# 1AC---Round 7---DRR

## 1AC

### Bureaucracy Adv---1AC

#### Advantage 1: BUREAUCRACY.

#### Trump has axed federal collective bargaining, dooming the administrative state.

Jennifer Dorning 25. President of the Department for Professional Employees at the AFL-CIO. "Congress must immediately restore the union rights of federal employees." The Hill. 9/1/2025. thehill.com/opinion/congress-blog/labor/5477873-trump-union-busting-attack

In March, President Trump signed an executive order intended to strip nearly 1 million federal employees of their union rights at multiple agencies.

Over the last month, the Trump administration has started to implement the president’s union-busting executive order by unilaterally and unlawfully terminating union contracts at the Environmental Protection Agency, Federal Emergency Management Agency, U.S. Citizenship and Immigration Services and the Department of Veterans Affairs.

Union rights provide federal employees a way to improve their workplaces and report wrongdoing. The loss of union rights, therefore, not only impacts federal employees, but also the American people, who depend on the federal government and the services it provides.

That is why, on this Labor Day, we are calling on Congress to immediately pass the Protect America’s Workforce Act.

The Protect America’s Workforce Act is bipartisan legislation introduced by Reps. Brian Fitzpatrick (R-Pa.) and Jared Golden (D-Maine) and cosponsored by 222 members of Congress.

It restores the collective bargaining rights of the union federal employees impacted by President Trump’s attempted union-busting. It has the majority support needed to pass if it came to the House floor for a vote today.

Members of Congress on both sides of the aisle back the Protect America’s Workforce Act because they know that employees with a voice in their workplace have higher morale and are able to better serve the American people.

In fact, Republicans supporting the bill wrote to President Trump emphasizing that collective bargaining in the federal government plays a positive role by providing a structured way for employees and management to communicate and address workplace concerns.

Specifically, through collective bargaining, federal employees are able to offer expertise and experience that improves processes, reduces waste and generates efficiencies.

Officers at the Transportation Security Administration have been able to negotiate for policies that provide for better work-life balance and expanded benefits that have helped performance and retention at the agency.

Additionally, collective bargaining at the Department of Veterans Affairs led to an improved promotion process, which is important to ensuring the agency can retain talented staff.

At the Social Security Administration, union members secured more time for employees to attend and complete training that helps them perform their responsibilities more effectively.

Union rights also provide federal employees with a voice and protections that allows them to push back against politically motivated requests to compromise professional standards or ignore facts without putting their jobs at risk.

For example, EPA staff secured scientific integrity provisions and whistleblower protections in their union contract to ensure federal scientists cannot be pressured to alter climate data to align with political agendas. FEMA employees, who support communities that have suffered from natural disasters, negotiated for the right to refuse unlawful orders.

If federal employees’ union rights are not restored, we can expect to see a politicized civil service that puts politicians and special interests ahead of the American people. This means that the effectiveness of government services will suffer, which will result in worse outcomes for everyday Americans.

#### Only unions save the bureaucracy from politicization. Trump exacerbated a long-term trend but isn’t an anomaly.

Donad Moynihan 21. Professor of public policy at the University of Michigan, Ph.D. in public administration from Syracuse University. "Populism and the Deep State: The Attack on Public Service Under Trump." *Democratic Backsliding and Public Administration*, 151-159.

Introduction

This chapter addresses the ways in which the Trump administration has exemplified and sped up a long-term trend toward democratic backsliding in the United States by undermining public sector institutions, with particular focus on the federal career public service. While previous administrations have looked for ways to exert closer control over parts of government they are ideologically at odds with, the Trump administration has gone further. It has sidelined administrative expertise and scientists in many areas, selecting senior leaders whose lack of qualification is frequently matched only by their disdain for their organizational mission. To achieve its goals, the Trump administration has shown a willingness to push the boundaries of the law beyond its breaking point. While avoiding a direct attack on the civil service via a governmentwide reform, the Trump administration has sought to weaken the ability of public sector unions to negotiate for benefits, punished individuals and units deemed not to be politically loyal, and weakened oversight bodies such as Inspectors General. All of this has been accompanied by a rhetoric of delegitimization, where the President and his supporters frequently invoke conspiratorial theories of “deep state” plots that have been embedded in the Republican Party. The broader picture suggests that Trump is an outlier, but not an anomaly, in terms of US democratic backsliding.

There can be little doubt that the Trump administration counts as a populist movement. What Mudde and Rovira Kaltwasser (2017, 6) define as populism surely fits: “a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the [general will] of the people.” Trumpism has few fixed ideological points of reference. Its marriage to traditional Republican policies has resulted not in more redistributive policies via a more generous welfare state, but greater tax cuts tilted toward higher earners, and economic nationalism characterized by trade wars and reduced immigration (both legal and illegal). The rhetorical marriage of Trumpism and the paranoid style that resided largely in the Republican Party since the 1960s has been a more natural union, built on shared assumptions of “1) a small number of people is (2) secretly plotting to (3) do significant harm” (Rank 2020, 363), where the members of the career civil service are cast as among the usual suspects (Hofstader 2012).

Trump’s great gifts as a politician are portraying the world in in Manichean terms, as a battle between the forces of evil and good. He began his official campaign by presenting Mexican immigrants as rapists, and has continued to portray immigrants and shadowy “globalists” as invaders threatening America. Even before he became a candidate, he built a base within the Republican party by joining the birther movement that questioned whether President Obama was actually born in America, and by extension, whether his Presidency was legitimate. Opposition Democrats are routinely portrayed as corrupt. This populist rhetorical style has been extended to the public sector. While previous Presidents engaged in some form of bureaucracy bashing, Trump went dramatically further, portraying the broader administrative system as a “deep state” or “swamp” that only he can fix.

The difficulty in any evaluation of Trump’s populism is simply to make sense of the volume of material, separating a grandiose tweet from a meaningful administrative change. What would be extraordinary in any other administration – a senior career official making allegations of serious wrongdoing against the President for example– has become routine. The other challenge is separating broader patterns of democratic backsliding from those of the Trump administration. As we shall see, the erosion of public sector institutions did not start with Trump; many were already in place, though not previously exploited by a leader with such clear authoritarian tendencies. The Trump administration has pursued democratic backsliding with greatest effects in the politicization of personnel and norms, and an evasion of traditional mechanisms of traditional accountability.

These tendencies, and the costs that they raise, are illustrated in two min case studies examined here: President Trump’s impeachment process, and a botched response to COVID-19. The chapter concludes by discussing how the intense polarization of the US electorate provides a protective shield for the Trump administration. This raises perhaps the most worrying aspect of the US case: democratic backsliding is largely understood through a partisan perspective, with one party largely the author of such backsliding, and with its backers largely indifferent or supportive of the process. It becomes hard to see how a polarized electorate can break this cycle.

Patterns of Backsliding

How do we recognize democratic backsliding in the context of public administration? Bauer and Becker (2020) identify centralization of structure and resources, and politicization of personnel or norms, and evasion of accountability as key indicators (see also the introduction of this volume).

Table 1 previews how the Trump administration stacks up in terms of the five criteria of backsliding in public administration. It also seeks to reflect that such tendencies have been long part of the US federal government. Indeed, one aspect of US exceptionalism is populist suspicion of the federal bureaucracy, which was evident even in the origins of the state. One of the chief criticisms of Alexander Hamilton by his Republican rivals was that he was creating an army of federal bureaucrats. President Andrew Jackson heralded the spoils system as a way to prevent a permanent class of bureaucrats. The introduction of the civil service system at the end of the 19th century tempered this pattern, and for much of the 20th century, good government advocates succeeded in expanding investments in expertise and neutrality by giving federal employees more protections (Gailmaird and Patty 2013).

Whatever consensus existed about the role of the administrative state in supporting democracy, it was an American one. The career civil service grew partly by Presidents expanding career status protections to their appointees, while still retaining a small army of political appointees to help them run the government (Ingraham 1995). The “paranoid style” of American politics framed federal bureaucrats as part of the ruling elite, as evidenced by McCarthyite attacks on career civil servants as Communists during the 1950s (Hofstader 2012).

In the decades that followed, the parties moved further apart in their evaluation of the career public service. The Nixon administration undertook a campaign of political control of career bureaucrats, aspects of which would be repeated by future Presidents, but used most aggressively by Republicans and taken to a new level by Trump. Nixon and his successors overriding concern was that federal bureaucrats were self-interested, intent of protecting their programs, unresponsive to any leader seeking change, and in particular, to conservative Presidents seeking to reshape and reduce the administrative state (Moynihan and Roberts 2010).

For scholarship, trends in research followed suit to some degree. The applications of principal agent theory that emerged, for example, began with assumptions of agent misbehavior, but offered little concern about the motives of the principal (Niskanen 1971; Moe 1985). Some research documented the tensions between bureaucrats and their political masters during the Reagan (Durant 1992; O’ Leary 2006) and Bush administrations (Lewis, 2008; Moynihan and Roberts 2010; Resh 2015), calling into the question the costs of a more politicized presidency in terms of agency effectiveness. Articulations of the American state that emphasized the role of bureaucracy as a democratic safeguard (e.g. Rohr 1986) fell out of fashion in both public administration and political science.

