly used measure of inequality. The coefficient varies between 0 [zero], which reflects complete equality, and 1 [one], which indicates complete inequality (one person has all the income or consumption, all others have none)." 59 "To begin to understand what life is like in a country-to know, for example, how many of its inhabitants are poor-it is not enough to know that country's per capita income. The number of poor people in a country and the average quality of life also depend on how equally-or unequally-income is distributed. 6° Thus one might not regard something which exacerbates wealth disparities (e.g., by leaving virtually all the wealth in the hands of a few, such as a dictator or an aristocracy, while the rest of the population remains impoverished) to be positive economic development, even if it raises the country's overall wealth dramatically. Countries with extraordinary disparities of wealth and poverty may also be unstable and thus be poor investment climates for business. "High inequality threatens a country's political stability because more people are dissatisfied with their economic status, which makes it harder to reach political consensus among population groups with higher and lower incomes. Political instability increases the risks of investing in a country and so significantly undermines its development potential ....61 Regardless of the measure of economic development, certain principles arguably support economic progress-namely, enforcement rather than violation of legitimate bargains, 62 encouragement rather than discouragement of investment in useful enterprises, creation rather than dissipation of legitimate and useful employment opportunities, and increase rather than shrinkage in the production of valuable goods and services. The words "legitimate" and "useful" in this sentence are intended to reflect the notion that there is no societal interest in enforcing corrupt contracts or contracts otherwise against public policy, 63 creating unlawful employment opportunities or ones which are not socially useful, or in providing poor quality or undesirable goods and services. For example, undesirable employment opportunities might be the following: jobs building x when the country already makes too much x, and there is no export market for x; or jobs in industries which do not benefit society, such as building arms for aggressive war, serving in a dictator's secret police, and engaging in narcotics production and human trafficking. The armaments and narcotics themselves might also be examples of undesirable production. The use of the phrase "public policy" brings up the question of "whose public policy," since public policy may vary from country to country. 64 Western institutions attempting to bring rule of law reforms to foreign countries would undoubtedly find it difficult to encourage enforcement which substantially offended their own public policy standards; and ignoring foreign standards of public policy would presumably lead to resistance from the foreign nations concerned. 3. The Linkage Between the Rule of Law and Economic Development Many have linked the rule of law to economic development in developing countries, and statements to that effect are common and longstanding.65 "The argument that the rule of law fosters economic development has been made many times.' 66 Although the principal focus of the rule of law and economic development discussion is in the context of international development, some American business organizations have noted the relationship between law and American economic prosperity as well.67 For example, one multinational company has recognized that "the business community [has] a particular opportunity to help spread the word that if countries want to grow economically, if they want to create better futures for their people, if they want to build new jobs, the independence of the judiciary in fact plays a critical role in economic development."68 In addition, the United States Chamber of Commerce has concluded as part of its "tort" or "civil justice" reform agenda that the American tort system costs businesses billions and harms both employment and productivity.69 Similar statements have been made by others, including the American Tort Reform Association: While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, judges in Judicial Hellholes do not. These few judges may simply favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases. More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense. What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of being places where legitimate victims can seek compensation from those whose wrongful acts caused their injuries .... Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.70 The linkage between the rule of law and economic development (including foreign investment) has been described as the "dominant theory.,, 7 1

<<PARAGRPAH BREAKS RESUME>>

A set of common sense assumptions appears to underlie the connection between rule of law and economic development, with some limited or questioned empirical study covering various possibilities,72 including a 73 country's historical origins. These assumptions relate to the key components of the rule of law. For example, "[m]ore independent judges are often more efficient judges .... The combination of judicial independence and efficiency seems to be essential for judicial reforms to have a positive effect on economic development., 74 "Judicial independence is a key determinant of growth as it promotes a stable investment environment., 75 Reforms which strengthen judicial accountability-and thus efficiency-improve judicial performance.76 A sound judicial system promotes economic development "by enforcing property rights, checking abuses of government power, and otherwise upholding the rule of law and in enabling exchanges between private parties., 77 "[T]he claim that judicial independence is a necessary condition for the protection of property rights or economic growth should give any American political scientist pause.78

"No one, whether local or foreign, wants to invest in a country that is politically unstable or where there is no confidence in the justice system, as investors would not be assured of a fair return on their investment., 79 "An independent judiciary could thus also be interpreted as a device to turn promises-e.g., to respect property rights and abstain from expropriation-into credible commitments. If it functions like this, citizens will develop a longer time horizon, which will lead to more investment in physical capital. . . .All these arguments imply that [judicial independence] is expected to be conducive to economic growth. 8°

"The link between property rights, the integrity of contract, and economic growth comes through several channels, but incentives play a central role: The more well-developed and secure are property rights, the greater incentives individuals have to invest., 81

Thus "the [World Bank] sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order., 82 As a former president of the World Bank noted:

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system. 83

Another World Bank commentator stated that "the payoffs from a successful [judicial] reform, in terms of economic growth and development, more than justify the work involved.,, 84 "One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development., 85

<<TEXT CONDENSED, NONE OMITTED>>

C. The Challenges to Promoting Economic Development through Rule of Law Addressing rule of law reform and economic development in any specific country presents particular challenges. "Specifying the optimal set of judicial and legal institutions for any given country is a ... difficult and context-specific task.",86 "The question ... becomes one of sequencing: Where does one start? ' 87 As in the case of economic development, the answers may depend on what the country needs. Obviously, if the country has undertrained judges, insufficient computer systems,88 and lack of courthouses, one would have to look at those items. Other considerations in deciding on reform include resource constraints, which make it important to prioritize among reform projects: "[E]very dollar spent on judicial reform is a dollar that cannot be spent on other public goods or put toward economically productive private investment,, 8 9 including public health.90 Researchers and policymakers may assess the effectiveness of past reforms, and if inadequate, they may wish to revise their future approach. 9' Other activities beyond legal and judicial reform might be needed to improve ,,92 the rule of law. "Rule of law is an end-state, not a set of activities. For instance, one may need to inquire whether "developing the judiciary is sufficient to advance the rule of law or whether it is also important to invest in improving political processes. 93 Establishing and reviewing the effectiveness of rule of law programs is an ongoing process. 2. Assessing the Level of Causation a. Recognizing Causation Controversies Determining, as a social scientific or empirical matter, whether economic development is caused or at least facilitated by rule of law reform or any of its aspects, including sound judicial institutions, is beyond the scope of this article. Such an approach requires an adequately designed research study, perhaps on a country by country basis, controlling for the effect of perhaps many other circumstances that might affect development.94 One commentator, for instance, has identified the questions she would like answered in order to determine the extent to which foreign investment is influenced by legal reform, but noted that the data was so far unavailable.95 The questions are as follows: \* Did or will you investigate Country X's legal system before you deciding [sic] to invest there? (Are legal systems a factor?) e If yes, did or do you consider it to be an attractive legal system? (What is an attractive legal system?) o Would you refuse to invest in, or remove investment from, Country X if you did not consider its legal system to be effective? (How much of a factor are legal systems?) e How much importance do you place on the legal system as a factor in determining where you should invest? (How much of a factor are legal systems?) \* Have you had or do you expect to have much interaction with the legal system in Country X? (How much of a factor are legal systems?) 96 The results may be inconsistent from country to country; and researchers or commentators may not achieve consensus because of disputes over the variables selected, the presence or absence of data,97 the definition of terms (including what is "rule of law" and what is "economic development"),98 other methodological controversies, such as countries that arguably do not fit within the overall theory, and the contention that correlation between rule of law reform and economic development is being confused with cause.99 Some even suggest that causation flows in reverse, with economic development leading to rule of law reform, rather than rule of law reform leading to economic development.1°° Causation may also flow in both directions.' 0' Moreover, certain northeast Asian countries have weak rule of law and had substantial economic progress 10 2 Some may question, if this is established, what this means for the general rule: for example, are they outliers or anomalies which leave the rule intact; is it too early to tell whether the progress is sustainable; 10 3 might past progress have been greater still in those countries if rule of law were stronger; or is substantial future progress possible only with stronger rule of law? Even some skeptical commentary, however, would not entirely deny the connection between rule of law reform and economic development, much less suggest that law reform efforts cease; rather, these commentators suggest law reform efforts go forward.1t 4 For example, questions about a World Bank study relating to the connection of law to economic development nonetheless concluded with appreciation for the work and suggestions for improvement, not cessation.105 Another commentator noted: It is hard to argue that an effective, efficient, and fair judicial system is not a good thing or that a country will be better off without "an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system," and I will not attempt to do so.106 ... I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries .... It would be foolish and futile to argue against it, and it would mean arguing against transnational legal learning. 1 07 Still others contend that "[w]hile there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of economic development.., there is much less consensus on which legal institutions are important .... ,,t8 In any event, although doing a study as an academic or future policy matter is undoubtedly worthwhile and may fall under the heading of "next steps" or "future challenges," it is unnecessary for the purposes of this article. Nor, as shown below, need it delay policymakers from making the decisions that they need to make in light of what they already know. b. Informal Legal Systems and Incentives Some contend that formal legal systems are not the only systems causally linked to economic development or are not essential for development. Instead, they identify informal legal systems consisting of various incentives which also help ensure that persons keep their promises: for instance, the negative consequences of failing to maintain a good reputation. 1°9 This, of course, does not prove that formal legal systems are not linked to economic development, but rather suggests only that other informal incentives may be at work too. For example, "[a] vendor who is a member of a community is unlikely to risk his reputation by failing to perform his obligations under a contract. The result would be a loss of respect and a subsequent lack of business."110 In other words, a company which does not carry out the first bargain may lose the opportunity to have a second bargain, because the company's reputation was harmed. Alternatively, the company may not lose the opportunity to do another deal, but it may lose the opportunity to do so at a reasonable price. Thus the cost of credit or sales price or any other cost indicators may escalate because of the perceived danger of a breach or noncompliance. "A country that cannot establish to the satisfaction of the contracting private party that the rule of law will ensure fair treatment can expect to pay more, perhaps much more, just to cover the risk.""' 1 In developed legal systems, reputation likewise plays a role in ensuring compliance, especially given the uncertainties involved in contract enforcement even in those systems. The availability of an action for breach of contract may be of limited benefit even in developed countries. Even if one has a valid claim, recovery is not assured. For example, the party in breach may assert defenses or counterclaims or be insolvent; a lawsuit may be time-consuming, slow and expensive; and the judge or jury may simply "get it wrong." In many ways, it is important to deal with someone with a good reputation under any circumstances. Although reputation is not referred to as law (a phrase generally restricted to formal law), this does not make reputation any less effective as a persuasive (if not coercive) force to ensure compliance. Sometimes it will be uncertain which mechanisms (formal or informal) cause some to keep their bargains. Some may keep their bargains because of reputational or informal legal systems, some may do so because of the formal legal system or threat of lawsuit, and others may do so because of the mixture of the two. 112 It might be difficult to guess which is the most efficacious as opposed to supporting both. 1 3 Furthermore, both systems may provide greater safety than one, resources permitting. 1 D. The Policymakers' Decisions A tension exists in the field of law and development between policymakers and researchers. They have different timetables and different knowledge requirements. Policymakers (including international financial institutions) and companies and their CEOs may (and will) act on the basis of sound policy, logic and common sense. None of these factors requires a demonstration of causation to a reasonable degree of social scientific certainty. Nor will they insist on such a high level of proof given their time constraints: if necessary decisions awaited the completion of time-consuming research, the time to act might have passed. Decisions may have to be made on the basis of scientifically imperfect, although otherwise sound, information: Policy decisions on economic development issues are being made every day in every developing country and in bilateral and multilateral agencies in the developed world as well. Economy policymaking is necessarily carried out under conditions of uncertainty—uncertainty about the facts and about underlying principles and causes. So decisions about whether to change legal institutions and substantive law will be taken-if only by inaction-in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions-both the rules of the game and law's organizations, especially the judiciary-do not matter. 115

<<PARAGRAPH BREAKS RESUME>>

That does not mean that research should not proceed and hypotheses and dominant theories should not be tested. Common-sense principles include the concept that economic transactions may be unsafe where there is no reliable legal system to enforce them, and foreign investment is less likely where the chances of investment protection are uncertain. 116 The lack of reliable enforcement may make doing business risky and complicate business planning; among other things, it may impede the formation of long-term or complex contracts or contracts involving large sums:

From the standpoint of economic development, perhaps the most unfortunate consequence of the unreliability of court enforcement is that it impedes the effective use of long-term and complex contracts. ... Today such contracts are essential in developing countries, especially for electric generating plants, ports, highways, and many other infrastructure projects.'17

It may also discourage the formation of new business relationships and lead to more conservative business practices overall. 18 Also, "[the prospect that courts will resolve these disputes impartially if the contracting parties cannot agree often leads to more reasonable bargaining positions and more prompt compromise."' 19 The argument connecting judicial reform and foreign investment has "undeniable common sense appeal-investors will want predictability, security, and the like."' 2 °

In addition, although some countries reportedly have attracted businesses to invest in their economies despite a weak rule of law, the weaknesses still may have been a negative factor for businesses considering whether to invest and may have deterred more investment. 121 Furthermore, even if weak rule of law may not deter investment in some circumstances, strong rule of law may positively encourage it; and investment may have been greater if rule of law were stronger. No one would be expected to argue that strong rule of law is a "negative" or that the rule of law should be weakened or corruption increased in order to improve the investment climate. 22 Also, no one can preclude the possibility that investment may occur even if rule of law is limited: some percentage of companies may tolerate high transaction risks in exchange for high potential gains or even successfully "navigate" corrupt systems through bribery or other means. 123 However, that is not the optimal situation.

E. The Consequence of Rule of Law Failures or Violations

Rule of law failures may have important consequences. Unfair judicial decision-making may lead to adverse judgments which will damage litigants and their families economically, harm shareholders, eliminate jobs, and interfere with society's ability to create goods and services. The causes of failure include lack of judicial independence (e.g., cases are not decided on the law and facts but as directed by another branch of government or person or to favor campaign contributors or local voters); lack of accountability (judges are uneducated, inefficient, or otherwise perform poorly); and even criminal conduct, such as corruption.124 As a commentator noted, the rule of law is particularly important to developed societies, including their economies:

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy.... Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy-regulatory mechanisms, tax systems, customs structures, monetary policy, and the like-would be unfair, inefficient, and opaque.125

Besides the economic consequences, such violations may also threaten the legitimacy of the court system, dissuade people from using the courts, and effectively deprive them of a fair place for the resolution of their disputes.

II. AMERICAN JUDICIAL ELECTIONS AND THE RULE OF LAW: ARE OUR PRINCIPLES AT HOME CONSISTENT WITH OUR PRINCIPLES ABROAD?

To casual observers, the epitome of the rule of law is the United States, and the United States is a leading exponent of the new rule-of-law orthodoxy. When we look closely at the U.S. legal system, however, we find few of these characteristics .... 126

A dark shadow is falling, fairly or unfairly, upon the perceived integrity of judges in many states that elect judges. Justice has been characterized as being "for sale." Impartiality and the judiciary's rule-of-law function are plainly threatened . . . [Clurrent thinking on how to protect the impartiality of the judiciary is gravitating toward the use and refinement of appointive methods of selection and related processes. 121

This section suggests that rule of law dialogue should enter the domestic arena, that domestic reform advocacy should reflect rule of law values, and that lessons learned internationally should be introduced into reform in the United States. 2 1

In supporting the rule of law abroad, Americans are advocating concepts of judicial reform that our judicial systems sometimes fail to comply with at home. For example, although international rule of law efforts stress judicial impartiality, independence and accountability, many Americans tolerate judicial elections that do not adequately protect these qualities.1 29 Some judicial elections seem to be efforts to achieve the opposite: namely, a tilted or slanted judiciary accountable to interest groups seeking to elect judges likely to decide cases "their way" or to hold judges accountable to popular and party preferences.1 30

In addition, the rule of law embodies the predictable application of the laws to all because the rules are open, known, and equally applied. But if the rules for decision depend on which side contributed or might contribute to (or against) the judge's campaign, or on who votes locally, the rules are no longer known or susceptible to equal application. Instead, they may shift-or appear to do so-from case to case according to the varying identities of the parties, depending on whether they are funders or potential funders, or where they vote.

A. The Rule of Law Concept Is Not Merely International: It Should Be Applied to United States Institutions

The U.S. and U.S.-based or -supported international development institutions have been looking at rule of law reforms, including judicial reform, worldwide, sometimes country by country.1 31 They have spent considerable time studying and assisting foreign states needing such reform.132 While these organizations are looking outward toward reform, other organizations within the United States are addressing the need for similar reforms in the United States, though rarely under the banner of "the rule of law."'133 In the foreign context, rule of law reform is driven by the need for economic stability and development, and, in some cases, human rights. 134 In the United States context, however, the same principles should apply, with a similar effort, starting with a closer look at state court judicial elections.

#### Development caps existential risks.

Wong ’22 [Ruth and Eevee Ciara; September 1; Senior Cloud Systems Engineer, M.A. from Johns Hopkins University, M.Sc. in Bioinformatics from Western Univrsity; Machine learning engineer at PayPal, writer for the Effective Altruism Forum; Substack, “Rethinking Longtermism and Global Development,” https://sunyshore.substack.com/p/rethinking-longtermism-and-global]

We agree that more powerful countries are likely to have more influence on the long-term future than less powerful ones, and that a country’s economic development is a strong indicator of its technological and geopolitical power. However, this does not mean that developed countries matter morally more than developing ones. Rather, it underscores the importance of global development—the process of low- and middle-income countries becoming high-income ones. Similarly, although workers in high-income countries generally have higher labor productivity, a large component of this is the place premium. That is, a worker’s productivity increases—sometimes by a factor of 15 or more—when they move from a poor country to a rich country, simply because they are being paid more for the same work. Once again, this speaks to the importance of global development and helping people escape poverty.

This essay describes why it’s important for the long term future for everyone to be in a relatively high-income country, and what it might look like for global development to be a longtermist issue. Global development benefits the long-term future by increasing diversity in global institutions and reducing civilization’s vulnerability to global catastrophic risks like armed conflict and pandemics.

What is global development?

Effective altruists regularly talk about “global health and development” as a category of ways to do good. However, it’s clear now that development drives health much more than health drives development. Global development is the process by which low- and middle-income countries turn into high-income countries. The best modern example of this are the Asian countries of South Korea, Taiwan, Japan, and China. These have been compared with other Asian countries that were thought to be “tiger cubs” in the ‘90s such as the Philippines and Thailand in the book How Asia Works, by Joe Studwell. In this book, Joe lays out a recipe for development. Here’s the summary from Bill Gates:

1. Create conditions for small farmers to thrive.
2. Use the proceeds from agricultural surpluses to build a manufacturing base that is tooled from the start to produce exports.
3. Nurture both these sectors (small farming and export-oriented manufacturing) with financial institutions closely controlled by the government.

Importantly, in South Korea, Taiwan, Japan, and China, these steps were taken by relatively uncorrupted leaders who made it their life’s work to develop their home country. Other countries unable to develop had leadership who were swayed by the neoliberal free-market thinking pervasive at the World Bank and IMF at the time, or who were otherwise too corrupt or incompetent to stay true in delivering their development strategy.

Global development is important for the long-term future

In an EA Forum post, Beckstead defines three types of benefits that an intervention can have: proximate benefits, benefits from speeding up development, and trajectory changes. Global development would have immediate benefits for people alive today: economic development in low-income countries means that fewer people would experience poverty, illness, hunger, and violence. Speeding up development is speeding up the process by which countries become high-income, so it would ensure that people realize these benefits sooner.

But most of the benefits of global development are through trajectory changes that affect the long-term future. We argue that global development creates significant long-term benefits through this route. Global development can also lead to trajectory changes in the global political environment that would not happen if the development timeline were slowed down, since such changes can be locked in over time.

Global development increases diversity in global governance

One of the main ways global development benefits the far future is through its impact on diversity and inclusion in world institutions. As countries get richer, their people get better educated and thus better placed to participate in institutions with great decision-making power over the world, such as multinational corporations, governments, and international organizations. Increasing the diversity of decision makers in global institutions improves the quality of world governance, which enables humanity to better navigate existential risks and other global challenges.

Diversity in global institutions improves their efficacy in two ways. First, socially diverse groups outperform homogeneous groups at decision-making because they deliberate more carefully and pay more attention to facts. They also innovate more because diverse group members bring unique perspectives. Second, it improves value alignment between these institutions and humanity as a whole. It has been proposed that humanity should engage in a “long reflection” to decide what is ultimately of value before making potentially irreversible decisions regarding its future. For such decisions to reflect the values and needs of all of humanity, as many people as possible should be able to participate meaningfully in the global institutions making these decisions.

Currently, about 689 million of the 8 billion people worldwide live in extreme poverty, and they cannot participate meaningfully in world governance as long as their basic needs are not met. 2.9 billion people lack Internet access, which is an important communication channel through which people make their voices heard on global issues and influence global institutions. Internet adoption is uneven across social groups: for example, women, people in rural areas, and people over age 25 are less likely to have Internet access. These disparities are especially pronounced in the 46 UN-designated Least Developed Countries (LDCs).

Another barrier to diversity in global governance is the structure of institutions such as the United Nations, which is not designed to represent the general will of humanity. UN institutions represent the will of states—especially the five permanent members of the UN Security Council: the United States, the United Kingdom, France, Russia, and China. Although a diverse group of countries have voices in the UN, their citizens do not, especially in the case of authoritarian states.

Global development reduces existential risks

Another important way in which global development improves the long-term future is by reducing existential risks, particularly risks from pandemics and political instability. 80,000 Hours estimates that the risk of a biological existential catastrophe in the next 100 years is about 1 in 1000. Poverty makes communities more susceptible to spreading infectious diseases. For example, a study of Monrovia, Liberia, in 2014 found that people living in slums who caught the Ebola virus spread it to an average of 3.5 times more people than people living in rich neighborhoods. This is because these neighborhoods are overcrowded, contaminated, and lacking in sanitation and health care infrastructure. Also, malnutrition weakens the immune systems of poor people, thereby making them more vulnerable to disease. Raising national income improves population health and enables countries to invest more in public health infrastructure, which makes populations more resilient to potentially catastrophic pandemics.

Global poverty also causes existential risk through its negative effects on international security. Many developing countries, particularly weak states, are caught in a vicious cycle of poverty, corruption, and political instability: “Inept, corrupt, or weak governance fosters poverty; widespread poverty makes effective, equitable governance more difficult to achieve; and when weak governments fail to improve their people’s lives, their legitimacy suffers.” Weak states often engender terrorism and crime because they are unable to maintain law and order in their territories.

### 1NC

#### Diplomacy enables strategic dealmaking that prolongs unipolar leadership.

Mitchell ’25 [A. Wess; May/June 2025; DPhil, Principal and Co-Founder of the Marathon Initiative; Foreign Affairs, "The Return of Great-Power Diplomacy," https://www.foreignaffairs.com/united-states/return-great-power-diplomacy-strategy-wess-mitchell]

Washington should use the strength generated by rebuilding itself at home and forging better alliances abroad to negotiate for a more favorable balance of power with Beijing. For instance, the Trump administration might use its improved position to insist on a reduced trade deficit with China and expanded access for American financial institutions operating there. It could encourage Chinese investment in targeted industries in the United States. Washington could even attempt a currency revaluation that would benefit both countries. China already wants a stronger renminbi so it can be used to help settle regional transactions, and a weaker dollar could support the U.S. administration’s efforts at reindustrialization.

There is no contradiction for Washington between engaging with China and attempting to rebalance relations with Indo-Pacific allies. Great powers throughout history have often found that rivals can act as a productive fillip to friends. Bismarck, for example, used talks with Russia to prompt Austria, Germany’s treaty ally, to strengthen its military—which in turn pushed Russia toward accepting Bismarck’s demands. The key is making sure that allies know there is a limit to how far their patron’s engagement with adversaries will go. Diplomacy with adversaries is about gaining temporary advantages that constrain the other side; diplomacy with allied states is about longer-term entanglements that give the central power more freedom. Calibrating the two in a way that motivates allies but does not alienate them is the art of diplomacy.

So far, the Trump administration’s moves with China augur well. The White House is holding out the possibility of a summit with Xi, but it has been coy about the timing. In the interim, it has concentrated on amassing leverage through tariffs and by prioritizing the Indo-Pacific in new defense spending plans. Should détente with Russia, U.S. efforts to rebalance its portfolios with allies, and the use of diplomacy in the Middle East pay off, Washington will enjoy an even stronger position vis-à-vis Beijing.

All of these policies will, of course, take time to bear fruit. But if the administration can combine the threads effectively, the United States will have the best shot at restructuring its relationship with China since the 1990s, when it fatefully opened up to its adversary.

BACK TO BASICS

The United States is bound to confront many challenges as it works to revive strategic diplomacy as a tool of foreign policy. But in comparison with those of earlier great powers, the country’s circumstances are auspicious. The United States has a unique ability, rooted in its open political system, meritocratic society, and dynamic economy, to undo unforced errors and rejuvenate itself as a global power. Diplomacy can help this effort along by translating these advantages into strategic gains in key regions that improve the U.S. position for long-term competition.

#### It’s zero-sum. US foreign policy ‘leverage’ encourages the EU to default to the US, undermining strategic autonomy.

Habtom ’25 [Naman Karl-Thomas; April 24; non-resident fellow at the Quincy Institute, Ph.D. at the University of Cambridge, where he focused on contemporary European military and diplomatic history; Quincy Institute for Responsible Statecraft, “European Hedging as a Diplomatic Opportunity for the United States,” https://quincyinst.org/research/european-hedging-as-a-diplomatic-opportunity-for-the-united-states/#]

Since 1945, the transatlantic relationship has primarily been characterized by U.S. military dominance, accompanied by foreign policy primacy. U.S. preeminence in security matters was further reinforced by the creation of NATO, where it acts as the central node; without it, the West suffers from decisionmaking and operational paralysis. The immensity of the Pentagon budget, along with the world’s largest arms sector and U.S. troop presence in Europe, further cemented the centrality of the United States in both the post–Second World War and the post–Cold War European security systems.

U.S. indispensability, enabled by European self-subordination, has turned military power into foreign policy influence. Greater European foreign policy alignment with the United States, often framed as convergence, has resulted in the European Union’s de facto vassalization.1

For a long time, defaulting to the United States removed independent European leverage in its global engagements, outside the area of trade. Growing hostility toward Russia and, to a lesser extent, China has resulted in policymakers in Beijing and Moscow increasingly disregarding their European counterparts as mere U.S. proxies lacking any substantive sovereignty — once again, with the exception of trade and economics.2Similarly, Washington has come to expect the E.U. to toe the line. As a result, despite its economic and demographic significance, the E.U. is ignored by both its transatlantic ally and its adversaries.

The rigidity created by a lack of hedging creates a near-permanent paralysis in the ability of European states to adjust their responses to world affairs independently of the United States, either individually or through a coordinated effort. Between the 1990s and the 2010s, this shortcoming could be largely offset by Europe’s relative importance in the world, especially economically. However, that is no longer the case. The E.U.’s share of global exports fell to 13.7 percent in 2022 from 16.3 percent in 2016 — a decline that signals Europe’s reduced economic influence compared to rising powers.3The E.U. is now consistently falling further behind both the United States and China.

In the security domain, independent European force projection has so far been practically nonexistent as more alternative actors emerge. France, the E.U.’s largest military power, has lost its influence in the Sahel after having been kicked out, with other Western deployments to the region also being cut short.4French, and by extension European, hegemonic presence in the area has fundamentally been displaced not because of Russian entry but rather because Sahelian states now view Western states as less vital to their security needs.5As Western political and economic influence wanes, it is Europe that suffers the most, as the United States is still able to ensure its own military and financial dominance within its own alliance system.

The consequences of a hedging-free approach have been largely negative for Europe. Amid a deteriorating security situation on the Continent, there has been a continued slide into global irrelevance, severe economic fallout from a misguided sanctions policy that will be difficult to reverse, and continued vassalization vis-à-vis the United States. As Politico’s chief Europe correspondent Matthew Karnitschnig has written, “Across an array of global flashpoints, from Nagorno–Karabakh to Kosovo to Israel, Europe has been relegated to the role of a well-meaning NGO, whose humanitarian contributions are welcomed, but is otherwise ignored.”6This trajectory weakens Europe as it enters into a “multi-nodal” world.7

Vassalization, both as externally caused by the United States and internally driven by European policymaking elites, has eroded Europe’s capacity to engage challenges on its own, whether emanating from the East or the West. The Trump administration’s apathy, if not negativity, toward the European Union may encourage some officials to pursue greater autonomy based in realism, but vassalization has already significantly atrophied European foreign policy realism.

#### Retrenchment is key to jumpstart European strategic autonomy.

Graefrath ’25 [Moritz; May 13; postdoctoral fellow in security and foreign policy at William & Mary’s Global Research Institute; Internationale Politik Quarterly, "For Europe, US Retrenchment Is Not a Threat, but an Opportunity," https://ip-quarterly.com/en/europe-us-retrenchment-not-threat-opportunity]

By framing the prospect of a significant US retrenchment as a threat, however, the current debate paints a distorted picture of Europe’s new geopolitical reality. What leaders and pundits alike have largely overlooked, is that it represents an important opportunity European leaders should welcome: It forces Europe to acknowledge the risks inherent in depending on another state for security; it paves the way for Europe to become an autonomous player on the geopolitical stage; and it creates an environment where inter-European cooperation on defense becomes more feasible.