Centralizing Control

The Nixonian model for Presidential control took two main forms (Moynihan and Roberts 2010). One was centralization of policymaking, the other was control of personnel. The first approach fits well with Bauer and Becker’s (2020) strategy of centralizing structures. The White House, rather than individual agencies where career staff held sway, became the heart of new policymaking from the Nixon administration on. In this, the Trump administration was similar to past administrations, but with one obvious difference. Members of the White House inner circle included the President’s own family, and others with little experience in, and much skepticism of, government. At various times, the President’s son-in-law was tasked with leading initiatives addressing the opioid epidemic, diplomatic relations with Mexico and China, criminal justice reform, Middle East peace, and a shadow COVID-19 task force, and overall government reforms, where he promised to make the federal government “run like a great American company.”

While past President’s had drawn on “kitchen cabinets” of informal advisers, the quality of those advisers and their roles were different under Trump. Three members of Trump’s private Mar-A-Lago club were given extraordinary influence over the Department of Veteran’s Affairs, the largest federal agency in terms of employees, to the point that they helped to push out its Secretary (Arnsdorf 2018). The President directed his private lawyer, Rudy Giuliani, to represent him to foreign governments, which partly precipitated his later impeachment. Trump avidly watched and consulted with conservative television commentators, with a revolving door between the White House and its most vocal media defender, Fox News, that sometimes resembled a state-controlled propaganda outlet (Mayer 2019).

The centralization of resource allocation that Bauer and Becker (2020) identify fits less well with the US context, given the separation of powers in the budget process. As many Presidents have learned, Congress jealously guards the power of the purse. For example, President George W. Bush proposed redesigning the federal budget around performance goals, but met firm opposition even with a Republican Congress (Moynihan 2013). Similarly, Trump has proposed large cuts in his proposed budget, leading to the unusual sight of agency heads explaining to Congressional appropriation committees that they need less money. But the President’s budget proposal is just a proposal, with limited influence on actual budget decisions. The President does have some powers in budget execution. As detailed below, Trump’s has abused those powers, resisting Congressional controls. In the context of the impeachment process, efforts to centralize resources backfired by moving the White House into the realm if illegality, but the standard of a powerful President exerting tight policy and resource control dates back to Nixon, with similar skirting of the law.

Politicization of Personnel

The second form of control pursued by prior Presidents was closer political control of the bureaucracy. Here, the Trump administration again extends past patterns, moving beyond the norms of past Presidents to a considerable degree.

The United States is unusual in the prevalence and power of non-career political appointees. The reliance on about 4,000 appointees is partly the historical echo of the spoils system, when government positions were effectively treated as the property of political parties, and a partly reflects a conservative suspicion of bureaucrats, and with it an abiding belief that the President needs his own people. This philosophy reached an apotheosis under Trump, who sees the career civil service as “the deep state” permanently plotting his demise.

It is easy to think of politicization of personnel as occurring on one dimension: the neutral expert is replaced with someone selected on the basis of political loyalty. The degree to which that loyalty matters in selection, the greater the politicization. If political appointees offer responsiveness to elected officials through their loyalty, this responsiveness comes at a cost. The best evidence we have is that appointees generate poorer organizational performance relative to career officials (Lewis 2007). On this dimension, the Trump administration has assuredly become more politicized. Many experienced Republicans were reluctant to work for him given his volatility and character (Rein and Philip 2017). The administration relied heavily on political loyalists who often had little interest in or knowledge about their job, or lobbyists looking out for clients (Lewis 2018). To an unprecedented degree, senior leaders appointed to agencies expressed suspicion or outright hostility to elements of their agency’s mission in a vast array of policy areas, including environmental, energy and federal land regulation, public education, housing, health and social programs.

There are two other relevant criteria to politicization that effects the quality of government and seem especially relevant under populist regimes. The first is what we might call depth. The Trump administration simply does not have enough qualified players to field a full team. The second criterion is stability. The expert is generally assumed to be a career official, with job security that allows them to last from one administration to the next. The appointee is less secure, since they serve at the pleasure of the President. In the best-case scenario, the timeline for an appointee in the US is usually 18-24 months. In the Trump administration, turnover is higher. Trump expressed a stated preference for temporary appointees, has removed many key officials, and in some cases proposed nominees who will not be approved by the Senate. Four out of five senior White House positions have turned over during the Trump presidency, and one-third were still vacant even by 2020 (Steinhauer and Kanno-Youngs 2020).

Such temporary leaders cannot establish medium-term goals, make credible commitments or offer a vision for the direction of their agency. They have all of the credibility of a substitute teacher. By one calculation, for the most senior Cabinet level jobs have been filled by “acting” officials one-ninth of the time, about three times the rate of the prior Obama administration (Blake 2020).

One implication of the lack of depth is tied to the lack of stability, which is the role of career officials in filling out leadership positions. Presidents tend to concentrate their most qualified appointees in high profile agencies, policy settings where they want to make an impact, or agencies they distrust (Lewis 2008). In agencies lacking these characteristics, it is more likely that career officials are left in senior positions of leadership. This may seem to provide a protection against democratic backsliding, and perhaps is better than the counterfactual. But the US system is designed to work with political appointees in place. For example, the Federal Vacancies Act of 1998 allows career officials to step into political appointee leadership roles normally subject to confirmation of the Senate, but limits the number of days that an official can hold a senior position as “acting” leader to less than a year. And so, the instability of the system continues even when career officials are designated as leaders.

These aspects of politicization – expertise, depth, and stability – have combined, resulting in a shambolic outcome, both in terms of a more politicized personnel and performance. In other areas Trump has undermined federal employee protections. In terms of legislature, Congress passed the Department of Veterans Affairs Accountability and Whistleblower Protection Act in 2017, which weakened employee protections in the largest federal agency, making it easier to fire them and harder for employees to appeal disciplinary actions. At the same time, Trump has offered no serious attempt to legislate governmentwide civil service reform. A proposal to eliminate the governmentwide human resource agency, the Office of Personnel Management, was rebuffed by Congress. In part, this is because the White House generally lacks policy entrepreneurs that could turn such ideas into legislation, reflected in Trump’s generally poor legislative record.

The irony of Trump’s legislative failures is that he turned to the very administrative state that he has denounced. A huge proportion of his more significant policy goals – in immigration, regulatory and welfare policy areas for example – have been pursued via executive orders and the rulemaking process.

Such administrative tools have also been used for public administration policy changes. Trump signed Executive Order 13839 in 2018: Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, which set up a broader governmentwide framework to make it easier to fire and discipline career employees. He has pursued a broad battle against public sector unions. One rule allows federal employees to opt out of paying their union dues, a strategy which had elsewhere been used by Republican governors to significantly weaken public unions in their states. As far back as 2017, White House officials mapped out the goal of decertifying such unions as a way of undercutting the “left-wing ideologues” who run them (Kullgren 2019). In January of 2020, President Trump proposed eliminating collective bargaining in the Department of Defense, creating the potential to remove bargaining rights from 500,000 federal employees. This pattern again echoed the past. The Bush administration had similarly sought to remove collective bargaining rights from Department of Homeland Security employees when it was created (Moynihan 2005).

For federal employees, there are obvious concerns about how weakening bargaining rights will hurt their pocketbook. In his proposed budgets, Trump has sought to make employees pay more toward their benefits and limit pay raises. There are broader concerns not just about whether such cuts undermine the ability of the federal government to recruit and retain talent, but also about the potential for a less-protected federal workforce to be more subject to politicization. Unions are not perfect, but they offer one organized form of resistance against politicization, and have been willing protest the Trump administration’s efforts in those areas. Stripped of their bargaining rights, they become less relevant, and less able to defend their members from politicization.

#### An unprotected civil service unleashes “the biggest portfolio of catastrophic risks ever.”

Loren DeJonge Shulman 22. Lecturer of international affairs at George Washington University, M.P.P. from the University of Minnesota, "Schedule F: An Unwelcome Resurgence." Lawfare. 8/12/2022. lawfaremedia.org/article/schedule-f-unwelcome-resurgence

Best-Case Scenario: Weakening the Civil Service Risk Management Role

Over 2 million career civil servants working across dozens of large and small agencies are hired under the competitive service process. More than 70 percent work in national security-oriented agencies, such as the Defense Department, the State Department, the Treasury Department, and the Energy Department. Many more work in technical, administrative, policy, and legal roles. They do work that often results in news that makes headlines—negotiating sanctions policies, advising on the legality of drone strikes overseas, maintaining relationships with allies and partners, preparing procedures and resources for future pandemic response—and a great deal more behind the scenes that may end up on a cabinet secretary’s or president’s desk for consideration.

Author Michael Lewis describes civil servants’ responsibilities in the “The Fifth Risk,” calling the U.S government the manager of “the biggest portfolio of [catastrophic] risks ever managed by a single institution in the history of the world.” Some are obvious—the threat of nuclear attacks, for example—but most are glacial and opaque, demanding a portfolio of reliable and steady risk managers who can prioritize the nation’s security without fearing for their job security.

Thousands of such “risk managers” who work in policy-adjacent roles would be implicated by a Schedule F policy that removes the civil service protections set out for them in the Civil Service Reform Act of 1978. Civil servants today are protected against possible political retaliation, coercion, or removal by presidents and political appointees. They must be hired on the basis of relative ability, knowledge, and skills, using fair evaluation metrics. And they are protected against reprisal for whistleblowing.

These rules are frequently shorthanded derisively in (false) assumptions that civil servants cannot be fired. To the contrary, there are set guidelines for when federal employees can be lawfully terminated and disciplined based on performance or misconduct. The antiquated federal hiring process faces similar—albeit fairer—criticism, but its slowness is intended to screen for those who have “a high standard of integrity and trust to promote the interests of the public” and for good reason. Overall, these critiques misunderstand that the competitive hiring process and subsequent protections are what make it possible for civil servants to perform exceptionally, particularly in high pressure, complex policy areas where the government is managing extreme risk on behalf of the country, such as national security.

By protecting them from political reprisal, these rules give civil servants in policy roles the foundation to offer advice that may be tough for presidents to hear, to execute policies with high stakes, to report illegal activity and misconduct as a part of their duties, and to trust that they and their peers owe their first fealty to protecting and defending the Constitution. They do all of this with the confidence that their integrity will be rewarded and protected.

At best, shifting policy-aligned roles to Schedule F roles would have a chilling effect on such policy experts whom we rely on for their unique expertise, candor, and integrity, potentially making them more cautious about the advice they give, the portfolios they support, the risks they take in defending the Constitution, and their willingness to call out malfeasance or bad news.

Worst-Case Scenario: Harming National Security

At its worst, Schedule F will make it possible for presidents to remove thousands of experts who make U.S. global leadership possible. By shifting protected civil servants to at-will employees, Schedule F makes it possible to fire them without the due process currently owed to civil servants. In other words, civil servants could be fired for any reason at all—for giving unwelcome advice, for prior jobs, for being the subject of unsubstantiated accusations of any type, for perceptions of partisan affiliation, or simply for being in a role the president wishes to open up for a loyalist.

Some Schedule F advocates make clear that large-scale removals are under consideration and that removal, not oversight, is their ultimate goal for Schedule F. “Fire everyone you’re allowed to fire,” one commented, according to the Axios reporting. “And [then] fire a few people you’re not supposed to, so that they have to sue you and you send the message.”

Because the policy would also allow replacement of current civil servants without a competitive process, replacements for nonpartisan civil servants could be made without regard to qualification and suitability, or based on partisan affiliation, creating a new kind of political appointee.

The potential loss of talent could be wide and extremely damaging. Axios also reported that, according to sources close to Trump, the former president intends to “go after” the national security establishment as a matter of “top priority,” including those in the intelligence community and State Department. Policy roles that could be reclassified as Schedule F could cut across many high-import areas: Russian defense strategy, Iranian nuclear programs, or Chinese regional security capabilities, among hundreds of other categories. The harm to national security of removing and replacing civil servants—whose work, as we have established, requires expertise, relationships, and clear understanding of risk—with individuals with no required qualification except loyalty to a single individual is self-evident.

But, should a future president pursue this action, beyond missing an endless list of risk portfolio managers, the United States will miss something more fundamental to its success and security: its reliability. American alliances are valuable because of the steady undercurrent of the nation’s civil servants who maintain networks, expertise, and consistency regardless of who inhabits the Oval Office. Despite its turmoil, the American political system is a strong model and international interlocutor because its civil servants serve expertly and well across presidential administrations of any political affiliation. Schedule F, by stifling or removing long-serving civil servants, would make the United States a weaker, less reliable, and less trusted partner.

Why Shouldn’t the President Get a Say?

A president’s desire to shape a policy team, and to be sure it is filled with strong performers who are closely aligned with their views, is understandable. After all, presidents are elected to implement their chosen policy agenda, and having a team around them who can work in support is critical. But presidents already can wield enormous influence over both their closest policy advisers and the most far-flung agency overseers: through the 4,000 political appointees who are named, or removed, at the pleasure of the president. The Schedule F proposal would be an enormous and unnecessary expansion of this already poorly utilized system.

Most administrations never come close to seeing all those politically appointed policy roles filled despite the tremendous access and leverage such appointments bring them. And some presidential teams still struggle to make best use of political appointee and career civil servant partnerships. Rather than adding more chaos and instability with a Schedule F policy, administrations could be maximizing the opportunity that comes with leveraging their career and political leaders together. As noted in a recent Partnership for Public Service and Boston Consulting Group report:

Career executives bring program and policy expertise from their long familiarity with their agencies which can help them manage programs better and work more effectively with external stakeholders and inside actors. Politically appointed leaders can bring energy, risk-taking and responsiveness into an agency’s decision-making process which can improve performance. When leaders are matched with missions, agendas and teams that align with their distinct approaches and perspectives, they can find success in creating a government that is more efficient, innovative and responsive to the needs of the public.

The civil service system is not perfect. The pay system has its origins in World War II. The hiring process, though well-intended, is glacial. The permeability of the system in an era that requires close understanding and collaboration across sectors is limited. But the fundamentals are powerful, and they serve as a critical ingredient to the success of the United States’ global leadership and the sustainability of its democracy.

The U.S. government is able to take on high-risk, high-cost ventures—nuclear security, pandemic response, environmental clean-up, food safety, and more—because civil servants are hired based on qualifications, not party affiliation; give advice based on data and integrity, not fear of reprisal; and owe allegiance to the Constitution, not the president. It needs to stay that way.

#### And guarantees that the cumulative effect of multiple risks is extinction.

Henry Farrell 25. Professor of international affairs at Johns Hopkins University, Ph.D. in government from Georgetown University. "When the polycrisis hits the omnishambles, what comes next?" Programmable Mutter. 2-21-2025. programmablemutter.com/p/when-the-polycrisis-hits-the-omnishambles

A couple of years ago, on my now deleted Twitter account, I had a brief joking dialogue with Adam Tooze, about the concept of polycrisis, which he didn’t invent but has popularized. Adam explains the polycrisis as a concatenation of big problems - e.g. climate change; the crisis of democracy; global migration - that not only hit simultaneously but plausibly make each other worse. I pointed to another neologism, the “omnishambles” (from Arnaldo Ianucci’s dark comedy, The Thick of It - Wikipedia definition), describing governmental situations in which no-one has any idea what is going on or what to do, and policy-making is utterly shambolic and fucked up. By construction, I suggested, there must be such things as the polyshambles and omnicrisis.

It wasn’t a very good joke, but I think that there is a useful intuition behind it, which is worth turning into an entirely unfunny diagnosis. We are in a world where our problems are getting bigger, and are feeding on each other. Those of us who live in the U.S. are at the beginning of a sudden and dramatic worsening of the quality of government policy making. In other words, we are about to see a collision between the polycrisis and the omnishambles. So how do we think about this collision usefully?

From this perspective, both Paul’s post, and our op-ed map specific pieces of a larger and more complex problem. And when I use the term ‘complex,’ I use it advisedly. The polycrisis is a simplified way of talking about the world as a complex system. In Scott Page’s description, a “complex system consists of diverse entities that interact in a network or contact structure.” In less academic language, it is a larger system composed of smaller sub-systems that interact with each other. Even when these sub-systems are relatively simple, the whole may be complex and unpredictable. And when they are themselves complex …

This way of thinking about the world helps clarify what the polycrisis involves. Complex interactions may give rise to positive feedback loops, in which different parts of the system reinforce each other so as to induce instability. To apply this to the polycrisis, think crudely of how climate change may increase the likelihood of large scale migration across borders, leading to crises of democracy and government legitimacy, which in turn makes governments less capable of regulating the economic activities that make climate change worse. But complex systems may also give rise to homeostasis, in which some parts of the system become adaptive, perhaps dampening down positive feedback loops and responding dynamically to unexpected changes in the environment.

One of Paul’s early books builds on these ideas (although he later became skeptical, since they are notably better at describing the phenomenon than predicting how it will unfold, let alone providing precise guidance on what to do about it). Indeed, the Minsky cycle is exactly an example of how government may act to limit the likelihood of positive feedback loops getting out of hand. Without regulation, irrational exuberance feeds upon itself and the behaviors it induces. The role of the Federal Reserve, famously, is to order “the punch bowl removed just when the party [is] really warming up.”

Behind Paul’s post - and our piece - lies a possible understanding of the larger situation we face. In good times, we have an environment in which the problems are not too big, or can be dealt with one by one, or, ideally, both things are true at once. We have a government that is capable of dealing with them, acting as a kind of homeostatic regulator, which dampens down the possible chaos without, and perhaps even takes advantage of the unexpected possibilities it provides (while avoiding eviscerating the dynamical aspects of the economy - one can absolutely have too much government).

We are not in those good times. Instead, we are in an increasingly unpredictable environment with multiple major problems reinforcing each other in complex ways (the polycrisis). At much the same time, the most significant government in the world is absolutely not acting as a homeostatic regulator. Instead, of dampening down the chaos, it is accelerating it, while ripping out large swathes of the administrative apparatus that potentially allow it to understand the environment and influence it.