Confronting the Risks of US Hegemony

Since the end of World War II, the United States has wielded predominant influence over Western Europe. While usually framed in terms of a “transatlantic community” or “partnership,” the relationship was never one between equals. US hegemony first emerged as a response to the threat the mighty Soviet Union’s forces posed to the continent and continued throughout the Cold War as part of the strategy of containment.

Yet, even after the fall of the “iron curtain” in 1989 propelled the United States to the status of an ultimately secure unipole, Washington remained deeply involved in European affairs. The goal was no longer just to ensure no single European state would dominate the continent. Instead, American policy now also worked to guarantee Europe’s pro-US orientation and secure US military and economic interests on the continent. In the words of Philip Zelikow and Condoleezza Rice, who helped construct the post-Cold War order in Europe, US leaders worked hard “to ensure a central place for the United States as a player in European politics.”

A Beneficial Arrangement

It is not surprising that European leaders readily accepted this arrangement. After all, it proved remarkably beneficial. It allowed them to escape the need for any form of serious defense or security policy, as they could “pass the buck” of carrying the burden of European defense onto the United States. Instead of spending precious resources on military capabilities, they could focus on investing in their economies and tend to other issues of concern to their domestic constituencies.

Unfortunately, what Europe has long failed to appreciate, is that this arrangement comes at a steep price. Relying on a supposedly benevolent hegemon to guarantee your security only works if said hegemon remains committed to providing it. As soon as it judges that continuing the relationship is no longer in its interest, for whatever reason, its dependents are left high and dry. It takes as little as the arrival of a new administration ready to break with the foreign policy establishment and re-evaluate its strategic priorities to throw existing commitments into question. In short, relying on another state for your security always carries with it profound strategic vulnerabilities.

A Forgotten Lesson

Tragically, this is not a lesson that Europe failed to learn, but one that it seemingly forgot. During the Cold War, leaders in Paris, London, and Bonn were acutely aware that the United States might withdraw its troops at any time. This sparked serious cooperative efforts—including the formation of the European Community—designed to enable the continent to better prepare for the possibility of American abandonment. Yet, since the end of the Cold War, the idea that the transatlantic relationship might deteriorate, and that the United States might move to re-evaluate its presence on the continent, was occasionally discussed, but never seriously considered.

It is in this sense that the Trump administration’s public embrace of retrenchment rhetoric has done Europe a much-needed service: It has forced officials to confront the grim reality that international politics is a fickle business in which even longstanding cooperative relationships can change at short notice. In the long run, trusting in the continued benevolence of a hegemon is not a winning strategy. What you can trust are your own military capabilities.

Seizing Strategic Autonomy

Embracing emancipation from US hegemony not only promises to reduce strategic vulnerabilities but also opens the way for a decidedly European, not “Western” or “transatlantic,” foreign policy that no longer subordinates the continent’s interests to those of the United States. While both sides of the Atlantic undoubtedly have a series of interests in common—for instance, promoting free market economies and containing violent extremism—their interests also diverge across a wide array of issue areas.

For one, Europe has no interest in being dragged into the incipient trade war between Beijing and Washington. The continent already trades in goods almost as much with China as with the United States and stands to benefit most by retaining close economic relationships with both great powers. Against this, US President Donald Trump has clearly signaled his intent to force Europe to firmly choose a side—his side—in the age of economic competition he himself heralded with his recently announced set of tariffs. But Europe has no reason to enter this economic war of attrition on either side: For now, economic non-alignment remains the most prudent course osf action.

Similarly, as the Russo-Ukrainian war drags on, the two sides of the Atlantic are likely to harbor different preferences about how it should be resolved. Trump and his closest advisors have long been pushing for a negotiated settlement, declaring the end of the war their primary policy objective. From the Europeans’ perspective, meanwhile, limiting Russian gains and thus deterring it from further aggression constitutes the primary objective.

As divergences between US and European interests across a variety of issue areas appear destined to grow, Europe should welcome any opportunity for seizing greater strategic autonomy. A US turn away from the continent will give European leaders the freedom to design foreign policies targeted at promoting their states’ interests even when they conflict with those of the United States.

Crafting a Unified Response

Some have doubted Europe’s ability to confront the current geopolitical moment as it should, namely, by developing its own conventional—and possibly even nuclear—capabilities that can serve as the basis of an independent security and defense policy. Their pessimism is understandable. Whether during the 2015 migration crisis or the COVID-19 pandemic, European states repeatedly failed to come together and cooperate on policy issues of common concern.

What is more, many European leaders are currently plagued by domestic political constraints. To name just one example, the new German Chancellor Friedrich Merz needed two tries to even be formally elected chancellor by the Bundestag, calling into question his ability to rally the support necessary for his ambitious foreign policy program. Finally, some observers have warned that building independent European capabilities would take too much time to be feasible strategically. To them, somehow re-securing Washington’s commitment is the continent’s only real hope.

Embracing, Not Fearing, a Post-American Europe

Yet, research on great power politics and the consequences of retrenchment provides reasons to be cautiously optimistic. First, in contrast to migration or public health crises, whose effects on national security are limited and diffuse, Russian revisionism in Eastern Europe poses a direct, military threat to European security. Such threats are extraordinarily effective at fostering sustained cooperation among states, even if they disagree on a host of domestic and ideological issues. Now that the US commitment to Europe has been revealed to be uncertain at best, European leaders—for the first time in post-Cold War history—will be forced to put their differences aside and make real progress toward forming a mighty balancing coalition if they hope to guarantee the continent’s security against external geopolitical threats.

#### EU leadership contains eco-collapse, revisionist adventurism, and unregulated tech---extinction.

Attali ’25 [Jacques; Summer 2025; Special Adviser to the French President François Mitterrand and the founder and first President of the European Bank for Reconstruction and Development, Ph.D. in Economics from the University of Paris Dauphine; Center for International Relations and Sustainable Development, “Europe’s Choice in the Face of Global Reckoning,” no. 31]

Twenty years from now, people may say that the year 2025 was Europe’s last opportunity. It was the moment when the EU could have (had it chosen so) reclaimed its role as a central actor on the global stage—or, conversely, the year it resigned itself, through fatigue, fear, or ~~blindness~~ [ignorance], to irrelevance. The moment it lost control over its destiny and the totality of its freedom.

Europe has all the tools to become number one in the world again, or at least to maintain its rank as number two: with over 440 million people, the EU is one of the most extensive and most integrated economic areas in the world, enabling the free movement of goods, services, capital, and people. The euro is the world’s second most widely used currency, reinforcing the EU’s monetary influence. The EU is a global trade giant, negotiating free trade agreements and setting global standards—especially in regulation, data, and sustainability. EU regulations often become de facto global standards, particularly in the tech, environmental, and consumer protection sectors.

Through institutions such as the European Commission, the European Parliament, and the European Court of Justice, the EU has established a distinctive model of transnational governance. The EU champions democracy, the rule of law, and human rights—both internally and in its external diplomacy, particularly through its enlargement and neighborhood policies. It exerts global influence not through military force, but through normative appeal, diplomatic networks, development aid, and cultural outreach. Through programs like Horizon Europe, the EU is a significant funder of scientific innovation and cross-border research. It leads in setting climate goals (e.g., the Green Deal) and digital regulation (e.g., the Digital Markets Act and AI Act). By setting high standards for ethics and safety—particularly in the areas of AI and data privacy (e.g., GDPR)—the EU influences global technological norms.

Europe is also home to immense linguistic, artistic, and philosophical traditions that influence global thinking and soft power. Erasmus+, the European Research Council, and open academic networks make the EU a hub for higher education and intellectual exchange. EU institutions have withstood crises (e.g., Brexit, the euro crisis, and COVID-19). A robust network of NGOs, unions, and active citizen participation supports democratic life and policy innovation. It remains a magnet for neighboring countries and regions (e.g., Ukraine, the Western Balkans), offering stability and development in exchange for reforms. Through PESCO, Frontex, and its missions abroad, the EU is gradually developing more credible standard defense tools.

However, the stakes are numerous, existential, and planetary: climate change, exacerbation of poverty, water shortages, and uncontrolled technologies—not to mention the specific European issues: democracy threatened, European institutions slowed down by bureaucracy, the lack of real integration, the absence of a comprehensive migration policy, and the lack of a credible common defense and security arm.

And yet, although these challenges are so existential, Europe has rarely remained so silent, its voice so hollow, its actions so lacking. At a time when the world cries out for clear leadership, for vision, for collective will, Europe hides behind rhetoric, reports without follow-up, and sterile debate. Let us examine just a few of the most telling examples.

Industrial Decline

The evidence of industrial decline is overwhelming. Prominent voices—those of former Italian Prime Ministers Mario Draghi and Enrico Letta, and others—have painted a damning portrait: the absence of European champions in key future sectors, a steady erosion of competitiveness, loss of technological sovereignty, waning innovation, fragmented markets, absurd competition rules that block continental consolidation, and a stubborn refusal to fund even dual-use military industries. There is no coherent industrial policy, collective innovation financing, and strategic vision to prevent economic subjugation. And these reports, though accurate, have led nowhere. Neither the Commission nor the Council have moved to transform their insights into concrete directives. No political will has emerged to turn diagnosis into action.

The forces of inertia—within Brussels, national governments, corporations, and bureaucracies—cling to their micro-sovereignties and narrow privileges. They prefer a patchwork of petty kingdoms to the rise of continental giants. They defend an outdated doctrine that prioritizes consumer protection while sacrificing strategic foresight and the interests of producers and workers. Thus, we maintain a hundred telecom operators while the U.S. has four; we uphold a fragmented banking system; we keep on forbidding transborder mergers; we let our savings finance America’s trade deficit, which in turn erodes what remains of our industry. Meanwhile, China—now the world’s leading power—relentlessly expands its reach, undermining our markets, jobs, and our autonomy.

And yet, all is not lost. In many sectors, Europe remains the leader. In nearly every domain, the Union counts at least two companies among the global top ten. The EU possesses vast savings, world-class researchers, a great entrepreneurial spirit, and agile and inventive family businesses. All it lacks is shared political will to invest massively in the sectors of what I call the economy of life, which should be the priorities: renewable and nuclear energy, recycling, water, biodiversity, regenerative agriculture, healthy food, education, healthcare, culture, democracy, security, defense, and research. The moment has come to break with the economy of death—built on fossil fuels, pesticides, industrial food, and legalized addictions—and shift to a wartime economy, aiming not to destroy, but to rebuild.

Geopolitical Theaters

In Ukraine, European countries are diplomatically represented: the French, Germans, Poles, and Brits are visible and active. For now, they appear to have delayed the inevitable American withdrawal. But everyone knows—in Paris, Berlin, Warsaw, London, Moscow, Beijing, and Kyiv—that such a day will come: perhaps tomorrow, in a week, or a year. And everyone knows Russia awaits that moment to deal a fatal blow to the heroic Ukrainian army. Yet nothing is being done—or far too little—to ramp up the production of urgently needed weapons, either for ourselves or Ukraine: no ammunition, no drones, no advanced warfare systems. And yet, the list of needs is clear: the Ukrainians themselves are handing it to us, at the cost of their lives.

Once again, we are not in a wartime economy. We act as if the Ukraine conflict will resolve itself, as if we won’t soon face shortages of raw materials monopolized by China, of components, of strategic supplies. Even the U.S. President is beginning to realize this—belatedly and painfully.

The U.S. President has openly and repeatedly expressed his desire—perfectly rational from a geopolitical standpoint—to take control of Greenland, rich in resources and strategically located along the future Northwest Passage. Meanwhile, Europe remains idle. Nothing is being done to secure this land, a Danish sovereign territory under international law, and by extension, part of the EU. There are no guarantees of this EU member state’s sovereignty. And yet, it is of vital importance to Europe for the same reason as it is to Washington.

Changing this equation would require Denmark receiving far more robust and explicit support from its European partners, including military backing. Why, then, has no proposal been made to station European troops there, to build fortifications, ports, and airbases on a collective basis? Unless such a request was made in secret and denied just as secretly, which would be absurd. Let us imagine: would U.S. troops dare to confront NATO allies on that soil? They would lose all credibility in Europe—and perhaps in Asia as well.

In Africa, as the United States turns its back, China advances economically, Russia expands militarily, and ideologies and religions spread their influence, no one can deny that Africa is Europe’s natural and strategic partner. Africa is the future of Europe. It could be its most fabulous opportunity—or its gravest threat.

Working with African institutions, countries, peoples, and diasporas is the only way forward. But if we abandon the continent, catastrophe looms. In the immediate future, Africa will be home to a third of the world’s youth. Soon after, a third of the world’s total population. And if we do nothing, hundreds of millions of climate migrants will be knocking at our doors. The next migratory wave must be anticipated, managed, and co-created. Yet neither Brussels nor major European capitals seem willing to rethink our relationship with Africa, to extend a hand, or build a shared future.

In the Middle East, the EU remains a mere spectator. It announces imaginary conferences, issues weak statements, and postures at the margins—but stays absent from real negotiations. Its paralysis prevents it from sanctioning, as it should, both corrupt or terrorist Palestinian factions and the Israeli government guilty of war crimes and betrayal of the Zionist ideal. Europe is incapable of aiding the devastated population of Gaza, of contributing to the elimination of Hamas, of helping to build a Palestinian Authority that is credible, honest, and capable of governing a peaceful sovereign state alongside Israel. And yet, Europe bears historic responsibility: its powers once drew the region’s borders. Its nations know the scars of war. It could use its tragic experience to propose peace. Why not imagine a Middle Eastern Common Market, stretching from Ethiopia to Iran, from the Arabian Peninsula to Turkey, including Israel and Palestine?

Environmental Issues

If Europe wishes to remain true to what it once was, it must now dare to become what it could be: a power of the universal. Not through weapons, but through ideas. Not through domination, but through exemplarity. Not through fear, but through hope. And first of all, by becoming the vanguard of a civilization reconciled with life itself. For there is no time left to waste: the planet is suffocating, the oceans are rising, and species are collapsing. We have entered the age of runaway dynamics, where the fragile balances of the world are unraveling faster than we can comprehend them. In the face of this, Europe can no longer be content with being a regional model of ecological virtue. It must become the architect of a global pact for life, built on five essential pillars. Europe can make every trade agreement a lever for environmental progress. No more free trade without climate clauses. No more investments without guarantees for nature. The Union can forge strategic green alliances with emerging powers—such as India, Brazil, Indonesia, and African nations—that combine financial support, technology transfer, and shared sustainability goals. It can lead to the creation of a World Environment Organization, with binding rules mirroring the WTO’s power over trade. And why not, tomorrow, a Climate G20, enforcing a global carbon price, a planetary tax on fossil-fueled transport, and minimum biodiversity standards?

Oceans are the beating heart of the planet. Yet they are being plundered, polluted, and exploited. Europe can initiate a global moratorium on deep-sea mining until science can assess its actual impact. It can establish a vast network of marine protected areas, particularly in the high seas, made possible by the new UN Treaty on Marine Biodiversity. Europe can help Southern nations monitor their exclusive economic zones by satellite and combat illegal fishing, often linked to organized crime.

We must now repair the living world. Europe can make a significant contribution to a Global Biodiversity Fund, which would finance reforestation, species reintroduction, agroecology, and the establishment of ecological corridors. It can mobilize banks, insurers, and investment giants to treat nature as a priceless asset—as essential as gold or oil. Above all, it must demand carbon-free, deforestation-free supply chains. Every product consumed in Europe—from tablets and steak to shirts—should display its biodiversity footprint. Buying can no longer be morally neutral. Europe can enforce this awareness.

Europe must go further: grant rights to nature, recognize ecocide as an international crime, and support the establishment of an International Criminal Court for Environmental Destruction—capable of prosecuting those responsible for oil spills, illegal deforestation, and the poisoning of rivers.

Just as it once led on human rights, Europe can now champion a Universal Declaration of the Rights of Nature—a legal and moral revolution, necessary and urgent.

None of this will succeed without a new alliance between science and youth. Europe could establish a Transcontinental Green University, connecting its top research centers with those in Africa, Latin America, and Asia to train a generation of planetary ecologists.

It could launch a Global Climate Erasmus, allowing millions of young people to gain hands-on ecological experience. And build a public, open-access platform for environmental data—a global observatory tracking both degradation and regeneration.

The AI Revolution

A new frontier has opened, silent and immense, made not of matter but of thought—a frontier where the machines we have created begin to think, decide, and act without us. Artificial intelligence is not coming. It is already here. And with it, the most radical upheaval humanity has ever known: a shift from the logic of tools to the logic of minds. A moment where decisions are taken before we think, where desires are anticipated before they are born, and where the boundaries between freedom and prediction, between democracy and algorithm, blur into opacity. In this grand transformation, the role of Europe is not to dominate, but to orient. Not to build the biggest servers, but to write the rules that will preserve our humanity. Not to chase others’ empires, but to become the guardian of meaning in a world flooded with data.

Europe has always had this singular vocation: to think about the world before transforming it. In the face of artificial intelligence, it is once again Europe’s task not to slow down progress, but to ensure that progress remains human. With the AI Act, the European Union is the first political entity in history to define the conditions under which artificial intelligence—even if it is not yet fully developed—can be considered acceptable. It classifies risks, sets boundaries, prohibits surveillance dystopias, and affirms that some technologies, however efficient, have no place in a democratic society. Thus, Europe sets a precedent: a civilization where machines are not above the law, and where the digital world adheres to the same moral imperatives as the physical one.

AI systems learn, decide, recommend, and exclude—sometimes without anyone understanding why. Europe refuses this opacity. It demands transparency, explicability, and accountability—principles that seem philosophical, but are deeply political. What is at stake is the very notion of justice. In tomorrow’s world, a decision to grant a loan, assign a school, detect a crime, or prescribe a treatment may be made by a machine. The EU reminds us that a decision is only legitimate if it can be explained, challenged, and appealed. It affirms that freedom begins where comprehension begins. Elsewhere, AI is seen as a lever of supremacy. In Europe, it is—or should be—viewed as a means to serve the common good.

The Union invests in collaborative research, funds cross-border scientific alliances, and supports projects that leverage AI to benefit climate, health, education, and urban life. Rather than selling attention, it seeks to optimize energy. Rather than manipulating emotions, it aspires to detect diseases. Rather than predicting consumption, it works to preserve life. It is the outline of another model: a knowledge-based economy where machines augment responsibility rather than replace it. Europe must serve as a counterweight to technological authoritarianism. It can lead the fight for global AI governance, the ban on lethal autonomous weapons, and the preservation of human dignity in the face of the algorithmic gaze. It can carry this message to the UN, the African Union, the G7, and to all who still believe that intelligence without conscience is nothing but ruin. Europe must make AI literacy a fundamental right: every child and every adult must know what an algorithm is, what it does, and how to live alongside it. Europe must also invent new professions, new ethics, and humanities—not to resist technology, but to better live with it. To ensure that the future belongs not to those who know how to code, but to those who understand why they code. And we could go on, about education, research, and health—so many domains where Europe could lead.

There are so many instances of silence and procrastination. How should one explain this passivity, abdication, and tragic drift? If not, it is due to the leaders’ failure to grasp the urgency of the moment. An inert Europe only strengthens populism, fuels extremism, and paves the way for its downfall.

It is not too late. We can still choose. We can still reclaim our sovereignty. We can still become a major actor in history. An extraordinary opportunity lies before Europe. But it must find the courage to seize it.

### 1NC

Unions PIC:

#### President Donald J. Trump and Vice President James D. Vance, citing health concerns, should resign.

#### The United States federal government should:

#### - forswear strengthening collective bargaining rights for federal foreign service workers;

#### - substantially increase non-collective bargaining protections for federal foreign service workers;

#### - reinstate federal foreign service workers fired during Schedule Policy/Career initiatives;

#### - unanimously pass and promulgate a public announcement declaring the preceding policy;

#### - perpetually fund and staff foreign service agencies;

#### - provide federal foreign service servants with legal counsel in employment disputes;

#### - guarantee arbitration forums for workplace disputes in the federal civil service;

#### - and provide competitive wages and benefits for civil servants in comparison to private sector employees.

#### ‘Collective bargaining rights’ aren’t civil service protections. The CP competes and institutes a suite of employment reforms but avoids empowering union obstructions that ossifies the executive, which check existential threats.

Withe ’25 [Aaron; April 9; B.A. in Applied Sciences from Corban University, former member of the Washington and Oregon Advisory Committees to the United States Commission on Civil Rights, recipient of the Oregon Taxpayers Association’s Thomas Jefferson Award, CEO of the Freedom Foundation, a non-profit organization litigating over eighty cases involving public unions; The Hill, “Trump’s stance on unions is what Roosevelt wanted all along,” https://thehill.com/opinion/congress-blog/labor/5237960-trump-executive-order-union-obstruction/]

Franklin Delano Roosevelt — the architect of modern labor law and workers’ rights — wrote in 1937 that collective bargaining does not belong in the public sector.

President Trump’s executive order ending collective bargaining across national security agencies represents a return to Roosevelt’s sensible approach. The order leverages authority granted by Congress through the Civil Service Reform Act of 1978 to ensure critical government functions aren’t hamstrung by union obstruction.

The urgency of this action becomes clear when examining recent history. According to the White House, since January, the Department of Veterans Affairs alone has faced 70 national and local grievances from unions, more than one per day. What’s more, when the Veterans Administration attempted to implement congressionally mandated accountability reforms, unions tried to force the reinstatement of 4,000 employees, many of whom were removed for poor performance or misconduct.

In what alternate universe can private organizations invalidate legislation passed by elected representatives?

Similar stories play out across the federal landscape. According to the Federal Labor Relations Authority, Immigration and Customs Enforcement officials cannot modify cybersecurity policies without first completing time-consuming midterm bargaining with unions.

When vital agencies can’t adapt to emerging threats without union permission, national security is at risk.

Critics will argue the executive order’s definition of national security is too expansive. Unfortunately, modern threats don’t fit neatly into Cold War categories.

Energy security, cybersecurity, pandemic preparedness and economic defense all represent critical vulnerabilities adversaries can exploit. The integrated nature of these threats requires a holistic understanding of national security extending well beyond traditional military concerns.

To be sure, union supporters raise legitimate concerns that deserve serious consideration. Federal workers deserve protection from partisan purges, workplace discrimination and retaliation for whistleblowing. They’re also entitled to reasonable compensation and safe working conditions.

These are values most Americans share, regardless of political affiliation.

But collective bargaining isn’t necessary to secure these protections. Civil service safeguards predate unionization and will remain intact under Trump’s order. Merit principles, anti-discrimination laws and whistleblower statutes continue to shield workers from abuse.

All that changes is the union’s power to dictate operational decisions that elected leadership should control.

America needs a new framework that protects workers without undermining accountability. Some state reforms offer promising models, requiring annual recertification elections for unions, ensuring they maintain worker support. Other states have ended automatic dues deduction while strengthening civil service protections, effectively uncoupling worker rights from union power.

In the months before President Joe Biden left office, his administration renegotiated the collective bargaining agreements of federal agencies such as the Environmental Protection Agency. This move highlights the core problem: When unelected organizations can systematically obstruct policies established by elected leadership, the government becomes less responsive to voters’ needs.

Trump’s executive order, even with its limitations, addresses a longstanding problem in federal governance. The question isn’t whether you support unions or management, but whether you believe the government should prioritize serving citizens over protecting entrenched union interests, regardless of which party controls the White House.

Our government’s effectiveness depends on resolving this tension. We need a federal workforce that combines strong protections for individual employees with the flexibility agencies need to fulfill their missions.

Only then can we achieve what both parties claim to want — a government that works for all Americans.

### 1NC

#### The United States Congress, including the Office of the Speaker of the House, should request that the Office of the Law Revision Counsel revisit the codification of Subchapter X of Chapter 52 of Title 22 of the United States Code. The Office should insert a ‘no source’ provision into 22 U.S.C. §§ 4101–4118 clarifying that nothing in Executive Order 14251’s amendment to § 1-501 of that subchapter limits or revokes collective bargaining rights guaranteed under the Foreign Service Act of 1980. Without strengthening collective bargaining rights, the President and foreign service should abide by this clarification.

#### It competes and solves---issuing a request for OLRC clarification solves without changing positive law, avoids politics, AND cements a model to tame polarization.

Cross ’20 [Jesse and Abbe Gluck; May 2020; Assistant Professor at the University of South Carolina Law School; Professor of Law and Faculty Director at the Solomon Center for Health Law and Policy at Yale University Law School; University of Pennsylvania Law Review, “The Congressional Bureaucracy,” vol. 168]

C. Office of the Law Revision Counsel

“The bulk of the revision done is done by lawyers in the executive branch.”

Tasked by its organic statute to “develop and keep current an official and positive codification of the laws of the United States,”114 OLRC functions as the custodian of the U.S. Code. Before the existence of the Code, private companies and agencies prepared some compilations of updated federal laws, but these collections were not authoritative, and they could contain errors.115 As a result, the only way to determine current law was “slogging through all of the session laws” of Congress.116 It was not enough to know that a law had been passed a century ago; one had to search all laws passed since that time to ensure no amendments had been made in the intervening years. The U.S. Code was deemed necessary because this research process became “increasingly cumbersome” as the number of laws exploded.117

By creating the U.S. Code in 1926,118 Congress joined many state legislatures that had begun to prepare and adopt topically-arranged legal codes.119 Unlike several such states, however, Congress did not create a governmental office to maintain its Code.120 Instead, Congress entrusted management and oversight of the Code to the House Committee on the Revision of Laws--and it did not provide the Committee with any significant staff to perform this task.121

Throughout the 1950s and 1960s, even as the federal statutory landscape was expanding, the work of preparing codification bills was assigned to only two individuals.122 As a result, Congress often outsourced this work to non-congressional actors. With respect to the updating and publishing of the Code, Congress often relied on services offered by the West Publishing Company.123 With respect to the preparation of codification bills, most work was done by executive-branch attorneys, because executive agencies had more staff.124

The House addressed these concerns about the lack of institutional capacity for codification as part of its review of its committee structure in 1974.125 The result was a House resolution that, among other reforms,126 created OLRC.127 The committee report echoed the same concerns for the lack of congressional self-sufficiency that drove the creation of the other nonpartisan offices, lamenting that: “To assist in the Judiciary Committee's codification and revision work the West Publishing Company has, for some 50 years, more or less donated its services to the committee.”128 The report also documented Congress's prior dependence on executive-branch codification resources, noting that: “One title was codified after a large effort by the Defense Department which put together a team of 52 lawyers ... and budgeted roughly $3 million to prepare the bill for the codification of Title 10, Armed Forces.”129 OLRC would enable Congress to perform this work for itself.

A few months later, Congress passed a bill that declared the provision creating OLRC to be “permanent law,” rather than just the creature of a House resolution.130 In so doing, Congress ensured that OLRC could not be abolished via unilateral action by the House.131

The office currently employs thirteen individuals--a significant increase over earlier numbers,132 but one dwarfed by increases in many other congressional offices. OLRC employees are all attorneys.133 They are divided into two teams, with nine working on classification and four on codification (a distinction explained below). OLRC is headed by an individual known as the Law Revision Counsel who must be appointed by the House Speaker without regard to partisan affiliation.134 The Law Revision Counsel typically is selected through internal promotions of existing employees.

For its work on the U.S. Code, OLRC now performs several tasks. First, it performs “codification” work, where it prepares codification bills for Congress.135 This work requires surveying the myriad already-enacted federal statutes and determining which statutes fall within general cohesive subject-matter areas; those subject-matter areas are reflected in the fifty-three titles of the U.S. Code. OLRC occasionally creates new titles or repurposes old ones, but most of the subject matter areas were organized by Congress itself when it adopted the Code in 1926. (The Code was less than 2000 pages long then; now it is more than 50,000.)

OLRC then takes those statutes apart from the form in which they were passed and reassembles them--moving and reorganizing sections around to integrate those statutes into a single, coherent subject-matter title in the Code.136 OLRC inserts that newly prepared title into a bill, which it presents to Congress for formal enactment of the title into what is known as “positive law.” To transform a title of the U.S. Code into positive law, Congress must pass the codification bill repealing the myriad underlying statutes and enacting the codification bill itself (and the title contained therein) as the sole governing law in their place.137 Through its codification work, OLRC therefore conceptualizes, creates, and organizes a title of the Code.138

In preparing a codification bill, OLRC may make editorial changes to clarify presumed congressional intent in the prepared title, including grammatical changes or even the insertion of substantive textual provisions such as definitions. OLRC's work to draft codification bills includes a formal review and comment period whereby the office invites feedback and analysis on the bills from those with expertise in the relevant area of law, including administrative agencies, congressional committees, and academics. Congress has enacted twenty-seven titles of the U.S. Code into positive law, with the most recent enacted in 2014. 139

There are twenty-seven additional subject-matter-cohesive titles of the U.S. Code that most lawyers perceive as indistinguishable from the enacted titles (for instance, Title 42 of the U.S. Code, which contains the Civil Rights Acts, Medicare, and Medicaid). OLRC also conceptualizes and organizes those titles (most of which were originally organized by Congress in 1926) by rearranging provisions from enacted statutes (or retaining the work done by prior codifiers to that end). But those titles have not been formally enacted as codified law by Congress--that is, Congress has not voted on those OLRC edits at all--in many instances simply because Congress has not acted on requests for codification and has little interest in doing so, as we elaborate in Part II. As a result, those twenty-seven titles do not have the status of positive law (in other words, the governing law is still the originally-enacted public laws not the title of the Code).

A key practical effect of the difference between positive and non-positive titles goes to how a law is properly amended. To amend a law that is part of the enacted Code, one needs to amend to the Code itself (e.g., “Title 28, United States Code, is amended ...”). If instead, Congress accidentally amends with a public law that says “the Judiciary Act of 1789 is amended,” that amendment becomes something of a free floating piece of law because it is not “where” it belongs, as the provisions of the Judiciary Act were formally repealed when they were codified into the Code. Surprisingly, as we detail in Part IV, such mistakes in amending are not rare and they create challenges for those trying to find the most up-to-date versions of the law. To amend to one of the twenty-seven titles not enacted as positive law, Congress does have to amend to the underlying non-codified statute (e.g., “The Social Security Act is amended ...”), not to the Code, because the Code for those sections is not enacted law to amend. These distinctions have caused much confusion and numerous mistakes, as we elaborate in Part IV. The big point for now is how little most lawyers and judges understand about any of this.

For all titles, whether or not voted on by Congress, OLRC also performs “classification” work.140 Here, it prepares and publishes updated versions of the Code that incorporate recent amendments.141 This includes updating the official online version of the Code throughout the legislative year, which OLRC typically does approximately thirty to forty times per year.142 For non-positive titles, this classification work requires OLRC decisions about where to locate newly enacted provisions in the Code. This work also can entail certain edits to statutory text--such as modifying cross-references and inserting headings in non-positive titles. As non-positive titles grow unwieldy over time with repeated classifications, OLRC also periodically revisits them to rearrange them--work that it labels as “editorial reclassification.” 143

As noted, OLRC has significant editorial discretion in the performance of these functions, a fact unknown to most lawyers and courts. In codification bills, it may alter or even add statutory text in order to correct errors, resolve ambiguities, and make the Code easier to understand and navigate. In all aspects of its work, it has significant discretion to omit those provisions from the Code entirely that it deems not “general and permanent,”144 such as most parts of appropriations bills. It also has discretion to move full provisions outside the text of the Code and into the side notes--a determination that surprisingly often includes some important provisions, like pilot programs, statutory effective dates, and legislative findings.145 To appreciate the significance of this discretion, as we discuss in Part IV, more than half of the enacted text of the U.S. Code is now in statutory notes--that is, not visible as inline text in print sources and not readily accessible at all on secondary electronic sources, even for those who know to look for them.146 These changes often create situations in which the statute as encountered by the general public appears different--or at least less complete--from the text that was enacted.

D. Congressional Budget Office (CBO)

“[T]he Congress has, in the eyes of many, lost the power of the purse to the Executive Branch.”

In the half-century preceding the creation of CBO, the office that now is Congress's economic and budgetary analyst, budgetary power rested heavily with the executive branch. The Budget and Accounting Act of 1921 required the President to submit an annual budget proposal, and so largely entrusted the President with responsibility for budget planning.147 The 1921 Act also established the Bureau of the Budget, later renamed the Office of Management and Budget (OMB), which gave the President significant control of data and analysis relating to the budget.148 In the following decades, economic analyses of legislative issues, such as cost estimates for bills, typically were produced by executive agencies.149 Those calculations, it often was suspected, would vary based on the President's level of support for the underlying legislation.150 This era of “presidential dominance” over the budget process continued unabated throughout the 1960s.151

Congress became increasingly concerned about this allocation of budgetary power in the 1960s. The Vietnam War and the Great Society \*1574 policies placed new strain on the federal budget, and Congress grew dissatisfied with executive-branch budgetary tactics that it viewed as coercive.152 These inter-branch tensions reached a boiling point when, in 1972, President Nixon threatened to withhold significant appropriations from certain federal programs that conflicted with his policies.153 These impoundments, along with a post-Watergate concern among some about the trustworthiness of OMB,154 led to new congressional interest in reclaiming its budgetary and economic powers.

In response, Congress formed a joint committee in 1972 that was directed to develop recommendations “for the purpose of improving congressional control of budgetary [procedures].”155 Drawing on the template of California's Joint Legislative Budget Committee, it recommended the creation of a nonpartisan joint staff and director to work beneath two new budget committees, one for each chamber.156 This approach, the committee hoped, might finally “give Congress its own center of congressional budgetary operations.”157

A year later, Congress enacted the Congressional Budget and Impoundment Control Act of 1974, which acted upon the joint committee's recommendations.158 The conference committee's explanatory statement observed: “[T]he Congress has, in the eyes of many, lost the power of the purse to the Executive Branch.”159 It further stated: “[C]ongressional enactments [have] permitted the Executive to achieve a great concentration of financial and policymaking authority .... Yet the Congress did little to improve its own budget capabilities.”160

To reclaim control, the Act established a series of new procedures and practices--including presidential procedures for impoundments161 and procedures for the new congressionally driven budget process.162 To manage the latter process, it also created several new congressional institutions. These included the new budget committee in each chamber--a division of labor partly designed to allow for specialized attention to aggregate federal \*1575 spending163 and partly the byproduct of bicameralism traditions in Congress164--a structure that separated budget power across the two chambers. It was also partly an effort to navigate and appease existing committee-level conflicts inside Congress.165 Rather than leave issues of budgetary expertise and calculation to these new committees, however, the Act also created the CBO.166

The Act made the CBO a nonpartisan legislative office, not committee staff as had been proposed.167 Representative Frank Annunzio said that the CBO would “aid in redressing the imbalance of information which the executive branch commonly uses to its advantage and our embarrassment.”168 Senator Edmund Muskie similarly commented that the office would “provide Congress with the kind of information and analyses it needs to work on an equal footing with the executive branch.”169

In subsequent years, CBO accreted authority, largely by proactively looking to analyze major legislative proposals and taking a firmly nonpartisan stance. President Carter's energy policy was the important first milestone. As CBO historian Philip Joyce put it, CBO proactively involved itself by “proposing to do an analysis of the plan, and by generating requests for this analysis from the committees of jurisdiction.”170 Ultimately, CBO determined that the Carter estimates of the policy's intended effects were \*1576 overly generous.171 Despite the controversy generated by this conclusion, CBO's critique of President Carter's plan helped establish the office's independence, especially because the entire federal government, including CBO, was headed by Democrats.172 CBO continued to display this independence from majority leadership with controversial forecasts relating to President Reagan's budget policy173--particularly in projecting a deficit when Reagan promised his budget would balance174--as well as unfavorable forecasts that contributed to the failure of President Clinton's proposed health reform legislation in 1994.175

The creation of the office angered some members by drawing power away from the very influential committees with control over the budget, including House Ways & Means and Senate Finance. CBO similarly has maintained independence from the budget committees of Congress. One of the most important early CBO directors, Dr. Alice Rivlin, openly embraced this internal separation of powers function for the office, famously stating: “[T]he CBO was not set up to work solely for the budget committees. I work for the whole Congress and have responsibilities to all committees and indeed to all members.”176

Today, CBO has approximately 250 employees, which it reports are “mostly economists or public policy analysts with advanced degrees,” and a few attorneys.177 The office is headed by a Director who is jointly appointed by the House Speaker and Senate President pro tempore (with recommendations from the Budget Committees) and who legally must be appointed without regard to political affiliation.178 In practice, the House and \*1577 Senate Budget Committees have alternated in recommending candidates for the position, and the Committees' recommendations have been followed.179

The office provides analyses, reports, and studies designed to inform Congress about the fiscal impacts of policies, legislative proposals, and enacted law.180 Its analyses include: (1) a cost estimate for nearly every bill that is approved by a committee;181 (2) ten-year and thirty-year forecasts of the budgetary and economic outcomes anticipated to result under continuation of current law; (3) economic analysis of the President's budget; (4) examination of the options to reduce the federal deficit; and (5) analysis of the economic impacts of federal mandates upon state, local, and tribal governments and the private sector, as required by the Unfunded Mandates Reform Act of 1995.182 CBO often proactively assists legislative staff in designing legislation that will not exceed desired expenditure levels.183 The office performs these functions particularly with respect to spending legislation (i.e., non-tax legislation), due to the complementary role played by JCT for tax bills.184

Congress also has hardwired use of the office's cost estimates into the routine legislative process, with rules and laws requiring committee-reported legislation to be cost-estimated (and for committee reports to publish those estimates).185 In most instances, Congress also has required that legislation meet certain budgetary goals--and while most of these rules provide the Budget Committees with the option to determine their own cost estimates, use of CBO estimates occasionally is mandated, and even when they are not, congressional convention dictates the use of CBO estimates regardless of \*1578 such specification.186 As a result, the “CBO score”--the estimated cost of a bill--often plays a pivotal role in a bill's success or failure.187

CBO publishes its formal cost estimates and analytic reports,188 materials outlining its underlying data and analytical methods,189 comparisons of its projections with a variety of sources,190 and chart books, slide decks, and infographics about the budget and the economy to make its projections more accessible.191 Any preliminary analyses CBO conducts at the behest of members or committees to assist in the development of legislation are confidential.192

E. Joint Committee on Taxation (JCT)

“Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone.”

Created in 1926, the JCT emerged in part from the enactment of the Sixteenth Amendment which, by providing legislative authority to impose an income tax, created a growing need for expertise in taxation. More concretely, however, it also emerged from a personal feud between congressional and executive actors. As George K. Yin, who has written extensively on JCT, has \*1579 chronicled,193 Treasury Secretary Andrew Mellon proposed in 1924 to reduce surtax rates and Senator James Couzens responded with well-publicized critiques of the proposal. This dispute turned personal and culminated in a Senate investigation into the Bureau of Internal Revenue.194 As Yin observes, the investigation awoke Congress to broader concerns about the drafting and implementation of tax policy.195

In the Finance Committee's hearing on the Couzens investigation, Senator Andrieus Jones lamented, with respect to tax oversight: “[T]he Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone.”196 Arguing that the committee should have experts of its own, Jones said: “I am not an expert engineer; I am not an expert auditor; nor have I the time to do the work myself.”197

With respect to drafting “recommendations for legislation,” Jones added: “[Congress] has had to rely solely upon recommendations which came from the Secretary of the Treasury. I submit that that is not a proper basis for the framing of legislation. You see only one side of it.” To avoid “becom[ing] mere rubber stamps” of the Bureau, Jones concluded: “We want an agency under our jurisdiction so we know what is going on.”198

This desire for congressional autonomy from executive-branch tax analysis translated into the committee's proposal for a “Joint Committee on Internal Revenue Taxation,” which was enacted into law by the Revenue Act \*1580 of 1926.199 The resulting institution, the JCT and its staff, quickly became essential to Congress's tax process and remains so today. There is no “tax committee” in Congress; instead, JCT provides the tax expertise for the House Ways & Means Committee and the Senate Finance Committee, as well as any other committee working on tax-related issues in Congress. As one commentator remarked, its Chief at times has exerted “more influence [on tax legislation] than the President, the Secretary of State, the assistant secretary in charge of taxation, [and] the chairmen of the tax-writing committees in Congress-- separately or combined.”200 The JCT staff now assists Congress at every step of the tax-related legislative process. It contributes legal, policy, behavioral, administrative, and economic analysis with respect to tax legislation.

Unlike most committee staff--but like the other offices of the congressional bureaucracy--JCT's nonpartisan staff serves both chambers of Congress and aids all members and committees.201 For example, JCT staff works with members and committees to develop tax policies and then collaborates with Legislative Counsel to translate these policies into statutory text.202 It also supports the committees at markups, floor debates, and committee meetings, and drafts the legislative history for tax bills.203 It prepares summaries of the bill and its proposed amendments at each stage of the legislative process, provides hearing testimony and produces “hearing pamphlets” that summarize and analyze potential reforms,204 and describes the proposals before the committee at markup.205

If the legislation reaches either chamber floor, JCT staff provides an official revenue estimate for the legislation--a function analogous to CBO's role on spending legislation.206 At conference committee, the staff drafts the \*1581 markup document, conference report, and revenue table.207 At various points in the legislative process, JCT also prepares distributional analyses of tax provisions,208 generates macroeconomic analysis of tax bills, and analyzes these bills' impact on GDP, unemployment rates, and the budget.209 It also ghostwrites committee reports for Ways and Means, Finance and other committees insofar as they relate to tax. JCT also supports the Senate Foreign Relations committee on treaties.

Outside the legislative process, JCT staff also conducts oversight functions, including ensuring that the IRS implements federal tax legislation in compliance with congressional intent.210 JCT almost never holds hearings of its own but, rather, works with partisan staff on other committees. Certain aspects of policy work, we were told, “are viewed by other staff as JCT stuff .... You will hear, ‘this is for Joint Tax. Joint Tax will go through it.’ ... They talk with us about their policy. We put together bullet-point specs of the bill, then JCT and Legislative Counsel writes the bill.”211

JCT staff also publishes the influential “Blue Book,” a document “written for the tax bar” and widely used by it, that provides explanations of the tax legislation enacted by each Congress.212 It also annually produces a description of the revenue provisions in the President's most recent budget proposal,213 a tax expenditures budget enumerating spending through tax \*1582 subsidies,214 and an annual overview of expiring tax provisions, among other materials.215

These published materials notwithstanding, JCT staff interacts with members and staff confidentially.216 Much like CBO, JCT staff will develop revenue estimates for early tax proposals, and it will collaborate with members to assist them in developing bills to reach members' revenue goals. As part of its routine work, the staff receives approximately 6,000 to 7,000 requests from members each year, the majority of which are requests for revenue estimates, and all of which are confidential unless released by the member.217 As JCT staff put it, “revenue estimates are part of our routine work because revenue estimates are bound up in design of provisions; members care about budgetary effects. It's part of the policy design.”218

Under its statutory authorization (now located in the Internal Revenue Code),219 JCT can appoint the Chief of Staff and additional staff.220 In practice, the Chief of Staff is selected alternately by the chair of the House or Senate committee with jurisdiction over tax issues (with the other chair assenting), and the Chief of Staff selects all additional committee staff.221 Currently, JCT has sixty-nine staff members, and while its organic statute does not mandate that hiring of staff (or Chief of Staff) be conducted in a nonpartisan manner, in practice the JCT explicitly seeks “nonpartisan legal professionals” and economists when hiring.222

F. Offices of the Parliamentarians

“We are the procedural navigators. Our knowledge isn't replicated anywhere else.”

The Parliamentarians' Offices are each chamber's “keeper of the precedents”; they have responsibility for collecting, maintaining, and knowing volumes of congressional procedural history.223 Even prior to the creation of the Parliamentarians' Offices, Congress relied on nonpartisan experts for procedural guidance. Throughout the nineteenth century, chamber clerks and messengers assisted members with floor procedures and provide point-of-order clarifications.224 The work of these informal advisors, combined with the procedural knowledge of the members themselves, was sufficient for many decades to “keep some semblance of uniformity” in each chamber, as one Parliamentarian has put it.225

By the 1920s, however, the emergent committee system had channeled members away from the chamber floors, particularly in the House, and thus reduced their familiarity with their own procedures.226 The new institution of Parliamentarians' Offices--created by the House in 1927 and by in the Senate in 1935--was to compensate for the diminution in member procedural knowledge and save members from having to master procedural rules.227 Freeing up members to focus more on substantive policymaking, it was thought, would empower Congress to better resist executive encroachments \*1584 into such policymaking.228 Moreover, members wanted a professional parliamentarian to play an internal separating powers role--namely, to curb the increasing consolidation of procedural power in both chambers, as was occurring under Speaker Joseph “Boss” Cannon in the House229 and under Vice President John Nance Garner in the Senate.230

The initial use of the Parliamentarians' Offices to disperse power within Congress has continued to shape the offices' work. For instance, the Parliamentarians' adjudicatory function is separated from the legislative leadership; they will issue rulings that accord with chamber precedent even if at odds with leadership preferences. A distinct Parliamentarian's Office for each chamber, accomplished in their separate establishment and continuing into the present, further disperses power in Congress. This separation is largely the product of an internal form of separation of powers mandated by the Constitution. Article I, Section 5 provides that “Each House may determine the Rules of its Proceedings.”231 As a result, each chamber has amassed a distinct body of rules and precedents.

But the two Parliamentarians' Offices exist upon different legal foundations. The House Parliamentarian's Office is statutorily authorized by the Legislative Branch Appropriations Act for 1978.232 By contrast, the Senate Parliamentarian's Office has never been given separate statutory authorization; instead it operates as a chamber appointment under the authority of the Secretary of the Senate, technically sitting beneath the Secretary.233 As a result, while federal statute provides that the House \*1585 Parliamentarian will be appointed by the House Speaker and chosen “without reference to political affiliations,” no comparable statute provides for the method of selecting the Senate Parliamentarian.234 In practice, however, both chambers have selected Parliamentarians via internal promotions of existing employees--the last three new Senate Parliamentarians, for example, each began the job with an average of over a dozen years' work experience in the office before assuming its leadership.235 The selection of the Senate Parliamentarian typically is made by the Senate Majority Leader.236 Although the Senate Parliamentarian has occasionally been removed for politically-motivated reasons,237 each successor has resisted partisan pressure,238 and the Senate Parliamentarian has in recent years survived partisan turnover.239

As the smallest of Congress's nonpartisan institutions, the Senate office currently employs just two attorneys and one clerk, and the House office employs six attorneys and two clerks. The House office maintains one subsidiary office, the Office of Compilation of Precedents.240 Both offices publish a number of materials related to chamber rules and precedents.241

The Parliamentarians make procedural recommendations on consequential matters. First, they make committee referral decisions for each \*1586 introduced bill--referrals that determine the allocation of power across congressional committees (and often a bill's chance of success). Committee referrals are high stakes and often hotly contested decisions within Congress.242 The offices handle approximately ten thousand referrals over the course of each Congress.243

Second, the House Parliamentarian makes important determinations on the “germaneness” (and hence allowability) of proposed amendments to bills. Under the germaneness rule, an amendment must address the same subject as the matter being amended. While the rule itself is a single sentence, it has generated “thousands of precedents.”244

Third, because budget reconciliation bills cannot be filibustered in the Senate, they are an increasingly popular mode of legislating in times of intense partisan gridlock. The Senate Parliamentarian has the authority through application of the so-called “Byrd rule” to determine which bills comply with six important budgetary rules that must be met to satisfy the conditions for reconciliation.245 Analogous fast-track procedures existing in current law also are providing fertile new battlegrounds for procedural battles.246

To advise Congress on the application of these and other rules, the offices perform both public and private functions. In their public-facing role, members of the office will advise the presiding officer of a chamber on the correct responses to procedural issues that arise in real-time on the chamber \*1587 floor.247 In private, they also deliver advice through consultations with members and their staffs in advance of a bill's consideration on the floor.

Procedural recommendations by the Parliamentarians' Offices carry no inherent, binding authority over members. Chamber rules bestow the presiding officer in each chamber with the power to make procedural rulings--and custom alone dictates that, in making these rulings, the presiding officer follow the recommendations of the relevant Parliamentarian's Office.248 Nonetheless, these recommendations are almost always followed by the presiding officer--and the presiding officer's ruling, in turn, is almost never appealed or overturned by a chamber majority, especially in the House.249 (A notable, modern exception has occurred in the context of the “nuclear option,” which we further detail in the notes250 and in Part II).

G. Government Accountability Office (GAO)

“The committees of Congress have no way of getting down to the actual facts ... we have no check at all.”

\*1588 GAO is the “congressional watchdog.”251 It is easily the largest of the nonpartisan institutions, with a whopping 3,000 employees (once as many as 15,000!) spread across its Washington, D.C. headquarters and eleven field offices.252

In the late nineteenth and early twentieth centuries, responsibility for the auditing and oversight of federal expenditures belonged to the Comptroller of the Treasury. In the debate over the legislation that ultimately would create GAO, the bill's sponsor, Representative James W. Good, shared a story highlighting his concern for the Comptroller's executive-branch dependence:

[T]he President desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury, who happened to be a little independent of this system, that he could not do it. But the President insisted and finally said, “I must have that fund, and if I can not change the opinion of my comptroller, I can change my comptroller.” With less independence all comptrollers, no matter to which political party they owe allegiance, have been forced to face the same practical situation.253

In 1920, Congress passed a bill to create a new office to address the Comptroller's independence and relocate the auditing and oversight functions from the executive branch. President Wilson vetoed it, claiming the bill's provisions allowing Congress to remove the new Comptroller General through concurrent resolution or to impeach were unconstitutional. But members continued to voice displeasure with the Comptroller's relationship to the executive. Representative Good again explained:

We believe that the Committee on Appropriations and the committees on expenditures and on revenue that are investigating matters under their jurisdiction should have at all times something more than an ex parte statement with regard to expenditures .... Every bureau chief who is worth anything wants his department to grow .... So year after year they come and ask for new activities and additional money to perform those activities, and most frequently Congress and the committees of Congress have no way of getting down to the actual facts, except as we dig them out from an unwilling witness, a witness naturally unwilling because he wants the money, and in his attempt to get the money will cover up all the defects of his office, all the \*1589 shortcomings of his organization, simply to get the appropriation for his department. We have no check at all upon this method.254

With the Budget and Accounting Act of 1921, Congress proposed a “General Accounting Office” to address these concerns. The statute charged the office to “investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds” and to “make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures.”255 The Act allowed for removal of the Comptroller by joint resolution or impeachment.256

Describing this proposed office, Representative Jo Byrns remarked: “The [proposed] comptroller general is the representative of Congress. He does not represent the Executive in any sense of the word, and the whole idea of the Budget Committee was to make him absolutely and completely independent of the Executive.”257 Representative Simeon Fess similarly explained: “This bill removes from the spending department the right to audit its own books ....”258 And the House committee report for the Act expressly discussed the office's role in the separation of powers, observing that:

The Executive having the power to initiate the budget, certainly an independent audit is necessary to insure at all times a businesslike execution of the budget .... The creation of this office will, it is seen, serve as a check, not only on useless expenditures but will keep the bureau more keenly alive to a rigid performance of its duties and obligations.259

Nonetheless, to secure the signature of the new President, Warren G. Harding, the bill made compromises. GAO would also have some independence from Congress; its head, the Comptroller General, would be appointed by the President (with Senate advice and consent).260 GAO's creation ultimately came as part of a larger set of tradeoffs with the executive \*1590 over power, including over the budget. The bill creating GAO also required the President to submit an annual budget proposal (thereby entrusting budgetary planning to the President) and established the Bureau of the Budget, later renamed the Office of Management and Budget (thereby entrusting budgetary analysis to the President).261 As one historian wrote, “Many congressmen, probably most, viewed the independent audit as the ‘quid pro quo’ for instituting an executive budget.”262

GAO's early work focused mostly on clerical review of “vouchers”--forms used by executive branch officials to document expenditure details.263 By the 1940s, however, GAO supervised the creation and holistic auditing of accounting systems in administrative agencies.264 Congress also reasserted its control over the office, declaring it officially part of the legislative branch in 1945265 and giving it additional powers to oversee executive branch implementation of the budget.266 In 1946, GAO's workforce consisted of nearly 15,000 employees.267

By the 1970s, Congress had more than tripled GAO's budget and, in the 1970 Legislative Reorganization Act, mandated that it carry out full-fledged “program evaluation.”268 The office transitioned from hiring only accountants to hiring scientists, policy specialists, and technical experts to aid in its modern mission of monitoring the substance and effectiveness (rather than just the accounting) of executive programs.269 The 1990s' Republican \*1591 Revolution significantly pared back GAO's budget and personnel, inaugurating its transition away from work initiated by GAO itself-- and instead mostly toward congressionally initiated projects.270 However, GAO remains the largest nonpartisan congressional institution.271

Present-day GAO oversees and evaluates federal programs and federal expenditures,272 and undertakes traditional financial audits to ensure that agencies are spending funds in an efficient manner.273 A broader range of investigations also fall within the office's ambit, including examining redundancies in federal programs and possible illegalities.274 GAO issues legal decisions addressing issues of appropriations law-- i.e., the body of laws governing agencies' use of and accountability for public funds.275 The majority of GAO's studies, investigations, and legal decisions now result from specific congressional requests, although it retains latitude to undertake \*1592 audits, investigations, and legal decisions at its own behest.276 A recent, prominent example--at the center of efforts to impeach President Trump--was GAO's determination that OMB violated the Impoundment Control Act when it withheld Ukrainian military aid that had been appropriated by Congress. The decision stated: “GAO's role under the ICA-- to provide information and legal analysis to Congress as it performs oversight of executive activity--is essential to ensuring respect for and allegiance to Congress' constitutional power of the purse.”277

GAO also submits policy recommendations for legislative action to Congress.278 These proposals can include recommendations that Congress enter into entirely new areas of legislation.279 The congressional solicitation of these recommendations is not simply pro forma--Congress regularly acts on GAO's recommendations. In 2018, for example, Congress adopted GAO's recommendations to direct the Veterans Health Administration to research overmedication, update the Department of Defense's prescription drug buying programs, and develop “performance metrics” on border security for the Department of Homeland Security.280

The head of GAO is still known as the Comptroller General and is still appointed by the President and subject to Senate confirmation,281 now after a congressional commission recommends a list of at least three possible candidates to the President.282 Although it is unclear whether the President is required to choose a name from the provided list, all three Comptrollers General selected since the institution of this process have been so selected.283 \*1593 The Comptroller General is still considered a legislative office because only Congress can remove it,284 and the person heading this position serves a nonrenewable term of fifteen years.

GAO's main work products are detailed reports, which typically range from 10 to 100 pages in length.285 The office also issues a “high-risk list,” which notes federal programs that GAO believes are susceptible to significant financial loss.286 Among other things, it also publishes its “Red Book,” an influential guide to appropriations law and rulings cited numerous times by the federal courts, including this past term by the Supreme Court.287 With respect to its analyses and methodology, the office's work is structured by transparency. GAO publishes nearly all of its reports and studies for public consumption--even if members of Congress would prefer the reports to be suppressed.288

GAO carries out a variety of additional responsibilities less immediately tied to the legislative process. Each year, it adjudicates thousands of bid protests--challenges to awards or solicitations of government contracts.289 Per the Federal Vacancies Reform Act, the Comptroller General notifies Congress, the President, and the Office of Personnel Management if an acting official has served longer than the 210-day allowance without official appointment and confirmation.290 Congress also periodically requests GAO \*1594 views (in the form of legal opinions) assessing whether the Congressional Review Act applies to certain agency actions.291

In fiscal year 2018, GAO “received 786 requests for work from the standing committees of the Congress, ... issued 633 reports[,] and made 1,650 recommendations.”292 Senior GAO officials testified ninety-eight times before forty-eight separate committees or subcommittees. According to GAO, agencies implemented seventy-seven percent of GAO's recommendations in fiscal year 2018 (an increase from seventy-three percent in fiscal year 2016).293

GAO staff, in interviews, repeatedly volunteered that the office's primary role continues to be safeguarding “Congress's constitutional prerogatives.”294

H. MedPAC and MACPAC

“Each of them are incredibly necessary, so that you take the decision-making and put it in the hands of professionals and take it out of the hands of Congress and the lobbyists.”

MedPAC and MACPAC likewise had their origins in congressional distrust of executive-branch administration. Like JCT, MedPAC and MACPAC stand out as nonpartisan institutions designed to support Congress in areas of particular policy and financial import in which the executive had become dominant. In this sense, they perform a specialized version of the kind of work that GAO also sometimes performs in other subject-matter areas.

But the history of MedPAC and MACPAC also illustrates a more modern story of interest group encroachment as another, and growing, threat to congressional autonomy that the congressional bureaucracy may guard against. In the early 1980s, Congress grew distrustful of the Health Care Financing Administration (the predecessor to the Centers for Medicare and Medicaid Services that administered these federal health care programs in \*1595 the executive branch).295 This distrust moved Congress to create two Medicare advisory commissions. The first, the Prospective Payment Assessment Commission (ProPAC), was created in 1983 to advise Congress on Medicare payment policies for hospitals.296 The second, the Physician Payment Review Commission (PPRC), was created in 1986 to assist Congress on Medicare payment policies for physicians.297 In the Balanced Budget Act of 1997, Congress merged these advisory commissions into MedPAC--an entity that retained the label of “commission” but that, unlike most congressional commissions, had no statutory expiration date.298 Building on the model provided by MedPAC, Congress established MACPAC in the Children's Health Insurance Program Reauthorization Act of 2009299 and provided it with funding (and expanded its mandate) under the Patient Protection and Affordable Care Act.300

Lobbyists were also a cause for concern. Describing the impetus behind the creation of MedPAC, CRS chronicled: “Congress [by creating MedPAC] was able to obtain its own source of objective expertise on Medicare payment policy and buffer members of Congress from pressures from interest \*1596 groups.”301 The chair of the Finance Committee's Subcommittee on Health Care, Senator Jay Rockefeller, said: “Each of [MedPAC and MACPAC] are incredibly necessary, so that you take the decision-making and put it in the hands of professionals and take it out of the hands of Congress and the lobbyists.”302 The commissions continue to provide a counterweight to lobbyists; partisan congressional staffers view MACPAC as a resource to help them get “outside the lobbyist bubble,” for example, providing “an objective take” that can inform the staffers of whether interest group information is accurate.303

Interestingly, several of the interviewees who staff the older nonpartisan institutions likewise mentioned interest groups as a common modern problem for them too. We were told that, if not for their offices, lobbyists would have more power. One former member of the Legislative Counsel's office recounted that office's efforts to resist pressure from partisan staff to simply incorporate legislative language drafted by lobbyists rather than draft its own version of the text. As noted earlier, the now-defunct independent technology agency, OTA, was founded at least in part for the same reasons304--interest group influence had become a more pressing problem for congressional autonomy over time.