Trump’s second term is going to be the apotheosis of the omnishambles. And it is potentially even grimmer than that. In an ideal world, there is at least a second order feedback loop such that bigger problems leads to better government and the expansion of capacity for government to deal with these problems in conjunction with other modes of problem solving (markets; democracy). In the world we are in right now, there seems to be just the opposite set of feedbacks. Bigger problems are not leading to better government in the U.S. and elsewhere, but to worse.

As noted already, complexity theory is much better at describing problems like this than at predicting how they will turn out, let alone solving them. But it at least provides a framework for seeing how the different sub-systems might interact together.

The crises we are likely to face in Trump’s second term are not simply going to be crises of financial regulation, or of tariffs, or of withdrawn security guarantees, or breakdowns of scientific knowledge, or loss of capacity to respond to emergencies. They are likely, instead to involve the interactions of two or more of these factors with each other, and with the pre-existing problems of the polycrisis. Mapping out - even crudely - the relationships between these different sub-systems will help us be better prepared for what happens, even if we cannot fully anticipate it.

#### Small mistakes cascade. Our internal link is about expertise, not policymaking authority.

Peter Earle 26. Director of economics and senior economist at the American Institute for Economic Research, Ph.D. in economics from the University of Angers, M.A. in economics from American University. "Expertise Remains Indispensable." American Thinker. 1-1-2026. americanthinker.com/articles/2026/01/expertise\_remains\_indispensable.html

Indeed, even the loudest critics of what’s sloppily been called “credentialism” quietly rely on it every day. Few people are interested in performing their own surgery or putting it in the hands of the Domino's Pizza deliveryman (who may fancy himself a “polymath” — another word which has strayed from its original meaning). And even if I know, roughly, how to fix a glitching electrical panel, I’m likely to leave that to people who do it daily. Amid the churlish cry of generalism-for-all, we continue to trust surgeons to operate, airline pilots to fly, structural engineers to calculate loads, anesthesiologists to manage unconsciousness, and specialized mechanics to keep complex machines from failing at speed. We do so not because these professionals are infallible, but because long training, apprenticeship, and error correction still matter in a world of growing, unforgiving complexity.

Modern systems — technological, economic, social/cultural — are far from intuitive. They are tightly coupled, layered, and increasingly nonlinear. Small mistakes can cascade. (Ask any actuary.) Partial understanding is nearly always more dangerous than ignorance when it encourages confident intervention without awareness of second- and third-order effects. That’s precisely why expertise developed in the first place—not to exclude the public, but to reduce error in domains where error is costly.

Ironically, errors within expert communities tend to fail slowly and visibly: they’re constrained by peer review, professional norms, and reputational risk. Popular error, by contrast, fails quickly and at scale. When decisions are driven by self-important narrative, identity politics, or viral consensus rather than disciplined analysis or hard-won experience, corrections come late — often only after damage has already been done. History suggests that major disasters are more often born of mass enthusiasm and political shortcuts than of excessive technical caution.

None of this, of course, implies blind deference. Expertise should inform decisions, not dictate values. Specialists are good at explaining constraints, tradeoffs, probabilities, and risks: not at deciding collective goals. Much of the public backlash of recent years stems from role confusion, when technical advice was presented as moral certainty or political necessity. The remedy for that failure is not an infantile screed to abandon expertise, but to restore its proper boundaries.

Throwing away accumulated knowledge does not empower citizens; it forces complex choices to be made by guesses, intuition, tribal loyalty, or rhetorical force. Societies that do this do not become freer or wiser. They become more fragile.

The lesson of the past few years is not that expertise is obsolete or, in and of itself, dangerous. It is that expertise, severed from humility and institutional restraint, can be misused and even weaponized. The correct response is accountability, not a ridiculous fantasy that we can replace hard-won competence with a disingenuous generalism, confidence, and crowd wisdom. Civilization does not advance by pretending everyone is equally qualified to do everything. It advances by recognizing that specialization, while imperfect, remains indispensable — and that abandoning it is not liberation, and hardly progress, but self-inflicted blindness.

#### Weak administrative capacity invites terrorism.

Timothy Snyder 25. Professor of history at Yale University, Ph.D. in modern history from the University of Oxford. "The Next Terrorist Attack." Thinking About... 11-1-2025. snyder.substack.com/p/the-next-terrorist-attack-26b

The rank and file of the critical institutions are subjected to administrative hostility and chaos. The names of active CIA officers have been sent on open emails to the White House, and in a Signal chat in which a reporter was included. CIA employees have been urged to take early retirement. CIA officers involved in any way in diversity recruitment have been fired (a judge has blocked this, for the time being).

FBI special agents have been exposed to similar indignities. Top FBI officials have been pressured to resign and have done so. The Trump administration is pursuing FBI special agents who were involved in prosecutions of people who stormed the Capitol on January 6th 2021.

These people run national security, intelligence, and law enforcement like a television show. A media strategy does not stop actual terrorists. It summons them.

Terrorism is a real risk in the real world. The constant use of the word to denote unreal threats creates unreality. And unreality inside key institutions degrades capability. Security agencies that have been trained to follow political instructions about imaginary threats do not investigate actual threats. Fiction is dangerous. Treating the administration’s abduction of a legal permanent resident as a heroic defense against terror is not only mendacious and unconstitutional but also dangerous.

This administration makes the United States look vulnerable. Americans under the spell of Trump’s charisma might imagine that strength is being projected. Not so. To prospective terrorists we look erratic and weak. Even apparently unrelated policies — such as enabling foreign disinformation, gutting environmental protection, undoing weather forecasting, ending food inspections, and undermining disease control — make life easier for terrorists and open avenues of attack. By taking apart the government, crashing the economy, and dividing the population, Musk and Trump invite attention of the worst sort, from people who wish to hurt Americans.

Who are such people? Three possible groups of perpetrators of a major terrorist attack in the United States are native right-wing nationalists or white supremacists (“domestic violent extremists”), Islamicists, and Russians.

#### Counterterror expertise staves off global war.

Colin Clarke & Christopher Costa 25. Director of research at the Soufan Group, Ph.D. in international security policy from the University of Pittsburgh’s Graduate School of Public and International Affairs. Adjunct associate professor of at Georgetown University's Center for Security Studies, former special assistant to the President and senior director for counterterrorism at the National Security Council. "Terrorism Means Something Different Now." Foreign Policy. 6-25-2025. foreignpolicy.com/2025/06/25/counter-terrorism-iran-united-states

Yet within the counterterrorism community, personnel and funding have been drastically reduced, including by the Department of Government Efficiency, or DOGE. Resources have been shifted away from the counterterrorism mission, and replacing a generation of analysts and operators with indispensable expertise simply will not be possible.

The firewall between violent nonstate actors and conventional, state-based warfare is also highly permeable. Twice in the last two years, it has been a terrorist attack that has brought two nation-states to the brink of all-out conflict with one another. First, the Hamas terrorist attack of Oct. 7, 2023, catalyzed an open-ended conflagration between Israel and members of Iran’s so-called axis of resistance, a proxy network that includes not just Hamas, but also Palestinian Islamic Jihad, Lebanese Hezbollah, various Iraqi Shiite militias, and the Houthis in Yemen.

And in late April of this year, a terrorist attack launched by a group affiliated with Lashkar-e-Taiba brought two nuclear-armed rivals—India and Pakistan—to the brink of conflict on the Indian subcontinent. Terrorism has the power to draw in some of the largest militaries in the world and pit them against one another.

There is deep historical precedent here. After all, it was the targeted assassination of Archduke Franz Ferdinand in Sarajevo that sparked the earliest stages of what would escalate into World War I. However, it is not 1914 all over again. Unlike 1914, the 21st-century NATO alliance is not sleepwalking into a NATO-Russia conflagration over Ukraine. Rather, it is awakened to these threats. Still, how NATO and the United States contend with Russia remains an urgent task and may determine what kind of global order will exist for the rest of the 21st century. Western powers recognize the threats across Europe—sabotage, arson, cyberattacks, and disinformation—as part of an escalating campaign of hybrid activities.

Accordingly, it is not just countries like Iran, but also Russia, that pose major state-sponsored terror threats to the West. If a state-sponsored terrorist attack emanating from the Kremlin led to the downing of a cargo plane from or over NATO territory, could that lead to a broader war? Almost certainly, and it remains an issue that many European countries are concerned about.

During his campaign for president, George W. Bush ran on a platform of domestic policy, particularly focused on education and poverty reduction. But the 9/11 attacks transformed his presidency overnight, and Bush was soon overwhelmed with the complexities of nation-building and counterinsurgency in failed states after sending the U.S. military to Afghanistan, and then Iraq.

Today the United States faces a range of terrorism threats, including from domestic actors motivated by a litany of grievances, including anti-government extremism. The old threats still remain, albeit in slightly hybridized form. The core organizations of al Qaeda and the Islamic State have been smashed, but the offshoots and branches of these groups remain potent. Any number of transnational terrorist groups likely have the will and capability to strike the U.S. homeland in some manner, including al-Shabaab, Islamic State-Khorasan (IS-K) in Afghanistan, and Hezbollah, to name just a few.

The threat from al Qaeda offshoots in particular continues to linger, as evidenced earlier this month when Immigration and Customs Enforcement arrested a Tajikistan-born Russian national in Philadelphia, Pennsylvania, with ties to the organization.