\*1597 MedPAC and MACPAC continue to advise Congress on the federal health programs within their purview.305 Like GAO, each commission also makes policy recommendations to Congress relating to the health care programs it monitors.306 These policy recommendations are made by the body of commissioners itself (as opposed to by its permanent professional staff), and also may be shared with executive agencies or states.307 The permanent staff also operates as a continual informational resource for Congress, producing explanations of federal programs (like CRS) and of real-world implementation experience (which may be based on data they proactively collect, like GAO).308 The professional staffs also provide Congress with technical feedback on policy ideas or proposed statutes (like JCT).309 Unlike the commissioners themselves, the permanent staff does not advance its own policy recommendations in the performance of its functions.310

Like GAO, MedPAC and MACPAC also emphasize transparency.311 Both are required by statute to make their reports publicly available.312 Both also meet in public, provide opportunity for public comment at their meetings, and publish transcripts of their meetings.313 As with Congress's other internal agencies, however, more informal technical feedback provided to congressional staffers is confidential--to the point that even commissioners have access only to aggregate data regarding the extent and nature of the feedback that professional staff provides to congressional members and staff.314 Unlike GAO, the work that the Commissions perform in response to congressional requests does not dominate their workload; much of the \*1598 commissions' work continues to be self-initiated and proactive, anticipating issues that will be salient to Congress.315

MedPAC and MACPAC each submit two annual reports to Congress reviewing the federal health programs.316 If the Secretary of Health and Human Services submits a report to Congress, the commissions must submit written comments on the report to the relevant congressional committees,317 and MACPAC also is statutorily encouraged to submit reports to committees commenting on agency regulations.318 MACPAC also produces MACStats, which compiles data on the Medicaid program, annotated versions of the Medicaid and CHIP statutes, and a variety of issue briefs and fact sheets. Beyond submitting reports, the commissions communicate with Congress in various ways, including through testimony, briefings, and informal staffer conversations.319

The two commissions share the same organizational structure. Each consists of seventeen commissioners who are appointed by the Comptroller General. These commissioners must be drawn from a representative mix of individuals and professions involved with the applicable federal health programs.320 This structure was meant to bring a variety of perspectives to Congress that it might otherwise lack.321 The commissioners serve three-year terms, and their appointments are staggered.322 The Comptroller General also designates the Chair and Vice Chair of each commission.323

In addition to the commissioners, MedPAC has a permanent staff of thirty individuals, including nineteen policy analysts;324 MACPAC has a permanent staff of twenty-nine employees, including fifteen analysts.325

As a point of contrast, the entire full-time staff of the Senate Health, Education, Labor, and Pensions Committee specializing in healthcare is seven staffers and three fellows.326 All analysts in MedPAC and MACPAC have advanced degrees.327

<<TABLE OMITTED>>

II. The Bureaucracy’s Features and Functions

Bureaucracy as a subject of study has captured the interest of theorists of government and law for decades. But that literature has focused primarily on executive branch agencies, not legislative agencies, and the legal arena has been dominated by leading scholars of administrative law and the presidency.328 We briefly lay out the standard account of the bureaucracy, what it looks like, and classic tradeoffs it entails. We then detail how the congressional bureaucracy intervenes in that account and, in substantial ways, diverges from it.

A. The Standard Account

The congressional bureaucracy substantiates the mainstream account in part, but also offers some important divergences. Max Weber's classic analysis of the bureaucracy describes the ideal-typical bureaucracy as containing a number of key elements, including specialization and training, hierarchical relations of authority and compensation, ideological impartiality, and continuous fulfillment of duties by fully committed \*1601 employees.329 Weber's bureaucracies were staffed by appointed specialists with legal protections against arbitrary dismissal who received a regular salary, and who were expected to subordinate their personal or political goals to institutional ends.330

“Bureaucratic administration means fundamentally domination through knowledge,”331 he wrote, while emphasizing that “the question is always who controls the existing bureaucratic machinery.”332 Because in the ideal form the work of the bureaucracy is wholly rational, “dehumanized,” and thereby “eliminat[es] ... all purely personal, irrational, and emotional elements,”333 it requires additional leadership to steer it toward larger moral goals--what Weber labels “charismatic” leadership.334 The political and the bureaucratic, as modern government experts have argued, are in a relationship of “conditional cooperation”; both need one another and the top does not have complete control over the bottom.335 Debates over the need to preserve bureaucratic autonomy have been a key focus of modern scholars.336

Other work on bureaucracy has roots in rational choice theory, which has considered why Congress creates an executive branch bureaucracy and how it structures it.337 That work focuses mostly on Congress's own deficiencies as the reason why Congress turns to agencies--including limited time,338 lack of expertise,339 and desire to avoid accountability.340 The story is almost always one of Congress relinquishing policy control in the hope of receiving some countervailing benefit,341 such as increased efficiency (and other time-related benefits),342 high-quality output (resulting, for example, from enhanced institutional memory343 or managerial experience344), greater political leeway to pursue additional policy achievement,345 or a convenient scapegoat that Congress can hide behind to avoid political blame for difficult decisions.346 A different kind of benefit identified by scholars both past and present is the potential for a strong bureaucracy not only to check excessive presidential power, but also to serve as a bulwark against undue corporate influence.347 But the most touted benefit is expertise.348 Expertise gained from the bureaucracy, the theory goes, outweighs the loss of political control.349

With respect to control, scholars emphasize Congress's ex post tools, such as oversight power,350 as well as ex ante means, such as initial decisions about the structure of the bureaucracy that can orient it toward Congress's political preferences or otherwise “stack the deck” in favor of Congress's preferred outcomes.351 Some scholars have argued that the absence of active congressional oversight is actually a beneficial sign that more efficient control mechanisms are in use, not that bureaucracy has been left adrift.352

More recent administrative law scholarship has also looked to separation of powers.353 Neomi Rao critiques administrative delegation as undermining separation of powers, in part because she concludes that Congress is unable to adequately police its delegations.354 Neal Katyal and Gillian Metzger have argued for a strong internal separation of powers within the executive branch itself--across and within agencies--to provide the kind of check on executive power that they worry Congress can no longer provide.355

Much of this work points to arguments that, instead of formal constitutional structures, or a strong Congress, or even Supreme Court doctrine, sub-constitutional strategies can and should be used to achieve the same checks and balances.356 Almost all of this literature, however, identifies those sub-constitutional strategies, including how powers are internally separated, as located in the structure and operations inside the executive branch.357

B. How the Congressional Bureaucracy Intervenes in This Account

The congressional bureaucracy, in many ways, reflects Weber's description of what an ideal bureaucracy looks like. Congress' internal institutions, too, share a fierce commitment to objectivity and nonpartisanship; are each marked by their particular form of highly specialized knowledge; have long-serving staff who, on the whole, are more educated and older than Congress's political staff; share a commitment to the long-term interests of Congress as an institution rather than the political question of the day; and respect Congress's rules and jurisdictional limits about the scope and extent of their powers. This comment from one of the longest serving counsels in Legislative Counsel captures the mood: “For Congress ... it has been the curious marriage of the cool rationality that these auxiliary legislative institutions add (both from appearance as well as from reality) to the heat of raw politics that produces a stronger, more durable democratic system.” 358

Congress's bureaucracy also aligns with the classic account that a paramount role for the bureaucracy should be the provision of technical and subject-specific expertise. Much has been written about how Congress uses delegations to executive agencies to avoid blame.359 We extend those insights now to the legislative-branch bureaucracy. Members use the bureaucracy's expertise as a sword as well as a shield, including to shift blame.360 One interviewee explained: “There is a lot of value to having a memo on CRS letterhead in support of a position” because it “can be used as leverage over other members or the public.” 361

But there are some critical differences from the Weberian model. One is the lack of political leadership at the top of any of our bureaucratic institutions; as detailed in Part I, the heads of these institutions generally are appointed without regard to partisan affiliation. In many of the offices, the head is promoted from within and is a long-term staffer.362 One explanation for this structural difference is likely that these agencies are internal, not external, to Congress. The political leadership that we typically associate with the executive branch agency head is replicated in the congressional bureaucracy instead by members and their political staffs themselves; they decide how to utilize the information the bureaucracy provides. Further, removal power of the office heads often remains with political actors: three serve at the pleasure of the House,363 one is removable by a resolution in either chamber,364 one by joint resolution for certain specified reasons or impeachment,365 and four lack specification of any removal power or protections.366

Importantly, the offices of Congress's bureaucracy are not all the same. Like the executive branch literature emphasizes, Congress's internal agencies, too, are a “they,” not an “it.”367 Some are policy experts, some are not. Some expertise they provide is confidential, some is public. Some offer their expertise before legislation is enacted, others' expertise comes in ex-post. Some expertise is only suggestive and can be discarded by members at will; others' is more constraining. Some nonpartisan offices in Congress have become the subject of political attention and, with visibility, criticism; others have escaped attention almost entirely. Members and staff interact directly with some offices; for others, they never see them and may not even know they exist. Each of these differences contributes to how Congress controls its own bureaucracy.

These descriptions illuminate two additional important distinctions from executive agencies at the outset: First, much of the congressional bureaucracy's work is not binding on Congress. In practice, the congressional bureaucracy's work-product is enormously influential--the budget score or a revenue estimate for legislation are good examples--and Congress is generally required to obtain those numbers. But Congress does not necessarily have to act on the information. For instance, Congress can disregard the score and legislate outside of its financial targets. Congress can ignore research or drafted legislative language or decide not to act on a GAO audit, although the transparency and visibility of the congressional bureaucracy work-product on the ground makes at least some of it hard to ignore. Additionally, a good portion of Congress's bureaucratic work is not substantive (in the classic sense of devising policy for Congress), but rather involves the execution of policy ideas--whether converting them into legislative text, scoring their financial impact, referring them to the proper committees, organizing them in the U.S. Code, or providing research on their implications.

This may be another reason that the congressional bureaucracy has not been the same source of public and academic angst as its executive counterparts. While there are exceptions--CBO numbers had a large impact on several failed efforts to repeal the Affordable Care Act,368 and the Parliamentarian's rulings generally constrained what the Senate could and could not do by reconciliation without filibuster369--the bureaucracy has generally seemed unthreatening to Congress.

In fact, the very comfort that Congress takes in its bureaucratic structure offers another important theoretical contribution. Congress uses its own internal structures, and especially its bureaucracy, to separate powers inside of it and not just external to it. Members voluntarily cede power from themselves, or their own party, by winding up the congressional bureaucracy and setting it in motion. The congressional bureaucracy's continued existence itself--because Congress can always abolish it--strongly suggests that Congress values the dispersal of power that its nonpartisan institutions accomplish.

As we noted in the introduction, because of these differences, the term “bureaucracy” is not quite perfect. Congress's “scaffolding” is another term we heard; or the “institutional staff,” as opposed to the professional (political) staff. We also considered Congress's “Underbelly”--to connote an important support that is largely unseen. That term seemed too pejorative, given the bureaucracy's value.

We begin the discussion below with the internal separation of powers point and for the remainder of the Part detail the different functions and constraints of our bureaucratic institutions. There are many different ways to provide nonpartisan legislative support.

1. Internal Separation of Powers

Part I of this Article offered a new account of how the congressional bureaucracy contributes to the modern story of sub-constitutional separation of powers. The congressional bureaucracy adds a legislative component to that story that has been mostly overlooked. Congress's decisions to restructure itself via nonpartisan offices in the 1940s and 1970s were primarily motivated by its desire to check executive power and reassert itself in the lawmaking, budget, tax, and oversight processes. Its establishment of more subject-matter oriented independent agencies like MedPAC, MACPAC, and OTA came later, but likewise were responses to threats of usurpation that arose from Congress's perceived inability to effectively oversee the activities of parallel executive branch agencies (and later, lobbyists).370

The congressional bureaucracy also deserves a place in the modern account of internal separation of powers. To the limited extent that scholars have remarked on how Congress decentralizes power internally, they have understandably focused on Congress's outward-facing structures of which members are a part and how Congress disperses power among those members, such as committee organization, minority and majority leadership, bicameralism, and legislative veto gates.371

But Congress's internal institutions disperse lawmaking power within Congress even more, by removing swaths of it from members and political staff entirely. Simultaneously, the congressional bureaucracy prevents that power from being centralized in any single political office. Critically, in a context in which the president is not a threat, Congress is willing to set up ex ante processes that take power away from one kind of congressional actor or another in the interest of something greater.

Consider the alternatives. Congress could have built its bureaucracy simply by adding experts into existing centers of congressional power. As several of our interviewees have noted, this could have been accomplished by adding expert staff positions to the leadership staff, committee staff, or other partisan staff under members' direct control. Congress could have divided these positions between different staffs for majority and minority, with each side providing its own competing estimates, drafts, statutory reorganizations, and so on. Or it could have consolidated research, drafting, accounting, procedural, budget, and revenue expertise under the Speaker of the House and the Senate Majority Leader.

Instead, Congress dispersed these expert staffers across a collection of nonpartisan institutions whose mission is to serve the institution as a whole, including both parties--and that, because of their statutory authority and hardwiring into congressional procedures, cannot be removed by any one faction in Congress and often are not easily manipulated. In so doing, Congress decentralizes power within itself and removes a piece of the legislative process from partisan politics. As one high-level staffer put it: “We do not want to have the collection of power where everyone functions under a single secretary general.” 372

By way of comparison, Whitford and Miller's “credible commitment” theory posits that, in the executive branch, “[d]elegation to a (relatively neutral) professionalized bureaucracy serves as a natural conflict-resolution mechanism” when legislators are not certain in advance their first-choice policy outcome will always prevail. Delegation “is the natural form of compromise between competing political perspectives.”373 They further posit that bureaucrats “have no discretion when politicians are united. It is only when politicians are divided into conflicting factions that bureaucrats find a zone of independent authority.” 374

The congressional bureaucracy fits the Whitford and Miller account, but only to a point. Congress does commit ex ante to processes (such as revenue and cost scoring), procedural rules, rules on committee jurisdiction, and impartial legislative drafters and codifiers that may not always give members their first-best policy outcomes, but at least ensure nonpartisan arbiters. But this happens regardless of whether one party is in control or when the Congress is bitterly divided. That kind of trust in the congressional bureaucracy is what makes this story different from the typical executive branch story. Epstein and O'Halloran's oft-cited work on delegation likewise argues that a congressional majority is less likely to delegate to an executive branch under a different party's control.375 But there is little evidence that utilization of the congressional bureaucracy changes depending on the composition of the government.376

For another comparison, Jon Michaels posits an administrative (executive) state safeguarded by the division of power “among three sets of rivals” that are legally authorized to contribute to administrative policymaking: namely, “politically appointed agency leaders ... politically insulated career civil servants ... and the broader public.”377 The congressional bureaucracy does not perfectly fit Michaels's view either. The congressional bureaucracy, as the next section details, so steadfastly insists on nonpartisanship and displays such a total lack of interest in aggregating power that it is hard to describe it, in Michaels's terms, as a “counterweight.”378 That said, its institutions do in a sense function like Michaels's “heterogeneous institutional” agencies--operating alongside the political staff (what we may think of as a partisan bureaucracy), members, and interest groups all aiming to inform legislation.379

Indeed, several of our interviewees emphasized that in the absence of these internal congressional institutions, power would inure even further to partisan politics and interest groups. The bureaucracy is a counterweight to hyper-partisanship. It provides some optimism that Congress--even during the modern period of increasing centralization and partisanship--still preserves aspects of its process at the institutional and nonpartisan level. That is, Congress has chosen not to fully center power over the design, writing and analysis of legislation, in the hands of any one party or senior member.

Recall from our historical account in Part I that one motivating force for the creation of the Offices of the Parliamentarians was to curb the internal consolidation of procedural power under the House Speaker Joseph “Boss” Cannon.380 On the Senate side, the parallel motivation was concern regarding the centralized procedural control of Vice President John Nance Garner.381 We have already noted how the creation of CBO initially threatened some members of Congress by pulling power away from the then-influential finance-related committees and how CBO's Alice Rivlin openly embraced this internal separation of powers function for the new office.382 The 1970s expansion of Legislative Counsel was similarly aimed at democratizing drafting resources in Congress--an attempt described to us by one longtime staffer as “a movement of the Watergate class to gain more power” that gave rise to “things like the establishment of subcommittees to take power away from committee chairmen and increased support staff to help individual members” and not just committee chairs and leadership.383 The expanded funds dedicated to Legislative Counsel (as initially made in furtherance of the House office's new 1970 charter) provided more drafting resources for individual members and committees alike.384

GAO also has received similar attention, even beyond its role in the landmark separation-of-powers case of Bowsher v. Synar. Studies have chronicled the role that GAO has played in preserving the balance of power between political parties,385 between Congress and the executive branch,386 and between itself and partisan congressional actors.387

The political (partisan) staffers we interviewed for this study corroborated these points regarding the decentralization of internal power and elaborated on them. They emphasized that GAO was valued inside Congress for giving equal attention to the work of the majority and minority parties. Many opportunities and resources in Congress are allocated according to party \*1612 control and/or seniority. But when it comes to GAO, one party does not receive more GAO attention simply because it is in power. It has been found that minority parties have leveraged this power to protect their prerogatives even in times of unified government.388

We were also told by partisan staff that the Parliamentarians and Legislative Counsel help to preserve minority party power by assisting with drafting motions (a resource provided equally to both parties, on all sides of an issue), and by making sure the minority understands its power and uses it properly.

In a different vein, another set of staffers emphasized that CRS was a particularly “democratic” bureaucracy: whereas CBO, or even Legislative Counsel, must prioritize the work of committee chairs and leadership (equally across the two parties) when Congress is particularly busy, CRS has the obligation to answer every call with equal attention. For a junior member of Congress, particularly in the House, CRS can serve as a critical research arm for that member's office that enhances her power and lawmaking ability. MedPAC and MACPAC can serve a similar function for junior members.389

B. Different Types and Structures of Congressional Bureaucratic Expertise

There are many ways to be nonpartisan bureaucrats. In structuring its bureaucracy, Congress demanded specialization and nonpartisanship of all of its bureaucratic institutions. But Congress differentiated across the institutions in other aspects, making tradeoffs across structural elements. Should a nonpartisan agency's work be authoritative or permissive? Confidential or transparent? Policy neutral or offering a conclusion? At what point in the legislative process should the bureaucracy be engaged? At least some of these tradeoffs are relevant to considerations about the structures of executive branch agencies as well. And the tradeoffs contribute to theories of oversight. One way Congress can control its bureaucracy is if it does not have to use its inputs and assessments. Other offices in the congressional bureaucracy have mandatory inputs but are governed by transparency rules that allow Congress to police that work. Congress also votes on statutes after most (but not all) of the congressional bureaucratic input. That is of course another significant control. The rest of this Part highlights the key tradeoffs and features of Congress's bureaucracy.

1. Nonpartisanship

“You would never go down this road if you had a partisan bone in your body.”

All nine of the bureaucracy offices emphasized nonpartisanship as the defining characteristic of their work. One interviewee described nonpartisanship as the “core of their legitimacy.”390 Two heads of offices told us that nonpartisanship is what makes their offices “valuable” to Congress.391 And a deputy head of one of the offices remarked:

The nonpartisan nature of the work infuses every conversation we have here every day, so both sides of the aisle know no matter who calls us first to ask the question we give the same answer. It is so ingrained in everything we do here every day. Nonpartisan is the core of what we are.392

This nonpartisanship is anchored in a patchwork of legal requirements. Six of the institutions (out of nine, with single-chamber offices counted individually) have statutory requirements that their office head be appointed without regard to political affiliation.393 Six have statutory requirements that their staffs be so appointed.394 Statutory rules for eight provide a role for political actors in the appointment of office heads, but CRS's statute requires the head be appointed by a non-elected actor, the Librarian of Congress.395 Similarly, while statutory rules detail a potential role for political actors in staff hiring for five of the institutions, they explicitly omit such a role for three such institutions (and are silent for one).396 GAO also pointed toward \*1614 the absence of political appointees below the Comptroller General, for example, as a feature that contributed to GAO's nonpartisan culture.397

Culture and mission commitment also contribute. All of the bureaucratic institutions reported that, despite statutory requirements or lack thereof, they hire and promote on a nonpartisan basis. The Senate Office of the Legislative Counsel is typical. It lacks statutory protections for nonpartisanship in staff hiring, yet it reports on its website that “[n]o change in personnel of the Office has resulted from any change in political control of the Senate.”398 Prior research has found that JCT,399 GAO,400 and the Senate Parliamentarian's Office401-- each of which lacks statutory protections for nonpartisanship in the selection of office heads--nonetheless all appoint leadership and hire without regard to partisanship, and some nonpartisan congressional offices also explicitly avoid hiring individuals who have previously done partisan work.402 Self-selection also happens on the employee side at the hiring stage, as the positions typically lack appeal for individuals with strong partisan inclinations. As one staffer in a Parliamentarian's Office remarked: “You would never go down this road if you had a partisan bone in your body.”403

Office culture further cultivates the view that the primary allegiance is to the institution of Congress as a whole. We see similar descriptions in the general bureaucracy literature.404 The head of one office said:

There could be three senators in my office arguing about something, but there is always a fourth entity [in that meeting] and [that is the Congress as] an institution. You are trying to be the guardian or steward of its unseen needs and traditions ... [t]rying to take a long view, when most [people] coming in are just trying to get something done for today.405

In fact, we were told that this steadfast commitment to nonpartisanship is what saved the offices of the House Legislative Counsel and Parliamentarian in 1995, when Speaker Newt Gingrich and the new Republican majority revamped many other congressional operations. One longtime former nonpartisan staffer said:

I attribute this to (1) the institutions being neutral and having worked with, and in support of, the minority in the House as well as the majority--[we] had personally worked extensively with Gingrich and other political generals--less so with their newly enlisted and drunk with power troops; and (2) the leadership observation that the revolution reflected in the 1994 election would be incapable of carrying out their mandate without the professional resources of the legislative quartermaster corps who had the logistics to actually produce legislation.406

This commitment to neutrality was not sufficient to protect all nonpartisan offices--some offices had their budgets or functions reduced at \*1616 this time,407 and OTA was eliminated.408 For OTA, a combination of factors overwhelmed the institution-preserving function of neutrality-- including Gingrich's desire to centralize power,409 growing anti-science sentiments among some Republican factions,410 a desire for a highly-visible display of slashing the federal government,411 and lingering resentment over OTA assessments of the “Star Wars” program.412 For Legislative Counsel and the Parliamentarian, however, prior displays of neutrality proved vital to the cultivation of this support--and, consequently, to their survival both in that political transition, and into the current hyper-polarized and increasingly centralized environment. This supports George Yin's suggestion that, in at least some instances, the neutral stance of the bureaucracy is key to preserving its power and influence.413

2. Specialization and Long Tenure

“A real cadre of people with institutional loyalty and knowledge ....”

Specialization is another commonly touted bureaucratic feature in general.414 And the congressional bureaucracy's institutions are likewise marked by a very high degree of it. The bureaucracy was created precisely because Congress was desperately in need of that expertise. Today, the institutions' size gives the offices of the congressional bureaucracy capacity for heightened specialization: GAO has more than 3,000 employees,415 CRS around 620,416 CBO 250,417 Legislative Counsel more than 90,418 and JCT 65.419 By contrast, the partisan committee with the largest staff in the House is the Appropriations Committee with 119 employees;420 in the Senate it also is the Appropriations Committee, with 133 employees.421 The average size of committee staff in both chambers is about 58.422

This capacity enables impressive output. GAO has produced thousands of sophisticated analyses on topics from energy (2,593 reports) to health care (5,105) to space policy (920).423 GAO was directed to conduct over forty studies just by the Dodd-Frank Act, for example.424 CRS estimates that every year it fields over 60,000 informational queries from members on “whatever \*1618 is hot” at the moment.425 In 2018, CBO produced 947 formal cost estimates, responded to thousands of informational requests, and provided almost 150 scorekeeping estimates for appropriations bills.426 JCT emphasized that the committee staff it supports has much smaller staff than JCT itself. The Ways and Means Committee staff, for example, has only five people providing services for all of the members on all of their issues. JCT in contrast has forty-three legislative congressional staff, including seventeen attorneys. They said: “For example, we have one person who does nothing but cross-border issues. The Ways and Means [staffer on that issue] has many other issues [to handle] as well.”427

Legislative Counsel divides drafters into teams that focus on specific subject areas.428 CBO is organized into nine divisions that are oriented around particular modes of analysis or subject matter.429 CRS partitions its analysts into six research divisions, as well as four research support offices.430 JCT divides its staff into interdisciplinary teams. GAO, in addition to having several internal management divisions, boasts fourteen “mission teams” that each have a special area of policy expertise.431 Even OLRC, one of the smallest nonpartisan offices, divides its workforce into a codification team and a U.S. Code-updating team.432

Most of the congressional bureaucracy requires employees to hold advanced degrees in specific fields. The Parliamentarians, Legislative Counsel, and OLRC all are staffed by attorneys.433 GAO's employees have (often advanced) academic degrees in fields including accounting, law, \*1619 engineering, economics, and social and physical sciences.434 JCT staff includes attorneys, economists, and experts in accounting and tax analysis.435 At CRS, ninety percent of staffers have graduate degrees in law, policy, or other fields of expertise.436

Long tenure is another feature that the congressional bureaucracy shares with other common bureaucratic career staff.437 In CRS, for example, current employees have spent an average of thirteen years there, with several working for CRS for over fifty years.438 Legislative Counsel and GAO employees are of similar longevity.439 OLRC employees noted that: “[G]enerally, we've been here a long time .... [So] there is a real cadre of people with institutional loyalty and knowledge .... who interact with each other informally to get stuff done ....”440 JCT staff commented that their “expertise is longer, we've seen stuff before. Our tenure is longer.”441

As in Weber's paradigm, each institution respects its own jurisdictional boundaries and the expertise and terrain of others. JCT staff, for example, emphasized that they pride themselves on “good tax policy” and that they relatedly have a commitment to working with their field-specific counterparts in the executive branch--the nonpartisan Treasury staff.442 These JCT staff comments were typical of those we heard from others: “Our comparative expertise is we have greater specialization .... We have 15 lawyers plus accountants and we can specialize. Legislative Counsel brings drafting expertise .... Political staff brings a closer understanding of policy and \*1620 members' preferences.”443 The staff in a Parliamentarian's Office told us: “We are the procedural navigators. Our knowledge isn't replicated anywhere else.”444 A GAO interviewee added: “We have a multidisciplin[ary] workforce. Most of [our] workforce have advanced degrees [and] have specialties that aren't represented with staff. [B]ecause we don't have to respond to the political process, we can make plans and look at programs in a very orderly fashion.”445

This high degree of specialization stands in contrast to the political policy staff and members themselves. Interviewees emphasized that Congress is now experiencing a greater “churning” of partisan congressional staff and that “new folks” are coming in who “need to get up to speed.”446 The relative youth of that staff was also emphasized, as was their transient nature.447 Interviewees also told us that political staff “doesn't have time” to cultivate expertise or specialized knowledge, and that “members are coming from more nontraditional [i.e., non-legal or policy] backgrounds ... with different types of expertise” and that may change “how we need to get them up to speed.”448 Staff who work directly for members are generally less expert than committee staff, and House member staffs tend to be less experienced than Senate member staffs.449

Through the combination of nonpartisanship and specialization, these offices foster a perception in Congress that they are valuable and trustworthy. In a recent survey of partisan congressional staff, Kevin Kosar gathered staffer impressions regarding the frequency of use and reliability of different congressional support actors in budget and healthcare policy.450 Kosar found that staffers ranked each nonpartisan office included in the survey (GAO, CRS, and CBO) as more trustworthy across all topics (significantly so with a minor exception451) than each of: professional committee staff, bureaucratic \*1621 agencies, party leadership, members similar to one's own boss, caucuses, the administration, and state delegation members;452 CBO and CRS were also reported to be the most frequently used support actors along with professional committee staff.453

3. Nonpartisan Is Not Necessarily Position-Neutral or Non-Substantive

There are different ways to be nonpartisan and to use specialized expertise. For starters, there is a difference between being nonpartisan and being position-neutral, although almost nothing the congressional bureaucracy does is devoid of substance.

With respect to those institutions that do not reach policy conclusions: OLRC, and to some extent Legislative Counsel and the Parliamentarians, do not take substantive positions on one side of a question or another, but the Parliamentarians will give members advice about procedural matters and how to structure bills to bring them within (or keep them out of) a particular committee's jurisdiction. Their decisions have an important impact on the ultimate shape of legislation. Legislative Counsel will not judge the merits of any statute but will express views about the best way to phrase language or provisions that should be added.