Just this year alone, there have been a number of arrests in the United States pertaining to the Islamic State and support for the group. In February, an individual living in Brooklyn, New York, was arrested for conspiring to provide material support to the Islamic State and IS-K. In April, an Afghan native living in Oklahoma pleaded guilty to an attack he had planned on Election Day last November, on behalf of the Islamic State. And in May, a former member of the Michigan Army National Guard was arrested for planning to attack a U.S. military base, also on behalf of the group.

These attacks were thwarted, but imagine the second- and third-order effects of a mass casualty terror attack in a major American city targeting civilians. In such a worst-case scenario, if links to a state sponsor were uncovered, it could trigger escalation and lead the United States into war, depending on the nature and severity of the attack. As uncomfortable as it is to envision such scenarios, it is the inability or unwillingness to grapple with such possibilities that led to the failure of imagination surrounding 9/11.

If all politics is local, as former Speaker of the House Tip O’Neill was fond of saying, then the modern-day corollary to this adage is that all conflict is global. What happens in Kyiv or Khan Younis can impact the threat landscape from Melbourne to Montreal. One of the deleterious consequences of globalization, especially the advances in information technology and real-time communications, has been a shrinking of the battle space. Inevitably, conflict spills over borders and frequently manifests in the form of terrorism.

Lastly, there are a range of ominous and unconventional emerging-threat undercurrents percolating just beneath the surface. This is perhaps most evident in the recent arrest of two Chinese nationals charged with smuggling potential agroterrorism fungus into the United States, according to the U.S. Department of Justice. Any kind of spectacular attack, either against U.S. food and or water security, or involving the use of weapons of mass destruction, could commandeer the mandate of the broader U.S. national security establishment, which would then seek to reconstitute a robust counterterrorism capability after the fact. Thus, the accidental power of terrorism is that it is a universal spoiler of a well-intended policy agenda.

Emerging technologies have lowered the barriers to entry for would-be terrorists. These tools, including drones, 3-D printing, virtual currencies, artificial intelligence, and encryption, have become force multipliers for violent nonstate actors and may very well be an unintentional accelerant for a global war.

#### Independently, bargaining rights prevent the mass exodus of experienced diplomats.

Michele Kelemen 25. M.A. in Russian and East European Affairs and international economics from the Johns Hopkins University School of Advanced International Studies. "Veteran diplomats react to the Trump administration gutting the lead U.S. aid agency." NPR. 4/14/2025. npr.org/2025/04/14/nx-s1-5357431/veteran-diplomats-react-to-the-trump-administration-gutting-the-lead-u-s-aid-agency

Trump administration reforms at the State Department are shrinking the United States' diplomatic footprint globally.

AILSA CHANG, HOST:

Quote, "unjustified seismic shift" in the U.S. foreign policy enterprise - that is how some Democrats are describing the reforms taking place at the State Department. The Trump administration has already gutted the lead U.S. aid agency, and the remnants will now be absorbed by the State Department, which is also facing cutbacks. As NPR's Michele Kelemen reports, all of this has veteran diplomats worried.

MICHELE KELEMEN, BYLINE: For a hundred years, the American Foreign Service Association has supported U.S. diplomats at home and around the world. The Trump administration has stripped it of its collective bargaining rights with the State Department, something AFSA President Tom Yazdgerdi is now fighting in court.

TOM YAZDGERDI: Without collective bargaining rights, any major initiatives, say, on assignments or promotions, we no longer have eyes on. That's not only bad for our members, I think it's bad for the Foreign Service.

KELEMEN: But it's not only the union's troubles that worry Yazdgerdi, a veteran Foreign Service officer. He says it's important for the U.S. to have a professional, nonpartisan Foreign Service to help Americans overseas promote American businesses and carry out the policy of the president. But right now, he's seeing a lot of talent leaving.

YAZDGERDI: We have more people who have retired in the first 2 1/2 months of this year than in all of last year, so it's on pace to be a record year. And that's unfortunate because I think we want to also maintain, you know, that senior experience and knowledge. Mentorship is a huge thing in the Foreign Service. We might be losing some of that if we just see a run for the door from our senior Foreign Service members.

KELEMEN: The State Department has canceled summer internships. There's a hiring freeze and talk of closing a couple dozen diplomatic posts, including embassies and consulates. Retired Ambassador Ronald Neumann of the American Academy of Diplomacy says these kind of cuts can be done smartly.

RONALD NEUMANN: There's an intelligent way to reduce the size of the overseas footprint. But you can also do it stupidly.

KELEMEN: And what he's seen so far from the Trump administration gives him pause - that includes the dismantlement of USAID and a more recent decision to put a junior Foreign Service officer in charge of the State Department's Bureau of Global Talent.

NEUMANN: This is like, say, taking a second lieutenant and saying, OK, you should be chief of staff for the Army.

KELEMEN: The State Department would not comment on personnel matters related to Lew Olowski, a lawyer and Trump loyalist who joined the Foreign Service four years ago. He's now acting as the top official in a bureau usually run by a veteran diplomat confirmed by the Senate. Senator Chris Van Hollen, the ranking Democrat on a foreign relations subcommittee overseeing the department, is alarmed.

CHRIS VAN HOLLEN: Another very alarming proposal would be to replace experienced, knowledgeable career Foreign Service officers with political hacks.

KELEMEN: Van Hollen and other Democrats on the Senate Foreign Relations Committee have written to Secretary of State Marco Rubio, who used to be one of their Republican colleagues on the committee.

VAN HOLLEN: Rubio has been pretty much AWOL. I will say that the, you know, Republicans on the Senate Foreign Relations Committee have not been exercising their oversight responsibilities.

KELEMEN: Republican Chairman Jim Risch has, so far, backed the changes the Trump administration is making, saying he did not want USAID to survive. But he says he does plan to have Rubio appear before the committee at some point to talk about the reforms. Van Hollen says things are moving too quickly, and America's soft power institutions are suffering.

#### Extinction. Deft diplomacy checks nuclear war AND solves cooperation on every issue.

Michael Kimmage 25. Professor of history at the Catholic University of America, Ph.D. in United States studies from Harvard University. "The World Trump Wants." Foreign Affairs. March/April 2025. foreignaffairs.com/united-states/world-trump-wants-michael-kimmage

A Vision of War

In Trump’s first term, the international landscape was fairly calm. There were no major wars. Russia appeared to have been contained in Ukraine. The Middle East appeared to be entering a period of relative stability facilitated in part by the Trump administration’s Abraham Accords, a set of deals intended to enhance regional order. China appeared to be deterrable in Taiwan; it never came close to invading. And in deed if not always in word, Trump conducted himself as a typical Republican president. He increased U.S. defense commitments to Europe, welcoming two new countries into NATO. He struck no deals with Russia. He talked harshly about China, and he maneuvered for advantage in the Middle East.

But today, a major war rages in Europe, the Middle East is in disarray, and the old international system is in tatters. A confluence of factors might lead to disaster: the further erosion of rules and borders, the collision of disparate national-greatness enterprises supercharged by erratic leaders and by rapid-fire communication on social media, and the mounting desperation of medium-sized and smaller states, which resent the unchecked prerogatives of the great powers and feel imperiled by the consequences of international anarchy. A catastrophe is more likely to erupt in Ukraine than in Taiwan or the Middle East because the potential for world war and for nuclear war is greatest in Ukraine.

Even in the rules-based order, the integrity of borders has never been absolute—especially the borders of countries in Russia’s vicinity. But since the end of the Cold War, Europe and the United States have remained committed to the principle of territorial sovereignty. Their enormous investment in Ukraine honors a distinctive vision of European security: if borders can be altered by force, Europe, where borders have so often generated resentment, would descend into all-out war. Peace in Europe is possible only if borders are not easily adjustable. In his first term, Trump underscored the importance of territorial sovereignty, promising to build a “big, beautiful wall” along the U.S. border with Mexico. But in that first term, Trump did not have to contend with a major war in Europe. And it’s clear now that his belief in the sanctity of borders applies primarily to those of the United States.

China and India, meanwhile, have reservations about Russia’s war, but along with Brazil, the Philippines, and many other regional powers, they have made a far-reaching decision to retain their ties with Russia even as Putin labors away at destroying Ukraine. Ukrainian sovereignty is immaterial to these “neutral” countries, unimportant compared with the value of a stable Russia under Putin and with the value of continuing energy and arms deals.

These countries may underestimate the risks of accepting Russian revisionism, which could lead not to stability but to a wider war. The spectacle of a carved-up or defeated Ukraine would terrify Ukraine’s neighbors. Estonia, Latvia, Lithuania, and Poland are NATO members that take comfort in NATO’s Article 5 commitment to mutual defense. Yet Article 5 is underwritten by the United States—and the United States is far away. If Poland and the Baltic republics concluded that Ukraine was on the brink of a defeat that would put their own sovereignty at risk, they might elect to join the fight directly. Russia might respond by taking the war to them. A similar outcome could result from a grand bargain among Washington, western European countries, and Moscow that ends the war on Russian terms but has a radicalizing effect on Ukraine’s neighbors. Fearing Russian aggression on the one hand and the abandonment of their allies on the other, they could go on the offensive. Even if the United States stayed on the sidelines amid a Europe-wide war, France, Germany, and the United Kingdom would probably not remain neutral.