Unlike the executive branch bureaucracy, the congressional bureaucracy performs its tasks for both the majority party and the party not in control. Legislative Counsel, for instance, may have views about how to write clear language, use cross references, and so on, but those views will be consistently applied between the majority and minority draft legislation. They will work on whatever policy, we were told, “no matter how despicable,” that members ask them to draft. It is common for a single Legislative Counsel drafter to help members of both parties draft opposing legislation on the same policy question, often simultaneously. JCT staff told us “all the time, we advise members of opposite parties about the same issue.”454

Similarly, OLRC's mission is the same regardless of whose law OLRC is working on. As one interviewee described the office's role: “[It] doesn't matter to us whether a policy is liberal or conservative, wise or stupid. We are looking for clarity of expression and that's it.”455

In contrast, those congressional bureaucrats that are nonpartisan, but more policy focused, do issue conclusions about legislative proposals that may be preferred by one side or another. In many cases, these are conclusions about whether the proposals comport with rules or goals that, again, Congress \*1622 has articulated for itself ex ante. CBO and JCT issue conclusions about the fiscal impact of proposed legislation--conclusions that are used, among other things, to determine if legislation comports with Congress's stated fiscal goals. CBO, as noted, established its independence early by issuing estimates at odds with the policy goals of Congress and an Administration from the CBO director's own party. CRS likewise told us:

We are not the decision maker. We can draw pros and cons and arrive at conclusions, but we don't advocate .... We are an objective organization. We don't tell members what the best option is and what they should vote for. That's not our job. But it is not uncommon for us to come to a rather firm conclusion .... We have to present the minority position in order to fully inform members about any given issue.456

George Yin also has recounted a now-famous battle inside CRS over the drawing of policy conclusions.457 There, a CRS analyst had published an academic article critical of government decisionmaking that led to the Iraq war, leading the CRS Director to caution against taking “public positions” related to an analyst's research in outside publications.458 In a response, the analyst suggested the Director's stance could have a chilling effect, preventing analysts from drawing conclusions even in CRS publications (which typically draw conclusions when appropriate).459 The Congressional Research Employees Association also weighed in, releasing a statement in support of the analyst.460 (CRS staff we interviewed, however, disputed that CRS management had ever discouraged drawing conclusions and pointed to recent instances of CRS taking controversial stances.)461

This dispute reveals the competing conceptions of nonpartisanship that the congressional bureaucracy navigates. On the one hand, the analyst had expressed the opinion that, if not permitted to draw policy conclusions, the utility of his expertise would be greatly diminished. As Yin notes, the dispute \*1623 thereby highlighted the risk that neutrality, when understood as a reluctance to draw conclusions, can pose to the benefits offered by expertise. On the other hand, CREA forcefully defended analysts issuing policy conclusions when derived from “generally accepted methodologies of analysis and scholarship.”462 In so doing, it offered a competing vision where policy conclusions are nonpartisan when anchored in neutral, expert methodologies.

These institutions--and Congress in utilizing them--do consistently rely on their established methodologies to claim an objective legitimacy even in the face of side-taking. Parliamentarians operate based on the principle of precedent, and publish their precedents, but render decisions applying precedents that will favor one side or the other. JCT, GAO, CBO, and CRS issue analyses that may cut in favor of one position, but all of them forcefully emphasize the same principle of relying upon a consistent, published, and justified methodology as critical to their objectivity and nonpartisan credibility--a Weberian focus on rationalization that they argue lends neutrality or objectivity even to conclusions that some members might not wish to receive. As one interviewee remarked:

I've always seen a tendency to ascribe advice that is not what they wanted to some political motive. I think the only way we can combat that is [to] be available to go over that with them and use precedents and so on to show them that we have history of doing things this way.463

Congress has had hearings on JCT and CBO's methodologies by way of oversight.464 As JCT staff told us:

What does nonpartisan mean? This is why there's lots of pressure on modeling and transparency. Some members are disturbed that the way they think the world's going to work doesn't square with our estimates, so [we say \*1624 to them,] here are our methods and our evidence for why we are lining up a certain way.465

4. Policy Versus Procedure

Within Congress, the political staffs (those who work for members, committees, and leadership) undoubtedly are the primary specialists in policy development. As noted, however, some offices in the congressional bureaucracy explicitly provide critical policy development work for Congress. Congress tends to control those institutions' policy work by making the members' use of it optional. Others primarily play a procedural role--assisting a policy idea on its journey toward legislative enactment--but even procedural work can have policy implications.

CRS and GAO (and MedPAC and MACPAC) provide the most direct substantive policy support. Those offices independently (i.e., without specific congressional solicitation) may produce policy reports that Congress can use as it wishes.466 GAO has documented that many of its reports have played a mobilizing role in the ideation of legislation.467 JCT staff, while more reactive than proactive, also supply the bulk of tax policy expertise to staffers across various committees--especially Senate Finance and House Ways and Means--working on tax issues.468

Some straddle the policy-procedure divide. Legislative Counsel, for instance, is tasked only with taking members' policy ideas and “translat[ing] those ideas into statutory language and legalese.”469 In practice, however, the offices' deep knowledge of statutory regimes--and their institutional memory of past congressional successes and failures--often leads political actors to seek out input on how best to address policy concerns.

OLRC occupies a similar position. Its assigned task is to capture the already-enacted intent of Congress, not to develop new policy ideas. Nonetheless, it still engages in something that bleeds into policy when it reconceptualizes (indeed its authorizing legislation uses the word “restatement”) separately enacted pubic laws as belonging together under a new single title of the U.S. Code.470 So, too, OLRC makes significant policy- \*1625 implicating determinations when it decides which parts of a statute will be inserted into the main text of the U.S. Code versus those parts that will be relegated to largely-invisible side notes (a function of OLRC, surprising and unknown to many, that we detail below471). These editorial and conceptual functions are critical to shaping how legislation reads and is understood by the public after enactment, but they do not reflect the underlying policy decisions leading up to enactment.

The Parliamentarians' Offices engage mostly in procedure. While the work of these offices has high-stakes policy implications, they are almost never enlisted to assist in policy development, except insofar as they advise staff who to draft around procedural hurdles.

5. Confidential Versus Transparent: “The Atmosphere Has Changed”

Not all expertise-giving is apparent to the public. As we discuss in Part III, massive changes in how Congress operates--most importantly, departures from the regular-order, textbook process of lawmaking--have pushed much of the expertise-giving by the congressional bureaucracy earlier in the process and made it generally less visible. But here we wish to highlight another distinction that is a familiar tradeoff in administrative law: some expertise that these institutions develop is intended to be confidential, while some is not.

Each approach comes with its own risks. Confidential expertise can be manipulated (another way Congress can control its bureaucracy) and used to shift blame. Transparent expertise can get politicized.

Congress has written specific confidentiality obligations into the organic statutes of CRS, House Legislative Counsel, and the CBO,472 but private consultations with all of the nonpartisan offices that we studied are totally confidential--a practice that, for many offices, extends even to when members commission reports.473 Members can use information they commission if helpful, but never release it if harmful to their position.474 Staffers from all these agencies told us that members “find us useful. They can hide behind us \*1626 sometimes or use us to delay. They can tell constituents they submitted a question and haven't heard back.”475 And: “Yes, they can request [information] and choose to release or not if it comports with their political purposes. If they hear something from us they don't like, we won't tell anyone we spoke to them.”476

Even when official public input is ultimately the goal, members and staff frequently first consult informally--and confidentially--with all parts of the congressional bureaucracy. They routinely ask CBO about projections, or the Parliamentarians about jurisdictional and procedural questions, before seeking formal, public opinions from those entities.477 We were repeatedly told that this dialogic process of informal and typically confidential expertise-giving and subsequent legislation-changing--whether to get the bill to a particular budget number or to tweak the subject matter for a particular committee referral--greatly impacts what is ultimately written into the statute's text. So does the substantive feedback that the offices may provide in confidential consultations, such as when MedPAC or MACPAC provide commentary on early legislative proposals or drafts.478

GAO operates under a stronger default norm of transparency agreed to ex ante with Congress. Most of GAO's work happens in public, although GAO does informally consult with members in private. GAO emphasized the transparency of its actions as a core feature of its credibility.479 Notably, legislative reforms in recent years have called for more transparency in the various nonpartisan congressional institutions, with respect to both their processes and their work products.480 But our interviews suggest some caution may be warranted. In recent years, the CBO has found that publication of its cost estimates has dragged the office into the partisan fray.481 \*1627 For example, CBO drew major heat after its influential Affordable Care Act forecasts.482 CRS also has come under political pressure for conclusions it draws in published materials, such as a 2019 CRS report about the economic effects from the 2017 tax reform legislation483--a report met with partisan criticism from political commentators, the Treasury Department, and the Chair of the Senate Finance Committee, Senator Chuck Grassley.484

Parliamentarians also have come under media and political scrutiny precisely at moments when high-stakes, procedural rulings became public.485 On rare occasions, the Senate has even fired the Parliamentarian, including in the wake of controversial rulings.486 More recently, some members have \*1628 argued that the Vice President should play the role of Parliamentarian487--a threat made possible by virtue of the fact the Senate Parliamentarian exists only for the grace of Congress.488 As the only nonpartisan congressional institution without an organic statute, its very existence is especially precarious. As we were told, the Senate Parliamentarian “is out there without a net.”489

Staffers from all nine offices told us that congressional bureaucrats “would never take those jobs so they can carry out some [political] purpose,” even as some noted “the atmosphere has changed” and “nonpartisan staff are being impugned.”490 They worried about the “huge effort to minimize CBO and GAO and other organizations we use to function every day,” which often comes in the form of public criticism of those offices' outward-facing work.491 The more transparent the bureaucracy work has been, the greater the public oversight and the more it has come under this kind of pressure.492

6. Authoritative Versus Permissive

Some of Congress's nonpartisan institutions have limited mandatory responsibilities. Others are a statutorily required step in the legislative process. But one difference across the board from the executive bureaucracy \*1629 is that most of the work of the congressional bureaucracy does not have formal legal effect without some additional action from Congress.

Use of CRS and the Legislative Counsel is voluntary.493 CBO's cost estimates, on the other hand, are a necessary hurdle most bills must clear. Federal law mandates that each bill or resolution approved by any congressional committee (other than an appropriations committee) receive a CBO estimate.494 House rules additionally require these estimates to be published in committee reports495 and that legislation may be considered in the House only if, over various timeframes, that legislation does not increase the deficit or reduce the surplus--a determination that, partly by statutory mandate and partly by custom, is made by reference to CBO's cost estimates496 (but a House majority vote can waive the rule, and legislation has been passed without a score, or with a score after passage).497 JCT plays an analogous, mandatory role with respect to revenue-raising legislation.

GAO publishes a “Red Book” of appropriations opinions that are viewed as precedential inside Congress. These opinions are not binding on the judiciary, and GAO has no enforcement powers, but courts do give them “special weight.”498 When the Comptroller General exercises its statutory power to “settle all accounts of the United States Government and supervise the recovery of all debts,” the balance the Comptroller certifies is “conclusive on the executive branch.”499

Parliamentarian decisions are often treated as conclusive within Congress, even though statutes and chamber rules do not mandate their use in the legislative process. On a few procedural matters over the last few decades, Senators have ignored (or overturned by a majority vote) Parliamentarians' decisions500--including in the much-discussed instances in which the Senate has invoked the “nuclear option” in order to override supermajority rules for federal judicial appointments.501

Notably, many offices in the congressional bureaucracy with authoritative powers are required to exercise those powers transparently, through public reports or opinions. We think it is no coincidence that those offices are the ones most at risk of politicization.502 The combination of their visibility and the importance of their rulings puts them in the oversight spotlight.

7. Trust with Low Salience Tasks: Why OLRC? “No Members Know We're Here”

It is worth noting that OLRC inhabits an odd place on this spectrum. OLRC is required to prepare the U.S. Code for publication; that aspect of its work is mandatory. But it is up to OLRC to decide when a new title should be created and what it should contain, and Congress is not required to take any action on codification bills prepared by the office. OLRC can organize and reclassify enacted statutes into coherent legal titles, but it is up to Congress whether to formally enact those titles as so-called “positive law.” As \*1631 noted, half of the titles of the U.S. Code (including important titles like Title 42, which contains the civil rights laws) have been organized by OLRC (or prior codifiers) but never formally enacted by Congress as positive law titles.

OLRC staff told us several times there is a “total lack of political will” to enact codification bills:

Members don't care about positive law codification bills. Members care about, at best, policy and constituents, but making law easier to read and understand and navigate or correcting technical errors? They don't care about that .... What member ever went back to a town hall meeting and said, you know, “I got a U.S. Code title codified!”?503

We were surprised to learn from our interviews of partisan staff that most staffers do not even know what OLRC does, or where it is! Due to this lack of political salience, OLRC is not sought out by members. As they put it: “No members know we are here.”504

Why have an office no one cares about enough to use? The need to organize the U.S. Code in ways that make statutes and their amendments accessible to the public is uncontroverted. But why give that responsibility to a nonpartisan agency? Why not the Speaker's Office?

One reason, we believe, is precisely because no one is watching. As one interviewee put it: “Someone needs to do this. You need someone to run this stuff down. You have to have someone who isn't going to slip something by. Congress isn't going to be tracking it down.”505 In other words, the nonpartisan and politically dull stance of OLRC, ex ante, gives it the credibility to do work that is needed, but that Congress does not care about enough to supervise.

As with other studies of bureaucracies, OLRC's institutional design enables it to take on projects with long-term, diffuse benefits (but correspondingly low political salience). Its staff are incentivized not by the electoral connection, but by their own commitment to professionalism far beyond the next election cycle.506

8. Timing

Finally, expertise comes in all stages of the legislative process--including both pre- and post-enactment. The timing of congressional bureaucratic intervention is particularly interesting because, in addition to shedding light on the modern Congress's operations, it also creates a far more nuanced view of where “lawmaking” stops and starts. We return to this point in Part IV.

Some offices play a mobilizing role in the generation of legislation. GAO produces policy reports containing specific recommendations that can inspire legislators and staff to take action.507 CRS submits to Congress a list of expiring provisions in current law, thereby identifying possible topics for legislation.508 And OLRC even notifies members and Legislative Counsel of errors and inconsistencies in the law as enacted so that corrective measures can be passed.509

The Parliamentarian interjects expertise very early when called upon to make the critical decision about referrals to committee. (Consistent with the findings in the Gluck-Bressman study, it was repeatedly emphasized that “referral to committee remains hugely important.”510) Legislative Counsel translates policy staff goals into statutory language, and CBO and JCT calculate the cost of the legislation. JCT staff, as noted, is directly involved in nearly all stages of the legislative process.511 CRS drafts the bill summaries that appear on Congress.gov after their introduction.512 Germaneness rules and the Byrd rule create an important role for the Parliamentarians' Offices.

During this iterative process, the congressional bureaucracy's various offices have different roles, but they do not operate as silos. CBO relies on JCT estimates in the tax and revenue context. Partisan staff bring the Parliamentarians into dialogue with Legislative Counsel to develop statutory text that receives a desired committee referral. CRS may draft a report on proposed legislation that partisan staff will pass to Legislative Counsel to draft. JCT describes their role as one of transforming a concept into a concrete plan, but told us they then work hand-in-hand with Legislative Counsel to translate that plan to text. Language and substance are tweaked and tweaked again to get legislation within the budget and revenue goals members have set. A GAO staffer remarked:

We talk to each other all the time. We are very supportive of each other; we want to be sure we stay in our lanes. At the end of the day, we are all here to serve Congress and support congressional prerogatives. We do it in our own way. Some of CBO's work overlaps with GAO; everyone is respectful of that. Same with CRS. Congressional staff knows how to use us.513

A CRS staffer similarly noted: “There is a complementary relationship across GAO, CRS, and CBO in terms of our various mission spaces ... [as] defined by Congress.”514

Later in the process, JCT also drafts the legislative history for tax aspects of most bills before they are passed (usually for the Senate Finance and House Ways and Means Committees). CRS may be called in at any stage, whether to assess new ideas, analyze proposed legislation, or evaluate already passed legislation. CRS also provides data and analysis for committee reports.515 Legislative Counsel drafts some special legislative history, conference reports, and even amendments on the floor until the moment of the vote.

Most interestingly--in part because it is least well known--OLRC begins its influential work reorganizing and editing the positive and non-positive law titles of the U.S Code only after enactment. This includes textual changes (those changes, for positive law titles, are voted on in codification bills but not for the nonpositive titles). Other offices have post-enactment roles as well. JCT comes back into the picture to draft the “Blue Book,” its influential post-enactment synthesis. And GAO, in its role as the watchdog that oversees agency implementation, often begins the cycle anew by producing policy reports that contain specific recommendations for new legislative action--whether to address gaps in in oversight or to reign in agencies who are implementing laws improperly.516

III. Legislation and Statutory Interpretation Theory

At one of his last oral arguments before his death, Justice Antonin Scalia debated with Justice Stephen Breyer over how to resolve ambiguity in a statute where the text alone, including rules of grammar, was of no help.517 Justice Breyer suggested looking to legislative history. Justice Scalia instead suggested relying on a judge-created source outside the legislative process--a policy-based presumption of statutory interpretation. Justice Scalia's rationale: “You don't think Congress can leave it to its staff to decide what a statute means, do you?”

<<ASTERIXES OMITTED>>

We now turn to the implications of our study for the theories of legislation and statutory interpretation. There are several deficits we seek to remedy and several debates in which we intervene.

First, no matter where one comes down in the statutory interpretation wars, those debates are almost entirely based on empirical assumptions about Congress. Even those who think that lawyers should ignore the realities of the legislative process ground that argument in empirical claims that Congress has no collective intent, that Congress operates irrationally, or that Congress shares special drafting conventions with courts that are better substitutes for an approach focused on how Congress actually works.518 One cannot legitimate (or refute) such claims without doing the work of learning about Congress to determine if they are true.

We should be clear, too, that no one's approach is merely: “read the text and stop.” Every approach in the mainstream debates depends on sources external to enacted text when statutes are unclear, whether those sources are dictionaries, congressional operations, legislative history, or judge-crafted interpretive presumptions. Just because some sources, such as the courts' common presumptions of linguistic consistency or dictionaries, have legally attractive features (because some interpreters think those sources are “objective”), that does not make those sources less external to the text Congress enacts than sources linked to Congress's work.

John Manning's argument for shared interpretive conventions--that is, using judicially-developed canons of statutory interpretation instead of material more tied to Congress--is expressly legitimated on the assumption that Congress in fact shares those conventions. Justice Scalia's argument for the use of canons was similarly dependent on the assumption that Congress uses those conventions or knowingly drafts in their shadow. However, the Gluck-Bressman empirical study of congressional drafting practices seriously undermines those assumptions.

A more recent critic, Ryan Doerfler, argues that information about Congress is irrelevant because “context consists of information salient to both author and audience” and that the ordinary public, and perhaps also agencies or other legislators, do not know about Congress's operations.519 There is zero evidence, however, that the courts' interpretive presumptions are salient to anyone other than judges. The congressional bureaucracy's materials--including the CBO score, the Parliamentarians' rulings, legislative history, JCT explanatory outputs, and the organization of statutes in the U.S. Code--are more salient to all of the actors Doerfler identifies.

Doerfler also aligns himself with others520 in claiming that any arguments about collective intent--for instance that Congress, like corporations, can act collectively--are false because one cannot impute the intention of any one member of Congress to the whole. But that is not the point. Arguments about individual or subjective intentions are distractions here. Even Doerfler recognizes that Congress speaks collectively when it passes procedural rules or when it votes on final text of legislation, and that “it is plausible to attribute to an institutional group an intention to [do x] despite some members of that group failing to intend that ‘we’ [do x].”521

The congressional bureaucracy's formal work is precisely this kind of collective activity. As we stated earlier, Congress is sometimes an “it” as well as a “they.” The offices of the congressional bureaucracy are the creatures of Congress's own enacted laws, and those laws direct the \*1636 bureaucracy to produce statutory inputs. If the JCT says a law will raise $100 million, it does not matter if a particular member of Congress opposed the law for other reasons and it does not matter if the law actually would raise $100 million; regardless, we can assume that Congress had before it the conclusion the law it was enacting would raise $100 million. If the Parliamentarian says a piece of legislation should be referred to committee Y instead of committee Z because committee Z has no jurisdiction over oceans, then it is fair to assume that the bill covers oceans. So, too, legislators voting for a bill produced through Congress's professionalized drafting process, can be assumed to enact what the professional drafters themselves aimed the legal text to convey, not what any single member might have sneakily thought to herself. Just because legislators sometimes act individually, does not mean Congress does not act collectively.522

Second, we are part of a new movement in the field that has a civic-education bent. Legislation is now a subject taught in the first-year curriculum at many law schools. It would be preposterous to teach administrative law without teaching students about the components, structures, rules, and operations of the administrative state. And yet when it comes to statutes--the lion's share of modern American law--that is exactly how the topic has traditionally been approached, both as a matter of pedagogy and as a matter of legal doctrine. Statutory interpretation theory has engaged more deeply with dead philosophers than it has with Congress. Congress also has changed over time, and yet barely a dent has been made from those changes in even those interpretive theories and doctrine that are purportedly based on Congress's own operations. Work by us and our coauthors--as well as other scholars including Judge Robert Katzmann, Elizabeth Garrett, Victoria Nourse, Rebecca Kysar, and Jonathan Gould--has pushed to change this.523

\*1637 Third, regardless of the first two points, the fact of the matter is that judges do consistently interpret statutes in ways that judges claim are usually tethered to Congress. That means lawyers have to engage those arguments, too. Judges tell us they interpret statutes as not using redundant language because they assume that is how Congress uses language (but at least one prominent textualist judge (now Justice) has questioned that rule in the face of empirical evidence to the contrary.524) Judges tell us they rely on statutory organization instead of legislative history precisely because they assume the organization of statutory text is voted upon by members as part of the text, whereas legislative history is written by staff. This is not true. Students of the congressional bureaucracy now know that statutes are organized into the U.S. Code after passage by OLRC. Judges also presume that Congress uses the same words in the same way throughout the U.S. Code, when in fact, the structure of Congress and its bureaucracy points toward consistency and coherence only within subject matter areas and not within the Code as a whole.

With the exception of former Judge Richard Posner, we have not encountered a judge in the modern legislative state who has claimed that his or her interpretive approach is the result of judicial invention, federal common-law lawmaking, or the imposition of external norms--norms like notice, coherence, and consistency that could indeed justify some linguistic presumptions--atop the congressional process even in the face of evidence that Congress does not operate in the shadow of those norms. We emphatically believe that one could justify modern approaches in that way, but modern judges have never been willing to assert the mantle of being anything other than “faithful agents” of Congress with their work tethered to the principle of legislative supremacy. If that is to remain the justification, then for the doctrines to be legitimate our understanding of Congress has to be more accurate.

In the exchange set out at the top of this Part, Justice Scalia debated Justice Breyer over how to resolve a statutory ambiguity. Breyer would have used legislative history, but Scalia refused to because legislative history was the product of “staff.” But turning to a policy presumption instead, as he suggested, simply means the Court decides the question itself. How is that more faithful to Congress or more democratically legitimate if a theorist is focused--as textualists say they are--on legislative supremacy?

\*1638 Further engagement in these debates requires separate treatment. Our aim in this Article is (mostly) not to argue that the realities of the congressional bureaucracy necessarily must be utilized by statutory interpreters. Rather, our aim is to illustrate how our analysis of heretofore-overlooked congressional functions sheds light on those debates and offers a challenge to interpreters with theories and doctrines tied in one way or another to Congress. This Part examines how the congressional bureaucracy contributes to ongoing debates about the nature of the legislature, including modern changes and deviations from the textbook process that theory and doctrine rarely take into account. In Part IV, we conclude by suggesting how the bureaucracy changes our understanding of the very concept of a “statute”, and the implications this may hold for the rules of interpretation.

A. What the Congressional Bureaucracy Tells Us About Congress's Rationality and Changes in Modern Lawmaking

Recall the famous assumption about Congress advanced by Legal Process titans Hart and Sacks: “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”525 Modern textualism pushed that assumption aside, grounding interpretation instead in realist- and economic-based theories of Congress as an impenetrable, deal-making, compromise-driven, incoherent institution that courts can never hope to understand.526

The Court today has no loyalty to the Legal Process approach (although one of us has argued that Chief Justice John Roberts is actually of that school527), and the Court as a whole is quite textualist.528 But ironically, textualism's main interpretive doctrines--which are the ones the Court applies in virtually every statutory interpretation case--do implicitly attribute rationality, sometimes even perfection, to Congress. In other words, the assumption of a reasonable Congress underpins the central textualist canons of interpretations, even as textualism itself is grounded in the opposite assumption. Among the presumptions that federal courts (including judges of all stripes) routinely apply are assumptions that Congress legislates \*1639 constitutionally;529 does not bury elephant-sized changes in statutory mouseholes;530 does not unnecessarily repeat itself;531 uses similar words in the same way throughout statutes;532 and so on. The Gluck-Bressman study has shown that some of these assumptions are mistaken, but that does not change the larger point that even textualists, despite their purported values, maintain an idealized vision of a rational Congress for purposes of doctrine.

Modern lawmaking further complicates this view. The Gluck-O'Connell study of “unorthodox lawmaking” documents for legal readers the pervasive deviations from the textbook, “schoolhouse rock” legislative process that has been the paradigm for the past half century.533 If textualists thought the Congress of the 1970s was incoherent, they should find the gridlocked, unorthodox Congress of the 2000s much worse.

Enter the congressional bureaucracy. The congressional bureaucracy's interaction with the modern unorthodox Congress makes three interventions in this debate. First, it challenges these pessimistic views of Congress as an institution. Second, it helps us see how even common interpretive methods, including textualist interpretive presumptions, might be better tailored to the \*1640 facts of modern lawmaking. And third, it illustrates gaps in prevailing doctrine that must be addressed.

B. Unorthodox Lawmaking Is the New Orthodox Lawmaking: Implications for Understanding Statutes

The concept of “unorthodox lawmaking” (a term coined by political scientist Barbara Sinclair) was almost entirely absent from legislation and statutory interpretation theory and doctrine even a few years ago.534 The nonpartisan offices studied in this Article both fill out and complicate the unorthodox lawmaking account that has recently gained more traction in legal scholarship.

1. Congress Is Still Informed in Key Ways

On the one hand, the experience of the congressional bureaucracy substantiates the notion that the textbook process is increasingly rare and that new procedures--which to many internally already are understood to be the new orthodox lawmaking--have replaced it. Each of the offices we studied volunteered these congressional-process changes as extremely significant and pervasive. On the other hand, however, our account adds nuance that may be cause for at least some optimism. “Unorthodox,” we learn from the nonpartisan institutions, does not necessarily mean “uninformed.” Regular order--the now-traditional process that emerged in the 1970s to publicly vet a bill through committee, hearings, floor debates, bicameral conference, and more--was designed to ensure that legislation was studied, deliberated, transparent, precise, and error-free. Today, those processes have changed, but the congressional bureaucracy, and its expertise, continue to be utilized, even if they are less visible.

When it comes to a broad swath of legislative activities (including drafting, estimating, auditing, analyzing, and following the procedures for amending legislation), Congress continues to seek out rational deliberation and expertise--even within unorthodox lawmaking. Of course, the \*1641 bureaucracy's institutions are not Congress's main source of substantive subject-matter expertise--except for JCT (and legislative commissions like MedPAC and MACPAC). Future scholars therefore still bear the burden of showing that the partisan expert policy staff--the committee staff who provide the bulk of Congress's substantive policy expertise--continue to act in ways that contribute to a rational account of Congress (our anecdotal impression is that they do). But to say that modern federal statutes are not vetted or deliberated is simply wrong. Reasonable legislators still try to pursue reasonable purposes reasonably--just not in the ways the old orthodox model recognizes.

It is undoubtedly true that things are much more rushed. As Gluck, O'Connell, and Po detailed,535 unorthodox lawmaking changes the timing and transparency of legislative interventions and, with it, the structure, complexity, and legislative materials that accompany legislation. This proves to be as true for the congressional bureaucracy's role. As one staffer put it:

The expectation today is totally different. Before, it used to be the joke was the complexity of the tax code, but now that is spreading to other areas of the law. This creates more challenges for practitioners. The amount of time spent on legislating, having to do everything in one large bill, ram it all in, in fewer steps, leads to more mistakes, more inconsistencies.536

Parliamentarians are increasingly doing their work off the floor. The Legislative Counsel still drafts bills but now rarely has the chance to draft amendments from the floor or clean up in conference (because there is rarely a conference anymore). JCT still provides the policy backbone of tax legislation and the accompanying legislative materials, but legislative history is evaporating thanks to unorthodox processes. The JCT now puts those materials in other formats--including the post-enactment Blue Book--in the absence of legislative history. CBO has an iterative back-and-forth with drafters before an official score is released as drafters “slice and dice” to get a statute within the target score. The public cannot see any of that. The public just sees legislation rushed from formal introduction to passage.

Sometimes, bills simultaneously undergo the more public journey through the steps of the old orthodox lawmaking process. Some legislative reformers, nostalgic for the olden days, have called for changes to bolster those old steps.537 But, at least some of the time today, the tools of old \*1642 orthodox lawmaking--hearings and floor debates--are for C-SPAN cameras, not for internal fact-gathering and deliberation.538 Other times, it is true, public airing of issues--much like an oral argument in court--is a way to mull the issues, or hear where other colleagues stand. Substantive markups are still typically core legislative work. At the same time, however, Congress has remade these old orthodox steps into opportunities for external communication with constituents--and a great deal of deliberation and refinement now occur largely off the radar behind closed doors. But they do occur, and to a great extent they still rely on the bureaucracy.

The Gluck-O'Connell study details many distinctive features of the new unorthodox lawmaking and their implications for statutory interpretation and administrative law doctrine, and it raises questions about the risks and benefits of these modern departures from so-called “regular order.”539 Below, we highlight those areas that are of particular relevance to the congressional bureaucracy and that emerged as especially salient from our interviews. The main takeaways are:

• Preconference replaces conference: textual changes to bills are less visible, come earlier, and party leaders aggregate more power; no more conference reports.

• Statutes are longer, and have more errors and gaps.

• Text relating to procedural hurdles and budget scoring is painstakingly negotiated.

• There is less legislative history.

• The bureaucracy becomes more politicized as procedural tactics gain importance.

\*1643 2. New Timing and “Preconference”--and Their Challenges for Textualists

The new timing is different, not only with respect to compressed timeframes for legislating, but with respect to the point in the process at which expertise is sought and utilized. A new procedure--“preconference”--has largely replaced the last stage of the legislative process (conference) where changes between House and Senate bills were traditionally worked out. Many of our interviewees, without prompting, referenced to this term--“preconference”--as the new norm.

Conference has largely disappeared because any changes made at that stage require a new vote from both chambers; in today's era of extreme gridlock,540 party leaders are reluctant to take that step and seek to get bills done with just one vote.