Were the war in Ukraine to widen in that way, its outcome would greatly affect the reputations of Trump and Putin. Vanity would exert itself, as it so often does in international affairs. Just as Putin cannot afford to lose a war to Ukraine, Trump cannot afford to “lose” Europe. To squander the prosperity and power projection that the United States gains from its military presence in Europe would be humiliating for any American president. The psychological incentives for escalation would be strong. And in a highly personalistic international system, especially one agitated by undisciplined digital diplomacy, such a dynamic could take hold elsewhere. It could spark hostilities between China and India, perhaps, or between Russia and Turkey.

A Vision of Peace

Alongside such worst-case scenarios, consider how Trump’s second term could also improve a deteriorating international situation. A combination of workman like U.S. relations with Beijing and Moscow, a nimble approach to diplomacy in Washington, and a bit of strategic luck might not necessarily lead to major breakthroughs, but it could produce a better status quo. Not an end to the war in Ukraine, but a reduction in its intensity. Not a resolution of the Taiwan dilemma, but guardrails to prevent a major war in the Indo-Pacific. Not a solution to the Israeli-Palestinian conflict, but some form of U.S. detente with a weakened Iran, and the emergence of a viable government in Syria. Trump might not become an unqualified peacemaker, but he could help usher in a less war-torn world.

Under Biden and his predecessors Barack Obama and George W. Bush, Russia and China had to cope with systemic pressure from Washington. Moscow and Beijing stood outside the liberal international order in part by choice and in part because they were not democracies. Russian and Chinese leaders exaggerated this pressure, as if regime change were actual U.S. policy, but they were not wrong to detect a preference in Washington for political pluralism, civil liberties, and the separation of powers.

With Trump back in office, that pressure has dissipated. The form of the governments in Russia and China does not preoccupy Trump, whose rejection of nation building and regime change is absolute. Even though the sources of tension remain, the overall atmosphere will be less fraught, and more diplomatic exchanges may be possible. There may be more give-and-take within the Beijing-Moscow-Washington triangle, more concessions on small points, and more openness to negotiation and to confidence-building measures in zones of war and contestation.

If Trump and his team can practice it, flexible diplomacy—the deft management of constant tensions and rolling conflicts—could pay big dividends. Trump is the least Wilsonian president since Woodrow Wilson himself. He has no use for overarching structures of international cooperation such as the UN or the Organization for Security and Cooperation in Europe. Instead, he and his advisers, especially those who hail from the tech world, might approach the global stage with the mentality of a start-up, a company just formed and perhaps soon to be dissolved but able to react quickly and creatively to the conditions of the moment.

Ukraine will be an early test. Instead of pursuing a hasty peace, the Trump administration should stay focused on protecting Ukrainian sovereignty, which Putin will never accept. To allow Russia to curtail Ukraine’s sovereignty might provide a veneer of stability but could bring war in its wake. Instead of an illusory peace, Washington should help Ukraine determine the rules of engagement with Russia, and through these rules, the war could gradually be minimized. The United States would then be able to compartmentalize its relations with Russia, as it did with the Soviet Union throughout the Cold War, agreeing to disagree about Ukraine while looking for possible points of agreement on nuclear nonproliferation, arms control, climate change, pandemics, counterterrorism, the Arctic, and space exploration. The compartmentalization of conflict with Russia would serve a core U.S. interest, one that is dear to Trump: the prevention of a nuclear exchange between the United States and Russia.

### Lochnerism Adv---1AC

#### Advantage 2: LOCHNERISM.

#### The First Amendment is being weaponized. The plan supplants deregulatory Lochnerism with a positive defense of associational freedoms.

Brad Baranowski 19. J.D. from Boston University School of Law, Ph.D. in history from the University of Wisconsin Madison. "The Representative First Amendment: Public-Sector Exclusive Representation After Janus v. AFSCME." *Boston University Law Review*, 99(2249), 2251-2255.

Janus v. American Federation of State, County, and Municipal Employees, Council 31 3marked a bold reversal of decades' worth of labor law and practice for public-sector unions. 4At stake was the collection of agency fees - the funds that unions gather from employees they represent in order to finance activities like collective bargaining and arbitration hearings - from nonunion employees. 5Previously, the Court's 1977 decision in Abood v. Detroit Board of Education 6governed the collection of public-sector agency fees, allowing their collection from nonmembers so long as no amount funded the union's political activities. 7 Janus overturned Abood, 8simultaneously ending the settled practice of how public-sector unions funded their nonpolitical activities and sending the public-sector labor movement back to a state reminiscent of its early days - a time rife with legal battles over financing. 9As Justice Kagan lamented in dissent: "There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law - and in its economic life - for over 40 years." 10

Among the doctrines Janus threatens to upend is exclusive representation for public-sector unions. Exclusive representation provides that a union chosen by a majority of workers will be the sole representative of all employees in the bargaining unit at collective bargaining talks with employers, allowing the union to speak as one on issues like wages, benefits, and hours. 11Commonplace in state and federal statutes regulating unions, the doctrine of exclusive representation is the backbone of U.S. labor law, supporting the structure of labor organizing that has existed within the country since the New Deal. 12 Janus raised a question that strikes at the heart of this arrangement: Is the requirement of exclusive representation akin to agency fees? In other words, is exclusive representation an unconstitutional infringement on public-sector workers' First Amendment associational and expressive rights?

Plaintiffs in lower court cases, both before and after Janus, have sought an answer in the affirmative. 13Indeed, the Supreme Court practically invited such challenges, observing in Janus that exclusive representation was "a significant impingement on associational freedoms that would not be tolerated in other contexts." 14Little wonder that in Justice Kagan's view, Janus represented a backward-looking opinion that foretold nothing but chaos to come. 15

Many commentators have agreed with Justice Kagan's general evaluation, criticizing Janus on manifold grounds. 16Although varied, these assessments fit into a broader trend of legal scholarship and commentary - one that traces the First Amendment's increasing "Lochnerization." 17Commentators have bemoaned more generally what Professor Charlotte Garden called the "deregulatory First Amendment" - a new tool for the Supreme Court's conservative majority to use to chip away at economic and social regulations much like how substantive due process was used during the Lochnerera. 18Or, in Justice Kagan's words, observers have feared that the First Amendment is increasingly undergoing a "weaponization." 19In short, Janus has but one face for these commentators - and a grim, regressive one at that.

While these characterizations capture important - and unsettling - features of recent First Amendment jurisprudence, this focus on "Lochnerization" ultimately blinds these commentators to potential avenues to stem this regressive trend. Framed by a tragic historical narrative wherein the hard won expressive and associational rights of the 1950s and 1960s proved a double-edged sword that conservatives have since used to slash economic regulations - first with the rise of the commercial speech doctrine in the 1970s and 1980s, then with the recent spate of anti-union rulings - critics' characterizations overlook ways in which First Amendment jurisprudence might act as a shield for labor law. 20This oversight has left practitioners hamstrung, arguing more and more to defend less and less as pro-labor litigants attempt to safeguard perilous precedents rather than advance their own positive, labor-friendly account of First Amendment protections. 21Consequently, the constitutional status of exclusive representation appears more precarious than it need be.

An alternative exists. While at first sight, the logic of Janus and the deregulatory First Amendment point towards problems for exclusive representation, Janus has yet another face. Cases that comprise this "Lochnerizing" trend, such as Citizens United v. FEC, 22also glance towards the First Amendment's role in fostering representative institutions. 23As this Note argues, the interpretative trend commentators have deemed the "deregulatory First Amendment" is just that: an interpretation. 24As such, it can be supplanted by other, better frameworks. Recognizing that the First Amendment also protects the expressive association and speech at the core of duly constituted representative institutions is the first step in building such a framework.

Combining analysis of recent Supreme Court jurisprudence with normative considerations drawn from political theory, this Note details an interpretation of the First Amendment that it deems the "representative First Amendment." As explained below, association with a union representative is no more or less a burden on one's First Amendment rights than is the association with a corporation's board in which one invests or, even more on point, with one's state representative. Thus, in this framework, exclusive representation is secure, with Janus proving to be the opening line of a new justification for public-sector workplace democracy rather than the last word in that story.

#### The AFF stops Lochnerism in its tracks. First Amendment jurisprudence is “boundless” and spills over.

Brad Baranowski 19. J.D. from Boston University School of Law, Ph.D. in history from the University of Wisconsin Madison. "The Representative First Amendment: Public-Sector Exclusive Representation After Janus v. AFSCME." *Boston University Law Review*, 99(2249), 2282-2283.