Preconference was described this way: “Senate staff, they might negotiate more informally to get a bill the House can pass after Senate [passage].” There are “amendments back and forth.”541 But because of the traditional importance of conference, courts typically give great weight to the textual changes made at that stage,542 and many judges give special weight to the conference committee report.543 The new unorthodox timing changes this because there are almost no conference reports. The new timing also makes less visible the various changes made to bills between introduction and the vote. This is also an important change for interpreters, given that judges and advocates, including and especially textualists, often look to that statutory evolution for textual evidence of statutory meaning.

The Parliamentarians told us that now they “try to negotiate ... out [policy compromises ahead of time] rather than fight them out on the floor.”544 GAO told us that, even while most of its work is transparent, it now gives more nonpublic, early informal technical assistance than in the past.545 We were also told that procedural decisions are “becoming a lot more front- \*1644 loaded” and decisions about germaneness are “happening earlier and earlier in the process.”546

We were told there are rarely presidential vetoes anymore, “because the administration sends out statements of policy .... and the Senate and House are coordinating. Things are scheduled and done ahead of time. [They] are dealing with this stuff earlier.” Staffers characterized this new normal as “more pointing out landmines in advance ... rather than on the floor.”547

Staffers stated: “Fast track processes can feel like cheating. You are never going to spend three weeks on an energy bill, again.”548 One staffer told us that the national defense authorization process used to be a “robust amendment process” in committee and on the floor. But now, the staffer added, “today we do it one day on the floor as opposed to two weeks ....”549

JCT staff noted that under regular order, JCT had a role with conference [i.e., with reconciling House and Senate versions]. They told us: “behind the scenes, bills still look different now on the House and Senate side, but now they do preconference more to reconcile bills before they come out.”550

Even apart from losing the conference report, these timing changes make the basic amending process less transparent. Under old orthodox lawmaking, much of Congress's expertise-seeking occurred in display of the public. Congress undertook these activities, for the most part, on chamber floors or in committees. Today, with most vetting, changing, and analyzing of legislation now happening before a bill hits the floor, there is less opportunity for outsiders to see Congress actually grappling with difficult issues and tradeoffs. There is less formal procedural precedent being created and less explanatory material to inform other members and later readers of statutes. This leads to the often-false perception that Congress is not doing its job in a thoughtful way.

It also means that one kind of textualists' favorite materials--what they call “statutory history” (as opposed to legislative history), the textual evolution of a bill, including rejected and accepted amendments--is disappearing. We were told, for instance, that “appropriations has traditionally had a more open process. Legislative Counsel used to come to the floor to be ready to write amendments, but that is [a] relic of the past.”551 This does not mean that appropriations bills are not being amended or that Legislative Counsel is not writing the amendments. It would be a mistake for \*1645 judges to assume these things do not happen just because they are now less visible, with fewer published materials. It just means that the negotiations and drafting happen before the bills come to the floor. Instead, policy staff exchange notes and negotiate changes behind the scenes, often together with their bureaucracy supports, and typically before the bill goes to the floor, to avoid a conference.552 Policy staff may continually adapt the proposed legislation outside of the public view to account for the feedback, debates, and discussions that these entities now facilitate more informally--whether through early projections of a budget score, procedural advice on germaneness, or the drafting of language.

This movement away from the action on the floor to these earlier behind-the-scenes procedures may also have implications for our internal separation of powers point, detailed in Part II. The Gluck-Bressman study established that unorthodox lawmaking has shifted power away from committees and toward the party leaders.553 Our bureaucracy interviewees corroborated those conclusions and added to them. They told us that the timing changes make regular members less visible, and that there is instead more interaction with the bureaucracy directed by party leaders. CRS staff's comment was typical: “The nature of work is largely unchanged ... [but] the avenues by which they come to us are ... different .... Decades ago we worked primarily [with Members] through committee constructs ... [but now it's coming] primarily through Leadership.”554 This account suggests that increasingly centralization might be happening with respect to bureaucratic information and expertise--centralization that would undermine some of the internal separation of powers benefits the congressional bureaucracy brings.

3. More Mistakes and Gaps

There is now a higher expectation of errors and gaps. We were told by several offices that, for Legislative Counsel, usually charged with cleaning up statutes, unorthodox processes and timing now make it “harder to fix problems in bills on the floor,” and that as a result, statutes may be more “Delphic.”555 We were also told by OLRC that “as Congress has become contentious ... it's hard to get [the law] passed” that would make technical corrections after enactment. They added that departures from regular order can get a bill passed but that they “come out messier and later in the session.”556 In the 114th Congress, we were told, 75% of the passed legislation was passed at the end of the session. In addition, OLRC observed: “They can throw things in omnibus bills; those bills tend to be more complicated, have more errors. This has complicated things for us.”557

As one of us has previously detailed, the federal courts do not have a clearly articulated doctrine of legislative mistakes.558 Instead, the courts have an exceedingly harsh rule: effectively, that if the statutory language reads in plain English, apply it as such. The courts mitigate this rule with case-by-case exceptions meted out with little rhyme or reason apart from the fact that it is most often high-stakes cases (e.g., the recent Affordable Care Act challenge in King v. Burwell) that get the leniency.559 The lack of usable doctrine in this area is a major gap, and the quality-enhancing effects of the bureaucracy institutions notwithstanding, courts must develop a more rigorous and well-considered approach to legislative mistakes.

4. Highly Specific, Negotiated Language Used to Clear Procedural Hurdles

On the other hand, and in some tension with our point about mistakes, there may be a reason to give heightened weight to the particular words used to clear procedural or budgetary hurdles and to consider text especially carefully in the context of those procedural and budget rules. Our interviewees strongly emphasized the very careful language-slicing that occurs to bring bills with the desired procedural or budgetary goals.

One staffer compared this parsing of language to “slicing garlic with a razor blade.”560 When it comes to procedures for reconciliation--the procedural mechanism that avoids a filibuster--our interviewees emphasized that, to get a bill within the rules: “[we] are ripping things out of [it] ... [l]ike weeds in a garden.”561

Anyone looking at such a law, they emphasized, has to “presume it's not just because you are pleasing a particular constituency; it's about reconciliation.”562 Any interpretation of the text that does not account for the \*1647 constraints of the reconciliation process, we were told, is considered a misinterpretation of the law Congress tried to pass-- plain and simple.563

OLRC's work has changed in a different way. Unorthodox lawmaking has made that Office's job much more complex. Omnibus bills are the current favorite vehicle for passing mega-legislative deals together, and, as such, they bring together many different subjects. OLRC's job is basically the opposite--that is, to cohere the U.S. Code by subject matter. What OLRC must now do, then, is effectively reverse-engineer Congress's omnibus process. They told us: “We are breaking up what they are bringing together.”564

5. Less Legislative History

JCT and Legislative Counsel emphasized the important legislative materials that are often lost in the modern processes. Many omnibus bills do not have legislative history at all, or they bring together previously-written, separate bills with legislative history that may be old and outdated. JCT noted that, in particular, without the conference report “you lose an important part of the legislative history, which can be a significant loss.”565 JCT also told us that unorthodox lawmaking consequently increases the importance of the Blue Book--the influential summary of tax legislation produced by JCT after statutes are enacted. The Blue Book takes on greater significance in conveying congressional intent to agencies and the tax bar, we were told, “when there is no regular order, because often there is no conference report [or] committee report.”566 This is the case even though the Blue Book has often “been more aggressively expansive [than] legislative history”--it makes bigger statements.567

The House Parliamentarian's Office similarly emphasized that legislative history looks different now:

When looking to legislative history, there needs to be a modern look that takes into account [the fact] that the process [on the House floor] is much more structured [now]. The amendments and remarks need to be construed using a modern lens .... [T]he amount of remarks on the floor that are generated for purpose of legislative history has shrunk tremendously and [these remarks are now] reserved to bills where there are likely to be practitioners: judiciary committee, election law .... I don't think the process \*1648 is as static as some academics or judicial branch folks may have learned in civics.568

6. More Visibility and Politicization

Unorthodox lawmaking is not solely about doing things behind closed doors. It has actually elevated the visibility of some of the nonpartisan institutions-- as we have noted, not always in ways that are beneficial.

For the Senate Parliamentarian, resort to special procedures that get around the filibuster and other hurdles has made a difference in the public perception of the role. We were told: “The job is same as before, but it's gotten a higher profile and more personal largely because of the Byrd rule ... [and] fast track [procedures]. More light will be shone ... where expedited procedures have been written. And [they] have to make Solomonic decisions here and there.”569 Budget reconciliation proceedings, it was emphasized, “are very high profile, and criticized in the news ... the Byrd rule is the thing that makes Parliamentarians almost ‘Washington famous' every few years based on decisions that [they're] making about what is or isn't appropriate in reconciliation bills.”570

Just as CBO became more politicized once the importance of its reports became more salient, the Parliamentarian becomes a divisive figure when unorthodox processes put pressure on complex procedural workarounds.

C. What Does the Supreme Court Think About Unorthodox Lawmaking?

Congress is routinely disparaged and unorthodox lawmaking makes Congress appear even less deliberative than it did before. Years ago, some scholars had urged a theory of interpretation that considered whether Congress had adequately deliberated--in former Oregon Supreme Court Justice Hans Linde's words, whether Congress had engaged in “due process in lawmaking.”571 Until recently, courts had resisted any kind of direct engagement with the question of how the seriousness of a statute's legislative process should affect how that statute is interpreted.572 As noted, the Court \*1649 has no coherent doctrine of statutory mistakes, and does not seem to want to understand how aspects of the process--including the disappearance of committee and conference reports--have changed.

The Court has just started to grapple with these issues, but has a long way to go. The notable example is King v. Burwell, the 2015 challenge to the Affordable Care Act's insurance subsidies. Dealing with a likely amalgamation error in the ACA--an ambiguity caused by the sloppy merger of two different versions of the law without an opportunity for conference to clean up errors-- Chief Justice Roberts opined:

Congress wrote key parts of the Act behind closed doors, rather than through “the traditional legislative process.” ... And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation” .... As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.573

For all the Court's salutary interest in Congress--this was the first time the Supreme Court strove to bend interpretation to the realities of a statute's unusual legislative process--it largely got the story wrong. The ACA's unorthodox history was no parliamentary aberration; plenty of legislation had gone through reconciliation before (and only a portion of the ACA went through it). The statute also was exceedingly deliberated by a record-breaking five congressional committees for two years (including hundreds of hours of hearings). Legislative Counsel was intimately involved in the drafting. CBO and JCT were constantly engaged on scoring and estimating. CRS and MedPAC wrote numerous reports.574 It is true there was no conference, and as such the opportunity for Legislative Counsel to correct errors was indeed forgone. Arguably that means the final product was sloppy, but not necessarily that the law was not carefully deliberated and reviewed along the way. Studying the congressional bureaucracy substantiates the account that there is a “new normal” when it comes to the legislative process; how courts account for that has to be part of the project in statutory interpretation if the field is to have a democratic link to Congress.

Finally, we note that, we did not hear from anyone that Congress is eschewing congressional bureaucracy consultations due to unorthodox \*1650 lawmaking. But Congress could always pass rules requiring such consultation, just as it has in requiring a CBO score.575 Congress could also develop a practice of noting in the materials accompanying legislation which bureaucracy institutions were in fact consulted--a practice that might assuage some public concerns about the lack of deliberation in our lawmaking process. At the same time, as we have noted throughout the Article, there are risks to elevating the profile of the congressional bureaucracy--risks to the institutions' perceived neutrality and the lack of politicization around them. Mandating use of the bureaucracy might introduce new pathologies into the process, just as some have already argued that PAYGO has skewed the drafting process by excessively elevating the importance of the CBO score.576

<<ASTERIXES OMITTED>>

In the next and final Part of the Article, we offer more takeaways for courts, both for purposes of statutory cases and for overarching conceptualizations and assumptions about Congress's rationality. Our aim in this Part has not been to advocate for specific legislative reforms, or to criticize unorthodox lawmaking, or to argue that courts should develop doctrines to curtail it--as Hans Linde and others likely might have. Rather, we have primarily aimed in this Part to show how courts' assumptions about lawmaking and the materials produced therein have changed, even as courts have retained out-of-date assumptions about them; the congressional bureaucracy's modern experience corroborates earlier accounts of those changes.

And of course, we want courts to notice the congressional bureaucracy. American federal courts rarely cite to the institutions' work. In the past decade, the Supreme Court has cited only a handful of times to CBO (five), the Legislative Counsel drafting manuals (two), GAO (two), and to CRS (eleven).577 It has never cited to MedPAC, MACPAC, parliamentary rulings \*1651 or precedents, and cited only once, in 1975, to OLRC.578 The Courts of Appeals have cited them more frequently: GAO (fifteen); CBO (twenty-four); CRS (eighty-four); OLRC (five); Parliamentarian (two); MedPAC (five); JCT (twenty-four); and Legislative Counsel drafting manuals (eight). The next and final Part offers more concrete doctrinal payoffs for courts.

IV. Doctrinal Implications and Statutory “Deconstruction”

Is there a way to translate this Article's findings to on-the-ground statutory interpretation doctrine? Remember, the question is not whether to ignore enacted text. Assume the text is always consulted first, but the question is where to turn when the text runs out. Would looking more frequently to the JCT's report or revenue score, or considering Legislative Counsel's established drafting conventions, or the Parliamentarian's jurisdictional or procedural rulings, or the CBO score, or GAO Red Book or its report that prompted new legislation shed as much--if not more--light on textual meaning than a dictionary or judicially crafted policy presumption?

Recall the presumptions currently in use. They range from presumptions about language (e.g., it is not used redundantly) to presumptions about policy that judges, not Congress, devise (e.g., the presumption that construes statutory ambiguities in favor of Native American tribes, or in favor of bankruptcy debtors, or in favor of arbitration, or extraterritorial application of securities law, and scores more). Those judicially developed presumptions reflect the normative choices of the courts that created and later perpetuated and entrenched them. Which sources are more relevant and why?

This is a doctrinal legitimacy question. As Gluck's work emphasizes, we do not have to have statutory interpretation tethered to Congress. But if a connection to Congress is going to be the justification--including through policy presumptions the courts claim Congress knows or uses--then the doctrines should be tethered. Many canons simply are not.

At least three possible paths forward present themselves. First, ignore the congressional bureaucracy on the grounds that Congress does not act collectively, or cannot be understood. We have already discussed how Congress does indeed act collectively when it comes to the formally delegated work of the congressional bureaucracy. Moreover, if Congress can never be understood, then the answer is to move away entirely from a faithful-agent approach to a judicially centered one, not to continue what we have now.579 We will not devote further space to those arguments here.

Second, assuming some link to Congress is desired in at least some cases, we can consider how to utilize the outputs of the congressional bureaucracy, just as we utilize other outputs from Congress, like legislative history. In at least some cases, the bureaucracy's outputs may have more credibility than legislative history because they are nonpartisan and ex ante approved by Congress as a whole.

Third, we might draw some lines as to which aspects of the bureaucracy's work should be considered or consider some inputs as stronger than others, just as we prioritize different kinds of legislative history and canons. For instance, those inputs that are directly part of the legislative process--scoring, parliamentary rules, Legislative Counsel drafting--might be considered more relevant than reference materials like CRS reports.

Another place to draw a line might be at the vote. That is, perhaps post-enactment work to organize and clean up the U.S. Code (OLRC) or explain changes to the tax codes (JCT) should be discounted because Congress votes before they happen. For those who take such an approach, the Statutes at Large presumably should replace the U.S. Code as the source for federal statutory law, especially for non-positive titles.

But we also want to suggest a more provocative reconceptualization of “lawmaking” and the resulting statutory “text” that would include all the inputs and processes Congress sets up for itself when it creates and puts in motion its massive bureaucracy. Some of those inputs and processes are indeed explicitly set up by Congress to occur after the vote. The Constitution would seem to permit this: the text of Article I does not specify the rules, procedures, positions, or offices to create a functional legislature. Instead, it gives Congress the power to construct the institutions it finds most useful, including the power to create and choose its own officers, create its own rules, and use any necessary and proper powers to execute its functions.580 The fruits of those efforts are evident in Title 2 of the U.S. Code, where one finds the organic statutes for the congressional bureaucracy.581

We start with a discussion of these and other ways that the congressional bureaucracy complicates the concept of “a statute.” We then introduce several more specific potential doctrinal moves.

A. Deconstructing the Concept of “a Statute”

Perhaps the most provocative output of our study is how the various duties of the congressional bureaucracy contribute to--and destabilize--our common understanding of what a “statute” is.

Everyone knows that words must be understood in context, but the context of legislative language is much more than the surrounding words on the page. In fact, in many instances what we see when we pull up laws on Westlaw is not the entirety of what Congress wrote or how Congress arranged it at all. Lawmaking does not begin with the vote, and neither does it end with it. Final text reflects, incorporates, and assumes the various inputs from the bureaucracy, some of which are provided after enactment.

Statutory text is changed, reorganized, and reconceptualized by OLRC after enactment--and also explained and interpreted by JCT at that time. One of OLRC's primary missions is to pull apart the individual texts that Congress enacts and recombine and reorganize them with other texts enacted at different times into coherent subject-matter areas. The OLRC organic statute actually (and aptly) uses the term “restatement”--not faithful reproduction but rational reorganization--to describe its work on positive-law titles. The statute expressly calls the output a “revision” of the law--another reference to an editorial function (in full: “complete compilation, restatement, and revision”). Congress also expressly directs OLRC, in its authorizing statute, to interpret its enacted language purposively, not literally, in carrying out its codification tasks, even those tasks that occur after the vote.582

Indeed, the JCT staff emphasizes the importance of “congressional intent,” as reflected not only in the text but also in the revenue estimates, the legislative history, and other explanatory materials that accompany tax legislation. It thinks carefully about “what words should be in the statutes, and what words should be in the legislative history,” but it does not view them as of dramatically different importance.583

Congress structures itself across the board to think about law more as “topics” or fields, than as individually coherent or consistent texts. The \*1654 committee system, OLRC's work to “restate” the Code into subject-matter areas, and the division of the bureaucracy--including Legislative Counsel, CRS, JCT, CBO, GAO--into staff that specializes within topics and not across the entire Code all reflect this consistent congressional organizational norm. The bureaucracy brings coherence to a subject-matter field but affirmatively does not attempt to bring coherence across subjects. But that is not how our dictionary-wielding, statutory-interpreting, whole-code-cohering courts think about text.

Members focus only on broad policy brushstrokes. Staff, particularly Legislative Counsel, is responsible for the textual language. To say, as textualists do, that legislative history is especially unreliable because it is written by staff and not members is to say that the entire U.S. Code is unreliable: it is all produced by staff.

The entire process is iterative, with inputs from all of the bureaucracy. The real work of the modern legislative process, and especially members' role in it, has more to do with figuring out large-scale policy for complicated problems, not debating individual words and phrases. Two cheers to Chief Justice Roberts in Burwell for seeing that, but no third cheer to the Court for reverting to strict hyper-textualism in cases immediately afterward.584

What, then, is the “text?” Consider the Medicare statute. There is no “text” of that statute. The “text” of the Medicare “law” is a concept--one made up of many different statutory texts enacted over time. It is only the post-enactment, multi-year custodial work of OLRC that creates the illusion of a single, coherent text. They are the ones who take the original, thirty-six page Medicare statute enacted in 1965,585 along with the thousands of laws amending this original statute, and transform them into a single 1,183 page tome.586 However, this is simply their best guess at how to assemble a “text” of “Medicare law.” So is anyone else's attempt to assemble that “text.” This is true of any law that has been amended--positive or non-positive law.

Statutory law's complexity--all of these layers--may be its modern defining feature. And yet courts place great weight on the structure of those “laws” as they appear in the U.S. Code, as if each law was birthed with its final structure. Not so. Understanding the bureaucracy helps to reveal this.

Getting more granular, a statute that is parsed “like slicing garlic with a razor blade” to get the Parliamentarian to refer it to the jurisdiction of a certain committee incorporates an understanding of what subjects that statute is supposed to cover, because each committee only has jurisdiction over certain subjects.587 A statute that is repeatedly amended to get within a revenue or budget score incorporates the assumptions of those estimates. Statutes drafted with purpose clauses that no longer appear in the Code because OLRC moves purpose clauses to small side notes does not make those statutes less purposive and it does not erase the fact that Congress actually enacted purpose into statutory text in the first place. Should textualist courts ignore this?

To understand that Legislative Counsel drafts only operative statutory text, and never legislative history except in the case of some explanatory statements for conference reports (detailing differences between House and Senate versions of bills and how they are resolved) and some appropriations legislative history, is to understand such history carries special operative weight--and is more akin to enacted text than legislative history--inside Congress. Many judges do give extra weight to conference reports, but the special weight for some appropriations legislative history that is produced by Congress's own practices thus far has been ignored by courts.588

On the other hand, it is interesting that Legislative Counsel typically does not draft those enacted purpose clauses--and disproves of enacting nonoperative text (that is, text without specific mandates). OLRC marginalizes those materials too. But the partisan policy staff puts those materials in. What does that tell us about the weight they should be given?

This is complicated, and one has to be honest in evaluating this evidence. It is not that all of it is unequivocally clear or that all unequivocally points in \*1656 the direction of “use it!” But this evidence, no matter how one slices it, is much more tethered to the legislative process than what courts use now.

B. What You Think Is the “Statute” Is Not; OLRC As a Deeper Example

The best way to fully understand our point about deconstructing “text” is through a detailed example. Due to the post-enactment nature of OLRC's work, the formidable role it plays in shaping the language as it appears in the U.S. Code, and how courts--and, to our surprise, many partisan staff inside Congress--simply do not understand what OLRC does or how it affects text, we use it as our illustration.589 As we have emphasized, OLRC has broad, widely unknown, statutory mandates to rearrange federal law for various ends. For codification bills it also is charged to “remove ambiguities, contradictions, and other imperfections both of substance and of form.” 590

1. When You Open the U.S Code You Only See About Half of Enacted Statutory Law

For starters, there is the often-overlooked distinction in federal law between the “positive law” and “non-positive law” titles of the U.S. Code.591 Positive law titles are arranged and edited by OLRC and then formally enacted as titles of the U.S. Code by Congress, which is also supposed to repeal the various underlying statutes collected therein at the same time.592 By contrast, a non-positive law title of the Code has still been arranged and edited by OLRC (or OLRC working with a title previously organized), but the newly arranged title does not go through this bicameralism-and-presentment process (the underlying statutes, of course, did previously).593

In codifying titles, and in publishing both positive and non-positive law titles, OLRC makes consequential determinations that affect what we understand as the statute's “text.” First, OLRC's statutory mandate is to codify only “general and permanent” laws.594 OLRC deems some important provisions to be nonpermanent, such as most appropriations riders and many pilot/demonstration projects. Those are not codified at all. Second, OLRC often moves ancillary or nonoperative provisions (provisions that do not directly command) into statutory notes--a practice that has resulted in OLRC moving more than half of the words in the U.S. Code into statutory notes.595 That is, notes not visible when one pulls up a page of the Code on Westlaw or Lexis.

OLRC regularly moves not only preambles and purpose clauses into notes but also effective dates, and sometimes even severability clauses and other provisions.596 OLRC emphasizes that those provisions in the notes or omitted from the Code as temporary are still law. Our point is that lawyers often miss, or misunderstand them.

These decisions involve considerable discretion. Take the example of the Office of National Drug Control Policy, the authorizing statute of which required a statutory repeal of the law to occur in 2003.597 That repeal eventually was undone by Congress in 2018598--but between 2003 and 2018, the Office continued to exist (and be funded), even though it had no statutory authorization.599 OLRC deemed the office permanent during that interim period--and consequently its statutory authorization was above-the-line in the U.S. Code despite being repealed.

A different example, and one that also illustrates the kind of judgment calls OLRC has to make, is the Hyde Amendment, an influential appropriations rider, which bars the use of federal funds to pay for abortions, and which is re-enacted every year. Per OLRC's judgment, the Hyde amendment does appear in the U.S. Code, because it is consistently reenacted.600 On the other hand, an appropriations rider--again, part of an enacted statute--that defunded part of the Affordable Care Act in 2014, and \*1658 even became the subject of a Supreme Court case, does not.601 When we look at the Code, we only see part of enacted statutory law.

Jarrod Shobe insightfully has posited that OLRC's editing work in pushing prefatory and purposes language to the sidelines makes the Code look less purposive than it really is and gives courts more leeway to ignore congressional intent than they might otherwise.602

Even lawyers well versed in statutory research are likely to be surprised by how much of enacted law is now in notes. It has been calculated that 50 percent of the statutory text of the enacted laws of the United States are in the notes--that is, not in the main text of the U.S. Code.603 Shawn Nevers and Julie Graves Krishnaswami found that the Code contains a staggering 32,424 notes in total.604

As an exercise, assume a hospital general counsel is searching for her hospital's Medicare payment amounts. Searching for “hospital Medicare payment” on Lexis or Westlaw would bring up 42 U.S.C. § 1395ww, “Payments to hospitals for inpatient hospital services,” and the familiar-looking text of that section of the U.S. Code, as Figure 1 shows.

<<FIGURE 1 OMITTED>>

The text goes on for dozens of pages, but the counsel will not find anything about payment amounts for her particular hospital's classification unless she takes the additional step to “read below the line,” and scroll through to Lexis's “Annotations” Section (which comes after the source notes), as Figure 2 shows.

<<FIGURE 2 OMITTED>>

Once in the Annotations, the general counsel would still need to scroll through dozens of pages of other notes--amendment histories, OLRC editorial explanations, effective dates, and rules of construction--before she would find this provision, “Application § 15008(a) of Act Dec. 13, 2016”, as Figure 3 shows.

<<FIGURE 3 OMITTED>>

This is where the correct payment calculation for her hospital's Medicare classification is found--duly enacted statutory text, but far outside the bounds of the “law” as displayed in the U.S. Code, and buried beneath more than one hundred pages of other material.

Westlaw does not even display statutory notes on the landing page for each U.S. Code section.605 To even know whether there were notes of relevance, the attorney would have had to affirmatively navigate a drop-down menu (first the “History” tab and then the “Editor's and Revisor's Notes” tab), then scroll through the dozens of pages before the “Effective and Applicability Provisions,” which contain the relevant provisions of law, would appear.

These payment policies were passed by bicameralism and presentment along with the rest of the statute, and carry the full force of the law, yet they \*1662 are nowhere to be found in the “text” of the law as encountered by most practitioners and judges.

OLRC sometimes even inserts entire laws into statutory notes--so they do not appear as “law” at all to the uninformed when a title is pulled up on Westlaw.606 This often occurs when Congress enacts a freestanding law that relates, in terms of subject matter, to a topic within a codified (positive law) title. If Congress does not amend a codified title directly--an error that happens with relative frequency--the new freestanding law cannot simply be added to it.607 But OLRC wants to group like subjects together, so it appends the new law as a note to the codified title for subject-matter coherence. Westlaw and Lexis then make those notes not visible to the average researcher.

The Wounded Warrior Project is an example of this problem.608 It was enacted as a freestanding law, but it was related to the topic of medical care for the armed services--a topic within Title 10, a positive law title. Because the bill that passed as law did not explicitly amend Title 10, but rather was drafted as freestanding new law, OLRC was forced to locate the program wholly in a statutory note under that title.609 Nevers and Graves Krishnaswami identify many other examples.610

Through the use of these notes, OLRC manages to keep seemingly similar subject-matters grouped together in the Code, while also keeping Congress's enacted, positive law intact. It accomplishes this at the cost of accessibility, however, as lawyers and judges easily overlook these out-of-the-way provisions.611 Some nonexpert lawyers even dispute whether these outside-the-code provisions are “equal laws” to those OLRC puts above the line.

This accessibility problem is significant enough that actors within Congress--in particular, in Legislative Counsel--have sometimes tried to devise their own creative workarounds, both to overcome this problem for themselves and to assist outside interpreters (although we would note here that failure to draft a particular law properly into the Code in the first place \*1663 might have been the responsibility of Legislative Counsel itself). We were told of attorneys in Legislative Counsel who, at times, maintained personal collections of slip laws to assist in the ongoing challenge of locating provisions that OLRC excludes or relocates. We also were told of attorneys in that office adopting creative drafting techniques, such as inserting effective dates directly into the language of operative statutory rules, in an effort to tie OLRC's hands and require them to include such dates in main text of the Code.612

Ironically, a big part of the resulting transparency problem comes from relying on commercial providers like Westlaw and Lexis and the systems they design. Recall that OLRC itself was founded in part because Congress feared such reliance on outside compilers, namely West Publishing.

As Nevers and Graves Krishnaswami additionally note, the fact that Westlaw places the editorial notes--which are explanations provided by OLRC about the statute's history, references, amendments and other matters but are not actual law--together with the statutory notes, which are indeed law, “with no clear distinction, makes it difficult for researchers to find statutory notes or to understand their importance.”613 We have begun an effort to have Westlaw and Lexis address this problem.