The full scope of the challenges that employers may face should the Supreme Court hold exclusive representation to be a violation of the First Amendment is difficult to assess, providing an additional reason to proceed cautiously. Some commentators, for example, have speculated that cases like Janus may prompt the Court to adopt a more expansive approach to state action, expanding the deregulatory First Amendment into the realm of private labor relations - a possibility that will become only more plausible if exclusive representation falls in the public sector. 197While this Note does not attempt to provide an exhaustive list and analysis of such consequences, considerations of these effects is proper given both the possible magnitude of the disruptions awaiting employer-employee relationships and the source of such disruptions. As discussed below, the current boundless quality of First Amendment jurisprudence is due in large part to the normative judgments that underpin it - normative judgments for which there are feasible alternatives. 198

III. The Representative First Amendment

The collision course detailed in Part II is avoidable. The First Amendment does more than deregulate; it also protects duly constituted representative associations. In other words, the First Amendment safeguards the ends of democracy (i.e., representation) as well as its means (i.e., speech and association). All this is encapsulated in and protected by what this Note has deemed the "representative First Amendment."

#### Lochnerism greenlights existential judicial activism.

Robert Knowles 25. Associate professor at the University of Baltimore School of Law, J.D. from the Northwestern University School of Law. "How Lochnerism Ends." *Seton Hall Law Review*, 56(65), 66-72.

INTRODUCTION

The early 2020s felt like peak New Lochner. 1 The U.S. Supreme Court has been waging war on the administrative state and economic regulation, readopting the Lochner-era jurisprudence of the 1890s to 1930s in new doctrinal forms.2 Lochnerism prizes judicial supremacy, values common sense and traditional practices over agency expertise, and elevates economic liberty—the citizen’s right to participate in the marketplace and control property on one’s own terms—over other values in the domestic sphere.3

In foreign affairs, too, the Court’s jurisprudence has taken a Lochnerist turn, which manifests quite differently: The Court’s solicitude for economic liberty attaches, not to the citizen or corporation, but to the nation as a whole operating in the international realm. Tariffs and other trade restrictions—a core policy feature of both the Lochner Era and U.S. foreign policy in the 2020s—impose strict and potentially ruinous economic regulation that the Roberts Court would not tolerate if imposed on domestic transactions.4

This Article explains why the dualist nature of Lochnerism is also its fatal flaw. I introduce a model of Lochnerism as a recurring phenomenon in American jurisprudence with a predictable life cycle.5 Its rise and fall are driven by power shifts that change America’s role in the international system.6 Lochnerism surfaces during periods of low international conflict because U.S. courts are better equipped to police a boundary between domestic and foreign affairs matters.7 Yet periods of high international conflict involving the U.S. drive Lochnerism back into exile because solicitude for economic liberty tends to frustrate foreign policy during such periods.8 The U.S. government’s need to act effectively and nimbly on the international stage collides with the Lochnerian value of constraining regulatory authority within distinct limits.9 Security concerns suffuse domestic economic regulation, and an overmatched Court retreats.

Under this model, New Lochnerism is actually nearing the end of that life cycle, and the Roberts Court’s frenetic efforts to further transform the constitutional order in the 2020s are classic signs of a movement in its late stage.10 New Lochnerism is intertwined with the free-market worldview it embodies—neoliberalism.11 Neoliberalism regards “decentralized and spontaneous” forms of private ordering as inherently superior to public ordering by government.12 Put into practice, neoliberalism removes barriers to these private forms of ordering through deregulation, devolution, outsourcing, and market-oriented public policy.13

Even before the Trump appointees joined the Court, however, neoliberalism had already begun to lose its grip where it matters most—as the logic that keeps the international system stable and the United States as its predominant power.14 The neoliberal, free trade system has been giving way to conflict—the first full-scale war in Europe since 1945, trade barriers, arms races, cyberwarfare, industrial policy, and critical alliances fracturing in favor of Cold War-type rivalries.15 A new high-conflict era is well underway, and courts are lagging indicators of such shifts.16 As both the neoliberal worldview and the American-led order that sustained New Lochnerism continue to fade, the jurisprudence will fade, too. That is how Lochnerism ends.

This Article proceeds in four parts. Part I uses the Court’s pandemic cases to illustrate the problem. The Court’s poorly modulated and opportunistic response presages future confrontation, rather than negotiation, with the political branches over the implementation of vital public health and safety policies.17 The Justices’ opinions reinforced a pattern of second-guessing experts,18 “practical wisdom” that produced inapt analogies,19 some rather bombastic rhetoric,20 and, most fatally, line-drawing that appears arbitrary and results-driven.21 In other words, some of the same excesses that Lochner-era opinions were infamous for.

Next, Part I explains the methodology behind my account of Lochnerism’s life cycle. Drawing on international relations theory, history, and economics, it surveys how international conflict levels drive U.S. rights jurisprudence, which empowers or constrains economic liberty. I focus especially on three insights—that the international system’s structure shifts tectonically over many decades;22 that free markets will not meet national security needs without substantial regulation;23 and that the Court typically adjusts its judicial activism to fit the U.S. foreign policy needs during geopolitical conflict.24

Part II examines the vast literature on the Lochner-era Court to assemble a values-neutral and transhistorical definition of Lochnerism as a coherent and recurring jurisprudence.25 The features I highlight explain why Original Lochnerism was especially vulnerable to geopolitical shifts at the twentieth century’s midpoint. I define Lochnerism as a mission and a method. Its mission is to mediate the tension between economic growth, which accelerates globalization, and the administrative state, which regulates the consequences. At its best, Lochnerist jurisprudence tempers the pace of change through constitutional interpretation.26

As a method, Lochnerism is activist and nostalgic, positioning judges as embattled defenders of economic liberty against both globalization and regulatory expansion. Courts protect the distinct sovereignty of its citizens domestically and America globally, enforcing separation of powers and rights doctrines to maintain a clear boundary between the two sovereigns.27 As international conflict intensifies, however, that foreign-domestic boundary erodes. National security concerns move economic regulation beyond judicial expertise, forcing the Court to yield. During World War II, the U.S. government significantly expanded its administrative and regulatory powers, prioritizing centralized planning and control over traditional freemarket mechanisms.28 Successful wartime governance required flexibility and coordination across regulatory domains—including strict controls on production, prices, and labor, and establishing administrative mechanisms that persisted postwar. These experiences demonstrated that coordinated regulation could stabilize the economy even in crisis, shifting legal and political norms toward broader acceptance of federal economic oversight and embedding administrative rulemaking and adjudication in the structure of modern governance.

Part III examines the Roberts Court’s New Lochnerism, highlighting its similarities to, and differences from, its predecessor. Like the original, New Lochnerism seeks to shield traditional private ordering—markets, religious groups, and corporations—from globalization and the administrative state. It achieves this through four interconnected doctrinal prongs, the four types of Lochnerism: economic liberty, anti-administrative, private ordering, and, in foreign affairs, what I call Go-it-alone Lochnerism. 29

But New Lochnerism is more activist than its predecessor, despite the Justices’ efforts to disguise their activism in passive virtues. This activism is a product of the libertarian philosophy animating it— neoliberalism—and the global conditions that fostered it—U.S. dominance in a low-conflict, free-market-based international order. The Court’s attack on the administrative state has had limited national security consequences until recently because its deregulatory effects aligned with U.S. foreign policy—promoting economic globalization without fully committing to maintaining the international legal structures it helped establish. That fortunate alignment is over.

Part IV plots New Lochnerism’s likely fate as the Court and federal government adjust to high-conflict geopolitics that demand increased and coordinated economic regulation.30 The particular qualities of the 2020s high-conflict period include not just cross-domain military and economic threats to U.S. national security from rivals, but borderless environmental threats from climate change that pose catastrophic risks to Americans’ health, safety, and security.31 No amount of Lochnerist line-drawing can preserve a safe space of purely domestic regulation for the Court to roll back without also rolling back regulations necessary for U.S. security. The prognosis for the jurisprudence is not good. The Court’s most recent decisions are signs of a jurisprudence already in crisis. The world is knocking at the door, and New Lochnerism’s days are numbered.

#### It wrecks national security, ensuring great power war.

Robert Knowles 25. Associate professor at the University of Baltimore School of Law, J.D. from the Northwestern University School of Law. "How Lochnerism Ends." *Seton Hall Law Review*, 56(65), 123-127.

IV. THE FALL OF NEW LOCHNERISM

This Part details how the international system has shifted from a peaceful one led by the United States to a multipolar one riven by great power conflict. It discusses the significance of this shift for economic regulation. And finally, it examines how New Lochner’s current trajectory will lead it to collide with national security imperatives as the U.S. struggles to successfully navigate that shift.302

A. Our High-Conflict Era

Just as World War II upended the Original Lochner era, today’s national security concerns present an existential threat to New Lochnerism. All three aspects of Lochnerism—its preference for economic autonomy in the domestic sphere, its go-it-alone preference in foreign affairs, and judicial activism to enforce these preferences— were made possible by U.S. unipolar dominance in a globalized system. For a brief time, Americans benefited from their position in that order.