Congress's own work-product makes statutory notes more accessible than do commercial databases--the printed U.S. Code lists the notes in the side margins. The official Code website lists them as searchable text beneath the relevant codified provisions. Even so, where there are rules of construction or other notes that apply to more than one section, a reader just clicking one tab is unlikely to see them,614 because they are listed too far from the relevant provisions with no indication that the reader should look for them. To the uninitiated, even when found, they still appear to be of subordinate status to the Code's “text” and thereby similarly invite confusion and misinterpretation.615

2. Text Is Added, Edited, and Rearranged After Enactment

In deciding the breadth of each topic that it will reorganize into a title for codification, OLRC is statutorily directed to capture the presumed intent (specifically, “the understood policy, intent, and purpose”) of Congress-- including by modifying statutory language.616 An interviewee said: “The idea is to carry forward the precise meaning and effect without any change [in that meaning] ... but [also] to make any adjustments to make it easier to understand and to navigate, to correct technical errors, and to resolve ambiguities.”617

The changes that are made as a result to enacted text may surprise not only outsiders. Even most of the partisan staffers we interviewed, many of whom have worked in Congress for a long time, had no knowledge of OLRC's editorial work.618 In combining, reorganizing, and restructuring statutes into new subject-matter documents--whether for a new codification bill or to arrange a non-positive title--OLRC determines statutory structure, and it inserts cross references, subtitle divisions, and headings.619 In codification bills, it sometimes even adds new textual provisions, like definitions(!). We see all those items when we look at the Code, and courts derive much meaning from them--where a provision is placed, what provisions it is near, what the title of the section is, and so on.

For example, OLRC may insert what it calls a “no source” provision into a new positive title that it is preparing for Congress. A “no source” provision is one that did not exist in any congressionally enacted law, but that OLRC creates out of whole cloth.620 For example, if OLRC concludes that a new defined term will help it more easily articulate the policies that it is assembling in the title, it may insert a new definition into the title, and then use this newly defined term throughout the title.621 In the chapter of title 46 labeled “Liability of Water Carriers,” for example, the very concept of a “carrier” is a defined term added by OLRC in a “no source” provision (the term that indicates OLRC created it).622 While the Revision Notes flag those provisions as having no source, those notes are hard to find and do not appear in the main text--whereas the “no source” provisions themselves do appear in the main text of the Code unflagged, just like provisions that Congress actually had enacted in prior law. “In a positive law codification bill,” an interviewee reported, “we create these definition sections pretty frequently.”623

The Westlaw version of this title 46 “carrier” definition is shown below. Figure 4 shows the definition as it appears in the main text of the Code, where it looks like any other provision--no indication is given that the definition was added via an OLRC-drafted “no source” provision. As Figure 5 shows, it is only when the reader selects the “History” tab (flagged with a yellow arrow) and selects “Editor's and Revisor's Notes” from that drop-down tab menu that one encounters the table and explanation where OLRC identifies these as “no source” provisions (also flagged with yellow arrows); Westlaw's mere “no source” heading does not explain for the initiated what that means.

<<FIGURES 4 AND 5 OMITTED>>

OLRC also exercises its editorial discretion by formulating novel provisions to clarify what otherwise might only be implicit. Consider, again, Title 10, which contains a chapter entitled “Retirement of Warrant Officers for Length of Service.”624 This chapter contains three provisions. Under section 1293, it authorizes the Secretary to retire a warrant officer (upon their request) after twenty years of creditable active service, and under Section 1305, it provides that warrant officers shall be retired after thirty years of service (with some exceptions).625 These Sections, codifiers believed, implied that warrant officers would receive retired pay (e.g., by discussing eligibility for such pay).626 However, Sections 1293 and 1305 never made that entitlement explicit. Consequently, in preparing Title 10 for codification in 1956,627 codifiers at that time (predecessors to OLRC) created a “no source” provision to be added to the chapter: Section 1315, which would “make explicit the entitlement to retired pay upon retirement” for warrant officers under the chapter.628 It remains that way today.

When Congress passes the codification bill it effectively blesses these edits and changes. As formal matter, they are enacted by Congress. But they are certainly much further removed from the core legislative process--in Justice Scalia's terms, much more the product of staff--than many other materials courts eschew. The point is not that OLRC is acting ultra vires or secretively. OLRC actively solicits input from key staff, administrative agencies, and academics for its codification bills, but it is difficult to find evidence that many members and even most staff pay much attention to them.

#### Extinction.

Brundtlant ’20 [Gro Harlem Brundtland; May 14, 2020; first woman Prime Minister of Norway and former Director-General of the World Health Organization, leading advocate on global preparedness for pandemics, put sustainable development on the international agenda; The Elders, “Nationalism and partisan politics make it harder to tackle the existential threats to humanity,” https://theelders.org/news/nationalism-and-partisan-politics-make-it-harder-tackle-existential-threats-humanity]

The strange new reality of Covid-19 is forcing huge changes on all of us, some of which may become permanent features of how we live, work and organise our societies.

We are all being called upon to become more flexible, more adept with technology and more collaborative across borders and time zones.

I would like to commend the organisers of this Virtual People’s Forum, particularly the UN 2020 Partnership and Together First, for their ambition and dedication in bringing all of us speakers together.

2020 was always going to be an important year for those of us who are committed to the values and institutions of multilateralism. The year marks the 75th anniversary of the end of the Second World War, the detonation of the atomic bombs in Hiroshima and Nagasaki, and the creation of the United Nations.

These interconnected anniversaries highlight the need for sustained vigilance to protect global peace, in the knowledge of the devastating consequences of tyranny, war and weapons of mass destruction.

But today the whole world faces a threat as deadly as any arsenal, and which makes a mockery of any pretentions to national “greatness” or superiority over others.

Covid-19 knows no borders and does not respect national sovereignty. The pandemic is leaving a devastating cost; first and foremost in human lives, but also in terms of economic growth, political momentum and social inequality.

It has exposed the interconnected nature of global risks, and the extent to which even well-resourced health systems can be rapidly overwhelmed when crises hit.

A global crisis demands a global response. Yet the virus has struck at a time when the multilateral system was already subject to a sustained and targeted assault. This has made it harder for leaders and institutions to respond effectively and save lives, as we can see with the failure thus far of the UN Security Council to agree a resolution in support of the Secretary-General’s call for a global Covid-19 ceasefire.

I served as the Director-General of the World Health Organisation during the SARS crisis in 2002-3. This means I am very conscious of the importance of multilateral cooperation in tackling pandemics, and of the difficulties that multilateral institutions, including the WHO, face in persuading member states to respond in the global interest to such threats.

It is essential that countries support the work of the WHO and provide it with the necessary funding to carry out its work, including through implementing the recommendations of the Global Preparedness Monitoring Board.

The WHO should be enabled to work on behalf of the entire world, acting solely on the best available scientific and medical evidence.

The virus will not be overcome unless states work together, pooling resources and expertise to strengthen health systems, develop an effective vaccine, protect health workers and provide the necessary care to all who need it in society, including vulnerable groups such as refugees, migrants, the elderly and infirm.

For developed countries, this responsibility extends to supporting poorer states with humanitarian aid, debt relief and political counsel via the mechanisms of the UN, G20, World Bank and other international fora.

This network of international covenants and institutions, agreed and constructed since the end of the Second World War with the United Nations at its core, is far from perfect.

There are strong arguments for reviewing and reforming institutions and processes, particularly so the multilateral system better reflects the diversity of the human family and gives a voice to women, young people and other marginalised groups in society.

But it has nevertheless decisively supported the pursuit of peace, security and the protection of human rights, as well as economic and social improvements, around the globe, for over seven decades.

This is why it is so important now, in the UN’s 75th anniversary year and in the face of this deadly pandemic, for member states and global citizens to recommit themselves to the values of the UN Charter.

The siren songs of isolationism and populist nationalism need to be countered with a strong global chorus in support of cooperation, justice and human rights.

Narrow nationalism and partisan politics not only hamper an effective response to Covid-19, they also make it harder for the world to collectively tackle the existential threats that will continue even after this pandemic abates, in particular climate change and nuclear weapons.

### 1NC

#### Interpretation: CBRs are employee rights to negotiate with employers.

Hayes ’15 [Michael; August 13; Director of the Office of Labor Management Standards, J.D. from Cornell University; United States Court of Appeals for the Ninth Circuit, “Amalgamated Transit Union International, et al v. United States Department of Labor, et al,” No. 23-15503]

The key terms in section 13(c)(2) are "continuation" and "collective bargaining rights." The term "continuation" means "a keeping up or going on without interruption; prolonged and unbroken existence or maintenance." Webster's New World Dictionary of the American Language 319 (college ed. 1962). Thus, "when the transit employees had collective bargaining rights that could be affected by the federal assistance \* \* \* these rights must be 'continued' before assistance will be awarded to the public transit authority." United Transportation Union v. Brock, 815 F.2d 1562, 1564-65 (D.C. Cir. 1987). The phrase "collective bargaining rights" refers to employees' right to designate a representative and to bargain collectively through that representative with the employer with respect to wages, hours, and other conditions of employment. See 29 U.S.C. § 158(d); Allied Chemical and Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); cf. State of California v. Taylor, 353 U.S. 553, 560 (1957) (under Railway Labor Act, "(E)ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions") . "Collective bargaining rights" are therefore not substantive terms of collective bargaining agreements. Instead, the phrase refers to a process that was universally understood in 1964, and now, "to require, at a minimum, good faith negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment." Donovan, 767 F.2d at 159.

#### Violation: federal workers are not employees and the federal government is not an employer. That’s because they are NOT a business.

Vacca ’19 [Ryan; 2019; Professor of Law at the University of New Hampshire School of Law; Temple Law Review, “Uncertainty in Employee Status Across Federal Law,” vol. 92]

As such, only an “employer” may be cited for a violation of the act.172 Like with the NLRA and ERISA, the definitions in OSHA are circular. “Employer” is defined as “a person engaged in a business affecting commerce who has employees,” but not federal, state, or local governments.173 Unhelpfully, “employee” is defined as “an employee of an employer who is employed in a business of his employer which affects commerce.”174

Vote NEG:

1. GROUND. This AFF avoids every topic controversy: wages, benefits, strikes, and militant labor are unique to the private sector. Public unions are high and AFF thumpers are OP. Debate is only educationally valuable with an evenly split, debatable resolution.

2. LIMITS. Federal workers blows the lid off the topic: too many niche agencies to track with common “bargaining key” themes AND no unified NEG generics.

## Case

### Circumvention---1NC

#### Federal CBAs are circumvented.

Feder ’25 [Dave; March 10; Graduate of Harvard Law School, first in his class, Former Supreme Court law clerk to Justice Neil Gorsuch, Former federal prosecutor representing technology and life sciences companies in government investigations and complex civil and regulatory litigation; Fed Smith, “The Federal Labor Relations Statute and Collective Bargaining Agreements Are Currently Unenforceable,” https://www.fedsmith.com/2025/03/10/federal-lr-statute-collective-bargaining-agreements-are-currently-unenforceable/]

There are currently absolutely zero enforcement mechanisms available to Federal sector labor organizations (unions) to enforce any rights under the Federal Service Labor-Management Relations Statute (the Statute) and to enforce any rights under a negotiated collective bargaining agreement (CBA).

Unfair Labor Practices (ULP)

Let’s start with unfair labor practices. There currently is no General Counsel or Acting General Counsel of the Federal Labor Relations Authority (Authority). Thus, no unfair labor practice (ULP) complaints can be issued to enforce the Statute.

Although one of the five FLRA Regional Directors can have ULP charges investigated, make a preliminary merit decision, and attempt to resolve the ULP charge, no ULP complaint can be issued without a General Counsel or a properly appointed Acting General Counsel, and there is neither.

Thus, agency unilateral changes (such as terminating telework and remote work, a reduction in force, a reorganization, a realignment) can be unilaterally implemented without fulfilling the statutory bargaining obligation. If there was a General Counsel (or Acting General Counsel), a ULP complaint could be issued, the Authority could approve a General Counsel request to seek appropriate temporary relief in a U.S. District Court. The General Counsel could seek appropriate temporary relief (such as a restraining order) and be successful in enjoining the illegal unilateral agency action. That remedy is not available today because there is no General Counsel.

Federal Service Impasses Panel (FSIP)

Let’s talk about the Federal Service Impasses Panel (FSIP).

Under decades of Authority case law, an agency cannot implement a change in a condition of employment without first fulfilling the statutory bargaining obligation – which means bargaining to an agreement or resolution of an impasse.

Some unions have historically used the FSIP to delay the implementation of a change, but there is no FSIP. No agency is going to wait for four years to implement a change while waiting for a presidential election and the possibility of a new administration appointing an FSIP and then obtaining an impasse resolution. Instead, agencies may attempt to bargain to an agreement and then unilaterally implement if unsuccessful at obtaining a quick agreement and avoiding an impasse – or agencies may simply completely ignore the union and implement the change since there is no FSIP to resolve an impasse – or General Counsel to remedy the unilateral change ULP.

Federal Labor Relations Authority (FLRA)

Now, let’s talk about arbitration and the Authority.

Let’s say the union attempts to enforce a contract provision or an unfair labor practice through the negotiated grievance procedure. After the agency denies the grievance, the union can invoke arbitration.

After waiting four months or more for the arbitration hearing, paying for representation if not provided by the union itself, and paying exorbitant fees to the arbitrator for hearing and “study and writing” time, and waiting four months to a year for the arbitrator’s decision—and even assuming the union wins on the merits and obtains a viable remedy—the agency will file exceptions with the Authority—meaning that the arbitration award is not final and binding.

The Authority currently has one Republican and one Democratic member. It is more than possible that the Members will disagree on the agency’s exceptions and not issue a decision. So, the Union has expended considerable time and money and received absolutely nothing in return.

Let’s assume the Authority Members agree and uphold the arbitration award, but the agency does not comply. The only way to obtain enforcement of a final arbitration award is through the ULP procedure. And behold—there is no General Counsel or Acting General Counsel to issue the unfair labor practice complaint to enforce the arbitrator’s award.

So—some agencies may attempt to do the legal thing and negotiate, hoping to get a reasonable agreement on the negotiable aspects of the change—but unilaterally implement if there is no agreement and an impasse. Other agencies may just ignore the union. In either situation, there currently are no enforcement mechanisms to enforce the Statute or a CBA.

Going Through the Courts

How about the courts?

Should a union attempt to enforce the Statute or a CBA provision in a U.S. District Court, the civil action would most likely be dismissed for lack of jurisdiction.

While there may be a U.S. District Court judge out there of the approximately 670 who may assume jurisdiction because the administrative enforcement mechanism is not working—such an action would most probably be short-lived by a U.S. Court of Appeals. Plus, unless a national union initiates a court action, most unions at the level of representation do not possess the expertise and resources to initiate and prosecute U.S. District Court and Circuit Court actions.

Conclusion

So, what should a union do? These are difficult times for labor organizations and employees. Hundreds of thousands of bargaining unit employees will lose their positions, and unions will lose multiple millions of dollars of dues.

As to changes, old tactics used by some unions of attempting to delay changes by drawing out midterm ground rules negotiations and by negotiating to impasse over the change absolutely will not be productive or successful. Instead, if given the opportunity, unions should seek to expeditiously obtain agreement on reasonable negotiable proposals relating to a change that an agency can agree to and that assist unit employees as the change is implemented. Unions can no longer delay the change.

### Foreign Service---1NC

#### Trump’s not attacking the foreign service---he’s making it leaner and efficient.

Kroenig ’25 [Matthew; August 8; PhD, vice president of the Atlantic Council and professor in the Department of Government at Georgetown University; Foreign Policy, “Trump’s State Department Reforms Are Necessary,” https://archive.ph/wMfNG]

The problem was clear to the wise people of U.S. foreign policy, yet no action was taken.

Even worse, the personnel expansion was not directed to priority areas within the State Department. Former Defense Secretary James Mattis famously said that if Washington does not spend more money on the State Department, then he will need to buy more bullets. Unfortunately, much of the growth in staff was not going to the pointy end of the spear—such as foreign service officers, regional experts, and diplomats in the field that interact with foreign counterparts. Rather, as noted above, new hires were made for new functional programs devoted to issues like human rights, climate change, migration, women’s issues, food security, and diversity, equity, and inclusion (DEI).

These offices often pushed controversial agendas at the expense of core U.S. interests and alienated key partners by imposing progressive views, hotly contested even in the United States, on traditional societies around the world. The senior State Department official I spoke with, for example, told me one of his colleagues from a Gulf country complained that the State Department under the Biden administration constantly harassed his government about unionizing guest workers. And the U.S. Bureau of Political-Military Affairs assessed a country’s commitment to DEI before approving arms sales to allies. They also told me that advancing DEI comprised a full 20 percent of State Department employees’ performance ratings—a level equal with: leadership, communication, expertise, and management. A young foreign-service officer at a post overseas told me that “basically everything my team did was DEI” until recently.

Rubio has a different idea of how to run the State Department. He started the job with a clear vision for reform, informed by his many years on the Senate Foreign Relations Committee. As he stated in January after he was confirmed as secretary, “I want the Department of State to be at the center of how America engages the world—not just how we execute on it, but on how we formulate it.”

As both secretary of state and national security advisor, he is supremely well-positioned to rebalance the roles and responsibilities of the State Department and the NSC. As the department is being streamlined and empowered, the NSC is being rightsized. The philosophy of the reorganization is to strengthen U.S. diplomacy by returning power to overseas posts and regional bureaus, as well as cutting inefficiencies in functional, single-issue offices in a bloated headquarters.

According to the senior official, 82 percent of the layoffs were civil servants in Washington and none were foreign-service officers serving overseas. The move consolidated redundant offices, such as three separate shops devoted to sanctions. Many offices devoted to niche functional issues were shut down, but the functional missions were retained and moved to the regional offices doing the real work of daily partnership management. The Bureau of Political Affairs, which includes the assistant secretaries for major regions such as Europe, the Middle East, and the Indo-Pacific, was largely spared from the cuts. Individual bureaus were also streamlined, and the secretary’s number of direct reports was reduced.

Media reports dramatized the job losses that would supposedly gut U.S. diplomacy, but the trimming of roughly 3,000 positions from a staff of 80,000 was a modest adjustment. It simply reversed the expansion from the Biden administration and returned the State Department to the same staffing levels that prevailed during U.S. President Donald Trump’s first term.

Some might equate more staff with more diplomacy, but an inefficient organization that’s overly focused on the wrong issues will not help the United States prevail in its great-power rivalry with China.

Media reports gave the impression that the reorganization and layoffs were rushed without adequate consultation, but, according to my source, Rubio’s team began consultations on it back in January. By April, State Department leadership communicated a plan to reduce staff by roughly 15 percent. Senior career officials were then asked for their recommendations on how to streamline their bureaus. Department leadership read and responded to more 650 comments in the dissent channel—many of them supportive of the reforms—and attended congressional briefings and hearings regarding the reorganization. A working group met more than 20 times and considered feedback from career employees, Congress, and department bureaus. The State Department followed all legal requirements, communicated with its workforce, and worked for months to get the reorganization right.

### Foreign Policy---1NC

#### No Trump foreign policy impact---he won’t escalate and unpredictability dampens aggression.

Ansel ’25 [Frederic; April 12; doctorate from the Center for Geopolitical Analysis and Research of the University of Paris, teaches international relations and political science at the Paris Business School; Fakti.bg, “Rumors of World War III are greatly exaggerated,” https://fakti.bg/en/mnenia/963588-rumors-of-world-war-iii-are-greatly-exaggerated]

L"EXPRESS: Donald Trump seems to have his eye on the Nobel Peace Prize in his attempt to impose a ceasefire in Ukraine. But isn't he a risk factor for global stability because of his unpredictability?

FR. ANSEL: One of the directions of his policy in international relations, besides mercantilism, is the refusal to send American troops beyond national borders. This automatically reduces the risk of military clashes between American troops and Chinese or Russian soldiers. Thus, the specter of World War III is receding. But, of course, Trump has constant contradictions. If he does not send troops, he will not be able to annex Greenland, expel the Palestinians from Gaza or politically take over Panama... We must again ask ourselves whether this American withdrawal is positive in the long run, knowing that throughout history there have been just wars. If, for example, a real genocide were to occur and the United States could not be relied on - as happened in Rwanda in 1994 - such American abstention would have morally disastrous consequences. But the specter of global conflict is inevitably receding. Moreover, Trump’s unpredictability can be perceived by America’s opponents as irritating and even dangerous. To orchestrate his unpredictability is to create a kind of diplomatic fog, just as there is a fog of war. From this perspective, it is possible that this could slow down the potential military ambitions of both China and Russia. If China attacks Taiwan, what will Trump do? We do not know anything about that. But if Putin does not respect the likely upcoming ceasefire in Ukraine, there is no guarantee that Trump will not become enraged and decide to radically change his Ukrainian policy, feeling humiliated. What is certain is that in Xi Jinping’s eyes, this unpredictability, especially in the Indo-Pacific region, is not good news. However, Trump is not at all unpredictable with regard to NATO and Europe, since he clearly wants the costly war in Ukraine to end and for European countries to pay for their own defense so that it no longer costs the United States anything. But he has never taken such positions on the Indo-Pacific. Why? Because Japan and South Korea are solvent and buy and invest a lot in the US! That is why China has not been very active for the time being.

### Great-Power Aggression---1NC

#### No great-power war. The New Peace is overdetermined.

Fettweis ’25 [Christopher J.; May 13; PhD, Professor of Political Science at Tulane University; Security Studies, "Grand Strategy and the Spiral Model," https://doi.org/10.1080/09636412.2025.2497962]

The Twenty-First Century Security Environment

The deterrence model assumes a set of constant and immutable systemic features, ones that are equally applicable to all eras. Perhaps most importantly, its theorists contend that the imperative to expand is as powerful in the twenty-first century as it was in the nineteenth, so power vacuums are inevitably filled. “The game of politics does not change from age to age,” explained the deterrence theorist Colin Gray, “let alone from decade to decade.”34

The rules that govern international behavior are not static, however. The post-Cold War era would be hardly recognizable to leaders of earlier times. Despite popular perceptions to the contrary, and despite the best efforts of Vladimir Putin and Hamas, ours remains a time of relative stability. War occurs, but it does so in isolated areas involving an ever-smaller percentage of the world’s people. The statistics are well known or should be well known, to every student of grand strategy: By any measure, the last thirty years have been among the most peaceful in history, with the number and magnitude of all kinds of violence at record-low levels.35 Deterrence strategists ignore this rather remarkable development, however, and proceed as if nothing of importance has changed. Explaining these trends, or what Stephen Pinker called the “New Peace,” has been no small task. A variety of factors, including democracy, nuclear weapons, economic interdependence, aging populations, international institutions, hegemonic stability, and the spread of irenic ideas have been offered as casual candidates.36 Taken together, these potential independent variables led Jervis to suggest that the decline of warfare might essentially be overdetermined.37 Discussions of US grand strategy should instead begin by recognizing that the world remains substantially less violent and dangerous than ever before. Perception has not caught up to this rather profound reality, especially in the strongest of states.

The assertion that the New Peace persists, especially given the outbreak of wars in Gaza and Ukraine, is controversial, and this analysis need not wade too deeply into the debate. Many people will never accept the notion that the world has grown more peaceful for various scientific, personal, and professional reasons.38 Instead, this section will focus on three major, simple, empirically demonstrable truths worthy of consideration by America’s grand strategists.

First, the twenty-first century has, thus far, been the world’s least violent. It is sometimes difficult for people of the information age to grasp just how central war was to the human experience until quite recently. The ancient world was one of perpetual warfare, which continued through the medieval era and beyond. “The sun never set on fighting in the 14th century,” noted historian Barbara Tuchman.39 There were only seven complete calendar years in the entire seventeenth century in which there was no war between European states.40 This might seem like a small number, but it was actually an improvement over the sixteenth, according to one of its most prominent historians.41 Eighteenth-century great powers were never at peace for longer than seven years.42 The era of European colonialism contained rather extraordinary if often overlooked, violence. Though exact numbers are elusive, colonial wars resulted in the deaths of somewhere between 25 and 30 million people.43 Levels of warfare did not abate during the Cold War, even if it is sometimes referred to as the “long peace” because the superpowers did not come to blows. As many as fourteen million people died in the various horrific proxy wars fueled by East and West.44 In any comparison with the past, the New Peace comes out ahead. The twenty-first century is certainly quite violent—that is, unless it is compared to any that came before.

Second, the pacific global trends gain significance once exponential population growth is factored in. Humanity reached a billion members somewhere around 1800, and now there are more than 8 times that many of us. One does not need complex statistical techniques to conclude that more people, both in terms of raw numbers and as a percentage of the total, live in societies at peace than ever before. A recent analysis noted that the recent uptick in violence, due to the Russian invasion and civil war in Ethiopia, meant that the number of battle deaths in 2022 matched that of 1984—without also noting that there were only 4.7 billion people alive in 1984.45 As the most prominent student of this data concluded, the probability of being killed in interstate or civil war declined by a factor of seventeen from the years after World War II to 2020.46

Armed conflict remains endemic in a crescent that extends from the Sahel through the Middle East to the Urals. Outside of that crescent, where the vast majority of humanity lives, warfare has become rare. The Colombian civil war that ended in 2016 has ushered in an unprecedented eight years (and counting) of hemispheric peace; most European countries do not even prepare for war against one another, which is an underappreciated change from the past; the Pacific Rim, despite concerns of the pessimists, has not experienced significant conflict in decades; and Sub-Saharan Africa is quietly experiencing the most peaceful era in its history.47 It is the minority of unfortunate people inside that violent crescent who still live with the scourge of war.

Finally, surely it is significant that, at the very least, basic national survival is no longer a concern for leaders since modern states simply do not perish.48 The number of UN members that have been conquered is holding steady at zero. Today, states like Belgium and Bhutan are essentially as safe as the United States. Unlike most of history, with the obvious exception of Russia, states no longer try to absorb their neighbors. Without the realistic potential for national expansion, the deterrence model loses much of its explanatory and prescriptive capability. If power vacuums generally go unfilled, then weakness is hardly as provocative as Secretary Rumsfeld would have had us believe. In a world where the risk of emboldening enemies with insufficient deterrent is minimal, following spiral-model grand strategies carries little risk—and potentially substantial benefit.

### Latin America War---1NC

#### No Latin America war---cooperative ties and U.S. military primacy.

Tokatlian ’18 [Juan; September 5; International Relations professor at the Di Tella University, International Relations PhD from Johns Hopkins University. [No One’s Supplanting US Military Influence in Latin America; Defense One, “No One’s Supplanting US Military Influence in Latin America,” https://www.defenseone.com/ideas/2018/09/no-ones-supplanting-us-military-influence-latin-america/151029/]

Many U.S. and Latin American experts who analyze inter-American military relations tend to repeat two inaccuracies. First, they confuse diplomatic statements and military realities. Second, they reckon that the military policies of China, Russia, Iran, and India towards Latin America are generating a disturbing imbalance that is detrimental to Washington.

The former tendency is exemplified by an emphasis on then-Secretary of State John Kerry’s 2013 speech announcing the end of the Monroe Doctrine. In practice, however, the Defense Department and especially U.S. Southern Command, have reaffirmed their supremacy in Latin America.

The latter tendency requires a bit more unpacking. There is no doubt that China’s economic growth is being accompanied by an incipient military projection beyond its regional area of influence, including attempts to boost arms exports to Latin America. Yet Bejing’s effective military impact upon Latin America in the region remains low — with the exception of its arms exports to Venezuela. Russia is the region’s largest foreign arms supplier: since 2013, according to SIPRI, Moscow has supplied 27 percent of the region’s imported weapons, more than the United States (15 percent) and France (10 percent) combined. Meanwhile, military ties between Iran and Latin America annoy Washington, but Tehran lacks the capability to ensure its standing or hinder U.S. preeminence in the region. And as for the limited defense ties between India and Latin America, Indian specialist Sanjay Badri-Maharaj says it is a farce to talk about them.

In short, the U.S. military preponderance in the region persists and it is rock-solid. No extra-regional country, individually or jointly, can challenge U.S. military clout and control in the region. Among its instruments are U.S. Southern Command, located in Miami; the U.S. Navy’s Fourth Fleet, disestablished in 1950 and reassembled in 2008; military bases in Cuba and Honduras; cooperative security locations in El Salvador and Aruba-Curacao; and security assistance organizations in various Latin American countries. And while Beijing has sought to implement security cooperation programs and extend more invitations to military courses in China, its efforts are so far dwarfed [overwhelmed] by Washington’s: according to the Washington Office on Latin America: 75 out of 107 U.S. global military assistance programs are operating in the region, while the last year alone saw 5,361 Latin American military and security personnel trained in the United States.

China and Russia are trying to increase military-to-military contacts, but the United States has the National Guard’s State Partnership Program by which 17 states, plus Puerto Rico and Washington, D.C., have agreements on security and defense with 23 Latin American countries. Beijing and Moscow has been promising material assistance in the area of defense and security, but it is Washington that earlier this year pledged $436 million in military and police aid, according to data from Security Assistance Monitor (https://securityassistance.org/latin-america-and-caribbean) (This year, the U.S. sold $1.3 billion in arms to Mexico alone.

It is true that Russia has expanded its relationship with Venezuela, to the point that it now undertakes military exercises that seriously concern the United States. However, SouthCom conducts regular, collective joint exercises with countries in Latin America through drills such as Panamax, UNITAS, Tradewinds and New Horizons.

And U.S. special operations there have drifted upward. Since 2006, the slice of U.S. special operators deployed to the region has risen from 3 percent to 4.39 percent, according to researcher Nick Turse. In fiscal 2016, the Special Operations Command South conducted several anti-terrorist maneuvers with specialized regional units in the context of a change of focus from Central America to the Caribbean (especially with the Dominican Republic and Trinidad and Tobago) and a growing emphasis on South America (especially Brazil, Chile and Peru). In 2017, the Army’s Special Forces conducted various exercises with the armed forces of the region: with naval forces from Central America targeting drug interdiction; with Colombian and Peruvian units on matters such as drug-trafficking and terrorism, and with special forces from Chile on urban warfare.

In addition, visits to the region by U.S. military officials are very frequent and in some years they have surpassed trips by diplomats. There are some 1,200 uniformed military and civilians dealing with Latin America in SouthCom, more than the total of officials from various government agencies in Washington. The political influence of the military in inter-American relations is such that before assuming their respective presidencies in Colombia and Paraguay, Ivan Duque and Mario Abdo Benitez, visited SouthCom at Doral Florida.

To sum up, the United States remains undoubtedly, and by far, the primus inter pares on military affairs vis-à-vis Latin America. The acceptance of the idea, both in Latin America and the United States, that military policies by China, Russia, and Iran towards the area are alarming is questionable. The available evidence does not support such fear. U.S. military primacy in the Americas is undeniable.

### Russia War---1NC

#### No Russia war.

Liqun ’24 [Han; September 13; Researcher, China Institutes of Contemporary International Relations; China-US Focus, “What’s Preventing Bigger Wars in Global Hot Spots?”, https://www.chinausfocus.com/peace-security/whats-preventing-bigger-wars-in-global-hot-spots]

As the world awaits Iran’s revenge against Israel for the assassination of a Hamas leader, a British commentator said, nothing has happened — no escalation, no suicide attacks. It’s like the dog that didn’t bark in the night. Many would find sneak attacks, revenge and a wider conflict more logical. However, this is exactly what an international conflict looks like today: No country readily escalates a confrontation.

The Russia-Ukraine conflict had been more or less static for some time, but even the recent Ukrainian incursion into Russian has not triggered a larger-scale war. The Israeli assassination of the Hamas leader in Iran has not yet yielded retaliation. But why not?

The basic reason is that the relative strengths and limitations of all parties involved may not lead to a beneficial outcome. Neither of these two situations involve evenly matched sides. Both involve a relatively dominant party and sustained external interventions.

There are also indirect and deeper reasons:

First, large-scale war is not an economically viable option for any country. Historically, a war may be launched because of an economic collapse and to divert attention from internal problems. It may also occur when a nation is emboldened by its strong military to expand its territory or when it is forced to resist foreign aggression. At present, few economies are in a good shape, but none are experiencing total collapse.

Since the start of the Palestinian-Israeli conflict, the United States, with limited capacity for financial assistance, has found it difficult to support Israel and Ukraine at the same time. The German economy is in a downturn, and Europe’s ability and willingness to continue supporting Ukraine are declining. Russia’s wartime economy has worked well, but it’s unknown whether Russian can sustain a larger war.

Second, the social and political systems build during long periods of peace instinctively resist the shocks of a wider conflict or war, thus constraining the behavior of decision-makers. The Israeli military, for example, is based significantly on reserve service; soldiers have regular jobs and families. Some join a fight in the morning and hold video conferences at noon to discuss investment. They care more about families and businesses. Some people refuse to continue military service for this reason.

A shortage of men and a shrinking economy have hampered the Netanyahu administration’s ability to go for an all-out war. When Ukraine raided Kursk, the immediate concern of European officials may not have been the battlefield but the price of gold, stocks and houses. Even in the United States, which readily intervenes everywhere, anti-war voices have been high for a long time. No wonder Trump vowed to “end the Ukraine conflict with a phone call.”

Third, the returns of modern warfare are neither rich nor certain. More than a century ago, a war victory might mean additional territory, population, resources, greater influence in a region (or even the world at large), and more respect at home. Today, war means attrition. Without a solid moral ground, victory doesn’t naturally lead to additional territory, population or resources, and regime change may occur at home. Even a safer external environment gained through victory may not last. Since the beginning of the new century, the U.S. has waged several wars, all ending in chaos. As the world bears witness, no one wants to repeat those mistakes.

Fourth, greater information transparency plays a key role. Opaque and asymmetric information tends to increase the harm of an expected event and to escalate it to a crisis. But nowadays information technology compresses time and space, leading to a reduced likelihood of a conflict caused by misunderstanding. Audiences at the recent Republican rally for Donald Trump in Butler, Pennsylvania, and guerrillas in Hamas tunnels simultaneously watched as a bullet pierced Trump’s ear on July 13. After the Iranian president’s helicopter crashed, Iranians would not be ahead of ordinary British netizens in seeing photos of the site. High levels of transparency also bring an information explosion. As decision-makers prefer a fuller and more detailed picture to a sketch before taking action, there is now additional time for efforts to avoid escalation and engage in coordination and communication.

Fifth, as economic globalization has increased interdependence and connections, most countries cannot bear the economic consequences of market segmentation. While imposing unprecedented, comprehensive sanctions on Russia, the U.S. and Europe have also acquiesced to letting Russian oil and gas flow to the world market; and they have purchased enriched uranium, titanium and other key minerals from Russia.

While the U.S. has no need for Russian oil and gas, it would not be able to withstand the collapse of the world oil and gas market that would be caused by Russia’s sudden and complete withdrawal. It will take time for the EU to end its energy dependence on Russia; meanwhile, it must continue trading. Even Ukraine, which is at war with Russia, has not blown up Russian pipelines in its territory.

Sixth, good management in the international community has mitigated crises. Although harshly criticized, international and regional organizations and mechanisms have contributed to a certain extent. The world exerts pressure on Israel through the UN Security Council. The U.S. and Europe have maintained communication with Russia. Collective decision-making by the EU, strategic stability mechanisms among major powers and relevant regional security organizations have all been playing their respective roles. Moreover, through two world wars, the Cold War and various international and domestic crises, major countries have rich experience and means to deal with conflicts.

#### There’s no will or capacity for nuclear escalation.

Shinkman ’23 [Paul; February 24; Senior Writer of National Security at U.S. News. “Putin’s Hollow Nuclear Threat.” U.S. News., https://www.usnews.com/news/the-report/articles/2023-02-24/why-ukraine-wont-lead-putin-to-nuclear-war]

“The likelihood of Russia choosing – or Putin choosing – to use nuclear weapons directly against the West is astronomically low. It should not even be seriously considered at this stage,” says Katherine Lawlor, senior intelligence analyst at the independent Institute for the Study of War, which has fastidiously tracked Russia’s military movements since it first invaded Ukraine. “Putin would love it if Western leaders believed that he might. He is many things, but he is not suicidal,” Lawlor says. She adds that Putin ultimately does not want war with NATO – particularly given the current state of the Russian army. “He couldn’t even win a conventional war in Ukraine.” Putin’s references to potential nuclear war serve as an extension of capitalizing on Russia’s limited economic and military resources to bend others’ will. It’s a tactic the Russian leader has **accelerated** since first invading Ukraine in 2014, shortly before Obama dismissed the former core of the Soviet Union as nothing more than a “regional power.” The method has worked to some degree, most visibly by isolating Germany from its traditional ironclad allies in the West due to Berlin’s protracted reluctance to send new forms of military aid to Ukraine’s military. And it has effectively raised concern among experts who specialize in the potential for nuclear war. “It would be dangerous to assume that Putin would never use nuclear weapons,” says Jon Wolfsthal, a senior adviser to nuclear disarmament advocacy group Global Zero and a member of the Bulletin of the Atomic Scientists, which annually publishes its “Doomsday Clock” marking the potential threat of nuclear war. He notes that approach “has not been adopted by the United States Government, by NATO nor by the Bulletin.” “Blind faith in deterrence does not guarantee stability, nor does it take heed of the lessons of history – recent and more distant – that deterrence is fragile and can fail,” he says. “As financial and military pressures on Putin grow, the concern is that he will not think clearly or may put more emphasis on survival and the destruction of Ukraine than he does on alliances or friends.” The Bulletin advanced the Doomsday Clock to 90 seconds to midnight in late January – closer to “midnight,” or theoretical annihilation, than ever before – citing not only the threat of nuclear war from Russia with regard to Ukraine but also the spread of disease and climate volatility that its invasion has exacerbated. Wolfsthal adds that the primary tools Western leaders have used to deter Russia – chiefly economic isolation – have not yet materialized to a level Putin takes seriously. “He has invaded a sovereign country, committed war crimes and is engaged in random bombing of civilians, and yet trade with a number of countries in Europe and elsewhere has increased,” he says. “If there is a major effort to use economic threats to deter Putin’s possible use of nuclear weapons, we have not seen it, and it has not been visibly communicated to Russia as far as our research indicates.” Others believe that Putin’s most ferocious nuclear rhetoric mostly exposes the extent to which the embattled Russian leader feels **desperate** for new sources of leve**rage**. They suggest that leverage is what he was seeking this week with a sudden announcement that he would suspend Russia’s involvement in the New START treaty, the last nuclear arms control treaty between the U.S. and Russia. “What this is, is a message,” says John Erath, a former top National Security Council official for European affairs, now senior policy director for the Center for Arms Control and Non-Proliferation. “For the last six months and more, Russia's strategy has been to seek leverage on the West to end its support to Ukraine and suspend the hostilities on terms favorable to Russia.” “This is another ingredient in that stew,” he adds. “And like much Russian food, it is lacking in nutritional value.” Erath suggests that Putin thinks he can trade on the promise of resuming Russia’s obligations to the treaty to convince the U.S. to cease its support for Ukraine’s goals in the war and to acknowledge the Russian army’s gains. “In that sense, the announcement is a big deal symbolically,” Erath says, adding that Secretary of State Antony Blinken was right to call the statement “unfortunate and irresponsible.” Since Putin’s decision to invade Ukraine, Russia’s other sources of influence are **rapidly dwindling** or, more surprisingly, are now exposed as ineffectual. European countries that previously relied heavily on flows of Russian energy – particularly natural gas – have defied expectations and survived winter so far without supplies from Moscow. The endemic rot of corruption within its Ministry of Defense has become widely exposed. Its conventional military has suffered a string of embarrassing defeats on the battlefield, including during the beginning of an ongoing offensive that Russia believed would shift momentum in its favor. The Institute for the Study of War, like several other private intelligence firms, believes Putin’s nuclear saber-rattling serves more as an information operation designed to prevent the U.S. and Ukraine’s partners in Europe from providing additional military aid that could be considered escalatory, such as long-range rockets or sophisticated tanks. He has had some success, chiefly in Germany’s initial hesitancy to provide Leopard tanks. A year into the war, some things appear to remain off the table: The U.S. is firmly and vocally opposed to a no-fly zone, which Ukraine has sought since Day One of the invasion to limit Russia’s ability to attack its defenses and its civilian centers from the skies. And while American officials publicly say the course of the war is up to the Ukrainians, they have reportedly bristled at the suggestion that Kyiv would seek to reclaim the Crimean Peninsula, seized by Russia in 2014. Similarly, the U.S. has balked at the possibility of providing weapons that could carry the war into Russia itself. What Putin also has in his favor is a dramatic reversal in the outlook of some key figures in the Republican Party, who have inexplicably changed their perspective on Russia under the leadership of Trump in recent years. With Moscow once the center of Ronald Reagan’s “evil empire” and more recently viewed as an autocratic state seeking to reestablish an empire by force at the cost of newly democratic nations, the party of Trump finds itself with an estimated 97% percent of the Russian army engaged in a ground war and being routed by a foreign army without the loss of a single American life – yet questioning the financial cost of the commitment. What that means in the course of a presidential campaign that prominently features Trump and a host of similar-minded Republicans competing for the base he secured remains to be seen. The 70-year-old Putin, in office since 1999 and frequently referred to as “president for life,” may conclude he has only to wait out Biden’s promises of steadfast support for Ukraine. But for Putin to follow through on launching a nuclear attack, he would have to believe that doing so would achieve a military objective that outweighs the surefire response of a conventional military response from NATO, as well as the ensured international isolation from what few partners Russia has left – chiefly in China and India, where leaders have warned Putin against nuclear weapons use. Within Russia, the **war is not popular**, though polling suggests Putin has not yet lost the faith of the majority of ordinary Russians. Still, reports emerge regularly about the lack of confidence Russian troops have in their leaders up the chain of command – leading some analysts to even speculate whether generals charged with executing nuclear launch orders would comply with their directives. Using nuclear weapons also **wouldn’t achieve Putin’s battlefield aims**. Russian military doctrine calls for the use of low-yield nuclear warheads as a last-ditch tactic to punch a hole in enemy lines that mechanized infantry could then exploit. “The problem is Russian forces are **utterly degraded**, absolutely shattered,” Lawlor says. She notes the same is true of the Ukrainian military but adds that Russia does not currently have a single deployable division of troops that could carry out that level of operations. “Then factor in NATO retaliation for violating the nuclear taboo, likely to include conventional missile strikes on Russian headquarters, ammunition depots and storage facilities within Ukraine,” she says. “You’ve just **lost** the operational advantage you might have gained by using low-yield nuclear weapons – even if you use 10 or 15.” This scenario, however, exists within Russian offensive operations. Lawlor adds these circumstances could change if Russia feels it is squarely in a defensive position and needs to prevent “all-out disaster.” “You have to think about the human response to nuclear use,” she says, describing the effect on a Ukrainian soldier who witnesses a rising mushroom cloud several miles away toward the front lines. “The symbolism is really important in that the Russians may assume it would have a devastating effect on the morale of the surviving Ukrainian forces,” Lawlor says. “At this stage in the war, though, it’s not even under consideration because the Russians are still conducting offensive operations.” At least some of those who have engaged with Putin directly agree. Former Prime Minister Boris Johnson revealed earlier this month that he had received direct warnings from Putin of nuclear war. “He threatened me at one point, and he said, 'Boris, I don't want to hurt you, but with a missile, it would only take a minute,' or something like that. Jolly,” the conservative politician told the BBC. Johnson later explained to Fox News that he believed that what Putin was “trying to do was creep me out … trying to reduce it to a story about a nuclear standoff between Russia and NATO.” He argued that **Putin understands** the **devastating effect** on **Russia** if it were to launch nuclear weapons.

### Failed States---1NC

#### Failed states are total bogus AND not attributable to governance.

Woodward ’17 [Susan; 2017; Professor of Political Science at the Graduate Center for the City University of New York, Ph.D. from Princeton University; The Ideology of Failed States: Why Intervention Fails, “What’s in a Name?” Ch. 2]

The empirical problem with this concept follows directly from this theoretical vagueness. Without sufficient precision in the conceptual definition, no operational definition - how to identify an actual failed state, distinguish it from other phenomena, and measure its empirical variation - is possible.17 Where there are studies, however, the measures are superficial or, as discussed above, tautological. As Stewart Patrick, one of the few exceptions, concluded after a survey in 2006 of what he refers to as conven¬tional wisdom across all agencies of the US government, the UN, World Bank, OECD, and governments of Canada and Australia: “What is striking is how little empirical evidence underpins these assertions and policy developments. Analysts and policymakers alike have simply presumed the existence of a blanket connection.”18 By 2015, in response to the insistence by a group of nineteen countries considered failed states, the g7+, 19 that fragility should be measured as a continuum, the OECD DAC proposed a new fragility index of five separate dimensions - violence, justice, institutions, economic foundations, and resilience - that were so vague in their operational measures that it provoked immediate criticism of the blatant coding mistakes made.20

In his attempt to untangle the circularity of most statements on failed states, Patrick focused on the dependent variable, the security threats said to be caused by, in his formulation, “weak states” and, later, “precarious states.” The empirical problem, he argues, is that this category of security threats is huge. If one wants to test this causal relationship, then it is necessary to disaggregate the threats into their separate components. Treating the relationship as a case of externalities - the cross-border, spillover effects of weak states - he distinguishes six: terrorism, weapons proliferation, trafficking by organized crime and money laundering, violent conflict and complex humanitarian emergencies (the “bad neighborhood”21 phenomenon in which a country's risk of civil war has been shown to increase substantially if its neighbor is at war), pandemics and disease, and energy insecurity. He finds great variation in this first step of identifying separate patterns of association between each type of risk and weak states. Some threats are associated with weak states (e.g., proliferation of conventional weapons; but WMD, trafficking in persons or narcotics, and infectious diseases are not) whereas some are associated with strong states (terrorist activity, WMD proliferation, other kinds of trafficking such as money laundering, intellectual property theft, and cyber and environ-mental crime). The explanation for these associations lies, in some cases, with a lack of state capacity, but in others to specific policy choices by governments. Where the association can be attributed to what Patrick calls “governance challenges,” moreover, they are a necessary but not a sufficient explanation of the specific threat. Nor is the cause some vague, all-encompassing notion of failed states, but a very specific and identifiable institutional or resource weakness (such as impoverished public health services) that can then be analyzed for the appropriate policy remedy, if any.22

### Terror---1NC

#### No terrorism impact. Bathtubs have a higher kill count.

Mueller ’21 [John and Mark G. Stewart; 2021; PhD, Professor Emeritus of Political Science at Ohio State University and Senior Fellow at the Cato Institute; PhD, Professor of Civil Engineering and Director of the Centre for Infrastructure Performance and Reliability at the University of Newcastle in Australia; international leader in risk assessment, public policy decision-making, and protective infrastructure for extreme hazards; Terrorism and Political Violence, “Terrorism and Bathtubs: Comparing and Assessing the Risks,” vol. 33, DOI: 10.1080/09546553.2018.1530662]

The likelihood that anyone outside a war zone will be killed by an Islamist extremist terrorist is extremely small. In the United States, for example, some six people have perished each year since 9/11 at the hands of such terrorists—for an annual fatality rate of about one in 50 million for the period.

This might be taken to suggest, as one writer has characterized it, that “terrorism is such a minor threat to American life and limb that it’s simply bizarre—just stupefyingly irrational and intellectually unserious—to suppose that it could even begin to justify the abolition of privacy rights as they have been traditionally understood in favour of the installation of a panoptic surveillance state.”1 And terrorism specialist Marc Sageman characterizes the threat terrorists present in the United States as “rather negligible.”2 The vast majority of what is commonly tallied as terrorism has occurred in war zones, and this is especially true for fatalities.3 But even this has been exaggerated by conflating terrorism with war: civil war violence that would previously have been seen to be acts of insurgency are now often labeled terrorism.4

In order to put the numbers in some context, it has often been pointed out that far more Americans are killed each year not only by such highly destructive hazards as drug overdoses or automobile accidents, but even by such comparatively minor ones as lightning, accident-causing deer, peanut allergies, or drowning in bathtubs. Some comparisons are arrayed in Table l.

In recent years, however, critics have attacked what they call "the bathtub fallacy."

First, they stress that it is important to keep in mind that bathtubs are not out to kill you while terrorism is a willful act carried out by diabolical, dedicated, and clever human beings. Thus, although the number of people Islamist terrorists have been able to kill in the West since 9/11 has thus far been quite limited, those terrorists, as they plot and plan and learn from experience, may very well become far more destructive in the future.

Second, the critics charge that the comparison of terrorism with bathtub drownings is incomplete in that it doesn't consider the possibility that the incidence of terrorist destruction is ow precisely because counterterrorism measures are so effective.

Third, it is argued that, unlike bathtub drownings, terrorism exacts costs far beyond those entailed in the event itself. It damagingly sows terror, fear, and anxiety; disturbs our psychological well-being; undermines trust and openness within the society; and reduces our sense of intrinsic moral worth even as it increases a sense of helplessness.

They maintain, fourth, that the comparison is invalid because, unlike terrorism, bath tubs provide benefit.

And finally, they contend that terrorism costs are peculiarly high, particularly in a democratic society, because the fears it generates will necessarily need to be serviced by policy makers, and this pressure forces, or inspires, them to adopt countermeasures, both foreign and domestic, that are costly and sometimes even excessive.

In this article, we examine these five propositions and find all of them to be wanting. In the process, we conclude that terrorism is rare outside war zones because, to a substantial degree, terrorists don’t exist there. In general, as with rare diseases that kill few, it makes more policy sense to expend limited funds on hazards that inflict far more damage.

Terrorism is willed and may well become more destructive

Journalist Jeffrey Goldberg has suggested that “the fear of terrorism isn’t motivated solely by what terrorists have done, but what terrorists hope to do.” Bathtubs are simply not “engaged in a conspiracy with other bathtubs to murder ever-larger numbers of Americans.” However, terrorists “in the Islamist orbit,” he insists, “seek unconventional weapons that would allow them to kill a far-larger number of Americans than died on Sept. 11.”6 Or as Janan Ganesh of the Financial Times puts it, “Bathroom deaths could multiply by 50 without a threat to civil order. The incidence of terror could not.”7

Thus far, 9/11 stands out as an extreme outlier: scarcely any terrorist act, before or after, in war zones or outside them, has inflicted even one-tenth as much total destruction. That is, contrary to common expectations, the attack has thus far been an aberration, not a harbinger.8 And al-Qaeda central, the group responsible for the attack, has, in some respects at least, proved to resemble President John Kennedy’s assassin, Lee Harvey Oswald—an entity of almost trivial proportions that got horribly lucky once. The tiny group of perhaps 100 or so does appear to have served as something of an inspiration to some Muslim extremists. They may have done some training, may have contributed a bit to the Taliban’s far larger insurgency in Afghanistan, and may have participated in a few terrorist acts in Pakistan. In his examination of the major terrorist plots against the West since 9/11, Mitchell Silber finds only two—the shoe bomber attempt of 2001 and the effort to blow up transatlantic airliners with liquid bombs in 2006—that could be said to be under the “command and control” of al-Qaeda central (as opposed to ones suggested, endorsed, or inspired by the organization), and there are questions about how full its control was even in these two instances, both of which, as it happens, failed miserably.9 And, although some al-Qaeda affiliates have committed substantial damage in the Middle East, usually in the context of civil wars, their efforts to carry out terrorism in the West have been rare and completely ineffective.10 Even under siege, it is difficult to see why al-Qaeda could not have carried out attacks at least as costly and shocking as the shooting rampages (organized by other groups) that took place in Mumbai in 2008 or at a shopping center in Kenya in 2013. Neither took huge resources, presented major logistical challenges, required the organization of a large number of perpetrators, or needed extensive planning.

However, there is of course no guarantee that things will remain that way, and the 9/11 attacks inspired the remarkable extrapolation that, because the terrorists were successful with box cutters, they might soon be able to turn out weapons of mass destruction— particularly nuclear ones—and then detonate them in an American city. For example, in his influential 2004 book, Nuclear Terrorism, Harvard’s Graham Allison relayed his “considered judgment” that “on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not.”11 Allison has had a great deal of company in his alarming pronouncements. In 2007, the distinguished physicist Richard Garwin put the likelihood of a nuclear explosion on an American or European city by terrorist or other means at 20 percent per year, which would work out to 91 percent over the eleven year period to 2018.12

Allison’s time is up, and so is Garwin’s. These oft-repeated warnings have proven to be empty. And it is important to point out that not only have terrorists failed to go nuclear, but as William Langewiesche, who has assessed the process in detail, put it in 2007, “The best information is that no one has gotten anywhere near this. I mean, if you look carefully and practically at this process, you see that it is an enormous undertaking full of risks for the would-be terrorists.”13 That process requires trusting corrupted foreign collaborators and other criminals, obtaining and transporting highly guarded material, setting up a machine shop staffed with top scientists and technicians, and rolling the heavy, cumber some, and untested finished product into position to be detonated by a skilled crew, all the while attracting no attention from outsiders.

Nor have terrorist groups been able to steal existing nuclear weapons—characteristically burdened with multiple safety devices and often stored in pieces at separate secure locales—from existing arsenals as was once much feared. And they certainly have not been able to cajole leaders in nuclear states to palm one off to them—though a war inflicting more death than Hiroshima and Nagasaki combined was launched against Iraq in 2003 in major part under the spell of fantasies about such a handover.14

More generally, the actual terrorist “adversaries” in the West scarcely deserve accolades for either dedication or prowess. It is true, of course, that sometimes even incompetents can get lucky, but such instances, however tragic, are rare. For the most part, terrorists in the United States are a confused, inadequate, incompetent, blundering, and gullible bunch, only occasionally able to get their act together. Most seem to be far better at frenetic and often self-deluded scheming than at actual execution. A summary assessment by RAND’s Brian Jenkins is apt: “their numbers remain small, their determination limp, and their competence poor.”15 And much the same holds for Europe and the rest of the developed world.16 Also working against terrorist success in the West is the fact that almost all are amateurs: they have never before tried to do something like this. Unlike criminals they have not been able to develop street smarts.

Except perhaps for the use of vehicles to deliver mayhem (though this idea is by no means new in the history of terrorism), there has been remarkably little innovation in terrorist weaponry or methodology since 9/11.17 Like their predecessors, they have continued to rely on bombs (many of which fail to detonate or do much damage) and bullets.1

### North Korea War---1NC

#### No Korean war---deterrence holds AND Kim’s bogged down with Russia and internal disputes.

Roy ’24 [Denny; 2024; Senior Fellow at the East-West Center in Honolulu, Ph.D. in political science at the University of Chicago; The Interpreter, “North Korea is not about to start a war,” https://www.lowyinstitute.org/the-interpreter/north-korea-not-about-start-war]

Alternatively, Carlin and Hecker’s analysis is far better suited to a more reasonable conclusion: that since 2019, Kim’s government has shifted its efforts, to court outside assistance in the pursuit of its security and economic objectives away from reaching agreements with the United States and South Korea and toward a closer partnership with the China/Russia Bloc. That conclusion implies continued tensions on the Korean Peninsula, but not a second Korean War.

Kim gave a lengthy speech to the DPRK legislature on January in which he elaborated about relations with South Korea. As widely reported, Kim said the DPRK will no longer work toward reunification, and will henceforth characterise the South as the “invariable principal enemy” rather than “consanguineous”. He called for revising the DPRK constitution to remove verbiage implying that North and South are parts of the same country and calling South Koreans “compatriots.”

As some analysts have pointed out, recasting South Koreans as enemies rather than cousins might reduce the psychological dissonance that would accompany a decision to go to war. For decades up to now, however, Pyongyang’s official policy of striving for reunification did not prevent the DPRK government from making threats of mass violence against South Koreans (see, for example, the threat make Seoul a “sea of fire”).

Kim Jong-un would not be sending stocks of ammunition and missiles to Russia if he planned to fight a war on the Peninsula in the immediate future.

Furthermore, in the same speech, Kim said plainly that he does not plan to start a war. “We will never unilaterally unleash a war if the enemies do not provoke us,” he said. “There is no reason to opt for war, and therefore, there is no intention of unilaterally going to war.”

Kim says the policy change on reunification is a reaction to an “escalation” in hostility from the DPRK’s adversaries. He specifically cites South Korean discussion about the possible “collapse” of the North Korean state, “remarks made by the US authorities about the ‘end of our regime’”, US-South Korea joint military exercises, the US policy of nuclear-weapons-capable platforms regularly visiting South Korea, and enhanced trilateral cooperation between the United States, South Korea and hated Japan. Relatedly, South Korea has announced it is building a capability to pre-emptively kill Kim and other top North Korea officials. Pyongyang’s seemingly warlike behaviour is partly reactive.

We don’t need to rely on Kim’s word. He would not be sending stocks of ammunition and missiles to Russia if he planned to fight a war on the Peninsula in the immediate future.

An even stronger reason to doubt the Carlin-Hecker thesis is this: the combined forces of the United States and South Korea give them overwhelming military superiority over the DPRK at both the conventional and nuclear levels.

This year will see important elections in both the United States and South Korea. A return of Donald Trump to the White House is possible. Pyongyang might hope that a sharp jolt will force an overstretched Washington to return to negotiations ready to offer concessions, such as relief from economic sanctions, to reduce the number of global hotspots. Therefore, it might make sense for Kim to order a lethal military action as a means of gaining political leverage – but only if he was confident Seoul and Washington would understand the attack as limited and isolated.

This leads to an important observation: it is likely that much of the credibility of the Carlin-Hecker thesis rests on the widely-held but questionable assumption that Kim’s decision-making is “erratic,” and therefore need not make sense.

Kim needs to deter his enemies, which explains his military build-up and missile tests. He fears political contamination from South Korea, which may have pushed him to make official his de facto non-reunification policy. Welcoming a general war, however, would not solve any of Kim’s problems.

### UELE---1NC

#### No “use it or lose it” strikes.

Massa ’21 [Mark J. and Matthew Kroenig; June; MA, Security Studies, Georgetown University, associate director, Forward Defense practice, Scowcroft Center for Strategy and Security; PhD, Berkeley, Professor of Government at the Edmund A. Walsh School of Foreign Service at Georgetown University; Atlantic Council, Scowcroft Center for Strategy and Stability, “Are Dual-Capable Weapon Systems Destabilizing? Questioning Nuclear-Conventional Entanglement and Inadvertent Escalation,” https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/are-dual-capable-weapon-systems-destabilizing/]

While superficially plausible, closer examination reveals that “use it or lose it” rests on a weak logical foundation and does not, in fact, provide rational incentives to use nuclear weapons for three reasons.19

First, “use it or lose it” is a false dilemma. A false dilemma is a common logical fallacy that occurs when one is presented with a choice between two unattractive options when, in fact, there are more than two options available. The false dilemma presented by “use it or lose it” is that leaders with vulnerable nuclear forces have a choice between either using their nuclear weapons or losing them. Rarely, if ever, however, in international politics, do leaders face a choice between suffering a disarming attack and launching an intentional nuclear attack of their own. They have many other options. They can surrender. They can conduct diplomacy. They can retaliate with conventional military force. They can launch a nonnuclear strategic attack, such as in space or cyberspace. They could take other steps to ensure the survivability of their forces, such as to flush submarines to sea, place nuclear-armed bombers on alert, or activate mobile missile forces. They can engage in nuclear brinkmanship, raising the risk of nuclear war through nuclear alerts or veiled nuclear threats in the hope that the other side will back down. Intentionally launching a nuclear first strike is not the only, or even the most obvious, response for a state that fears it might become the victim of a disarming attack.