But U.S. unipolar dominance was the glue that held this arrangement together. For decades, the U.S. and its allies promoted neoliberal economic policies and loosened trade restrictions and foreign investment barriers to maximize efficiency.303 Antitrust enforcement weakened, prioritizing low consumer prices over market competition.304 The drive to lower production costs and wages weakened labor unions and stagnated incomes.305

Unipolarity enabled the U.S. to push free market solutions because the system of global trade and integration was backed by U.S. power projection. The U.S. Navy’s freedom of navigation maneuvers protected shipping lanes for the most part; U.S. troops were stationed around the world, providing a deterrent to regional aggression.306 Most nations relied on the dollar as their reserve currency, and the U.S. exerted “soft power” through its provision of humanitarian aid and cultural influence in film, television, and popular music.307

But over time, the free-market focus weakened that system’s capacity for structured cooperation, and this weakness has in turn undermined confidence in neoliberalism as governance.308 The most existential global challenges of the century present collective action problems, such as climate change, that a global system of free markets and private ordering are just not equipped to address.309 Indeed, the free-trade absolutism and loathing of market intervention that characterized the neoliberal era made these problems worse.310

Neoliberalism’s boundary-busting qualities also created the conditions for a revival of great power competition, the hallmark of a high-conflict global era. China’s rise to rough parity with the U.S. on economic terms was built, and still largely depends, on the economic power it gained from free trade with the U.S. and its allies, along with the rest of the world.311 Because economic power is a font of other forms of power, however, China has leveraged its newfound economic strengths to build power in other domains, including military power.312 And China’s foreign policy has centered on the goal of displacing the U.S. as the predominant power in the international system.313

As a result, by the mid-2020s, the global system has shifted from a U.S.-dominated unipolar one to a messier, multipolar or bipolar one that resembles 1930s or 1950s geopolitics far more than those of the 1990s.314 The ability of U.S. and European allies to project power globally—and in some situations, even locally—has faded across the domains of military, economic, and soft power.315 Russian aggression in Ukraine, from its 2014 “annexation” of the Donbas and Crimea to its full-scale invasion in 2021, was the first international armed conflict in Europe since World War II.316

A new high-conflict era is underway. Now that times have changed, the U.S. must shift away from both Lochnerian policies and jurisprudence.

Defense policy has long reflected neoliberal priorities, emphasizing economic liberty at home while ensuring U.S. operational freedom abroad.317 Outsourcing critical military production, however, has created vulnerabilities.318 Essential weapons components are manufactured in China, a strategic rival.319 To address these risks, the U.S. has shifted toward more economic regulation in trade, restricting key markets for computer chips and reviving industrial policy through the CHIPS and Science Act and the Inflation Reduction Act, in an effort to reshore critical manufacturing.320

But more will be required. The economic liberty central to Lochnerism is incompatible with the demands of prolonged geopolitical conflict.321 It instead requires more top-down coordination of resources across an entire society—education, labor, manufacturing, and research.322 A great deal of global conflict plays out in the “gray zone” between armed conflict and more outward forms of competition.323 Gray zone activities encompass a broad range of tactics, including disinformation, cyberwarfare, intellectual property theft, corporate espionage, and sabotage of space infrastructure.324 Because these tactics cut across so many regulatory domains, the combination of light-touch regulation and free speech protections have created openings for U.S. adversaries to gain crucial strategic advantages.

#### Additionally, Lochnerism goes digital and prevents effective data protection.

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But with Silicon Valley's mistakes and scandals looming just as large as its successes, its regulatory exceptionalism may be coming to an end. From Facebook's role in facilitating Russian meddling in the 2016 presidential election and Amazon's increasing monopoly-like power over Internet commerce, to Twitter's controversial banning of President Donald Trump and Apple's campaign to encrypt its way onto the wrong side of law-enforcement agencies around the world, there is a growing recognition that technology companies should no longer be able to remain "above" regulation. As Jonathan Zittrain observes, we are entering a new "era of digital governance," moving "from a discourse around rights . . . to one of public health, which naturally asks for a weighing of the systemic benefits or harms of a technology, and to think about what systemic interventions might curtail its apparent excesses." 3

This new skepticism towards laissez-faire technology policy is bipartisan, even if the different sides differ in their diagnoses and prescriptions. The right's main complaint is that social media companies (purportedly) censor conservative speech and its solution is state laws limiting the ability of platforms to moderate content. 4On the left, leaders of the "neo-Brandeisian" school of antitrust, which worries about how market concentration harms competition beyond simply raising consumer prices, have assumed high-level policy positions in the new Biden administration. 5

A key task for policymakers and scholars in the coming years will be to develop a framework for regulating technology companies. But this will be a challenging task, in part because technology companies operate in so many areas. It is thus important to find commonalities across different regulatory areas so as to draw generalizable lessons, and so this Article takes the topic of this symposium--content moderation--and situates it as but one of several related regulatory domains, from government surveillance and privacy law to consumer protection and antitrust.

My main argument is that an important commonality across these regulatory areas is the potential for the First Amendment to act as a potent tool against government regulation. The First Amendment's prohibition on government action "abridging the freedom of speech" has primarily been understood to encompass two more specific prohibitions: the prohibition on government restriction of speech, and a prohibition on government compulsion of speech. As scholars have long noted, because the First Amendment's scope is quite malleable, it is easy for companies to engage in "First Amendment opportunism" to advance their legal positions using the First Amendment. 6As I describe in Parts I and II, because the core business of all leading technology companies is the facilitation of communication via computer code, First Amendment doctrine supports plausible deregulatory arguments across a variety of policy areas. This Article thus contributes to the broader literature on the deregulatory uses of a "Lochnerized" First Amendment, 7specifically the ways that the First Amendment is leading in the direction of a "digital Lochner." 8

The Article's normative and doctrinal contributions come in Part III. As I explain in Part III.A, not all deregulatory uses of the First Amendment are bad; in particular, companies can play an important role in defending the First Amendment rights of their users against government infringement. But when major technology companies invoke their own First Amendment rights to resist government action intended to advance societal free expression values, courts should be highly skeptical. In Part III.B, I use the ongoing controversy over Florida's law limiting social-media content moderation to illustrate a new approach to evaluating Silicon Valley's First Amendment arguments, one that puts the rights of users and the speech interests of society front and center.

I. THE POWERFUL COMBINATION OF SPEECH AND SILICON VALLEY

A. Why Speech?

There are many open-ended provisions in the Constitution, and so it's worth asking why technology companies would ground their constitutional arguments in free speech rather than, for example, substantive due process and freedom of contract, as deregulation's proponents did during the era of Lochner v. New York. 9One reason is that Lochnerism, at least when it comes to economic regulation, is still a broadly discredited judicial ideology, 10and so substantive due process is no longer a credible option as a matter either of doctrine or legal culture. But this does not explain why the First Amendment has come to play the role that Lochner once did.

Part of the answer is the high status that free-expression arguments have in American legal culture and among the general public. The rhetorical "magnetism" 11of the First Amendment is of long duration 12and is a key component of the Constitution's central place in America's civic religion. As Lee Bollinger notes, "Free speech has become so much more than just a legal principle. It has become a part of the national identity, and in so many ways we have learned to define ourselves as people through the process of creating the principle itself." 13Among ordinary Americans the First Amendment--specifically the right to free speech--is consistently both the most recognized and most valued right. 14And because the First Amendment's speech protections generally extend further than in other developed regions, Europe in particular, the American free speech tradition further contributes to American perceptions of exceptionalism. 15Whether this is all to the good is contested, 16but as a descriptive matter it is the case.

A second reason for the corporate attraction to the First Amendment is that suits brought under the First Amendment require the government to satisfy a higher burden than in many other types of regulation. For example, to defend against the claim that an economic regulation violates due process, the government need only establish a "rational basis" for that action. 17A claim that an administrative action is substantively (rather than procedurally) flawed requires a demonstration that it was "arbitrary, capricious, [or] an abuse of discretion." 18

But as long as a litigant can establish that their free-speech rights are implicated by a government action--and, as we shall see, technology companies have plenty of ways of making that argument--the government's burden increases dramatically. Almost all restrictions on speech are subject to strict scrutiny, 19which requires both a compelling government interest and narrowly tailored government action. 20Although claims that strict scrutiny always dooms government action--that it is "'strict' in theory and fatal in fact" 21--are exaggerated, 22it is still a highly demanding standard. For example, Adam Winkler's survey of all strict-scrutiny decisions between 1990 and 2003 shows that "[s]trict scrutiny was most fatal in free speech cases, where only 22 percent of challenged laws survived." 23More generally, as Jedediah Purdy observes, the fact that First Amendment arguments are increasingly "sayable" imposes "(1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question." 24

A third reason that deregulatory First Amendment arguments are popular is the momentum of legal change. As many commentators have observed, the First Amendment's speech protections are undergoing a period of doctrinal "uncertainty and flux," and the overall effect is to expand the scope of First Amendment protections. 25Litigants will naturally thus gravitate toward such arguments if they think it will help them achieve their goals. 26Legal victories can also strengthen the force of non-legal free-expression arguments (since society's sense of what counts as free-expression is partially a function of what the courts tell it), which in turn strengthen future legal arguments.

B. Why Silicon Valley?

All organizations can take advantage of free-expression arguments. Indeed, the leading recent corporate First Amendment cases-- Citizens United v. FEC, 27 Burwell v. Hobby Lobby Stores, Inc., 28and Sorrell v. IMS Health Inc. 29--didn't involve technology companies at all. 30Yet large technology companies enjoy particular advantages when making First Amendment and free-expression arguments, and thus we should expect such arguments to increasingly come from technology companies.

First, technology companies are a particularly influential part of the economy. Part of this is their sheer size (depending on the day, the list of the world's biggest companies by market capitalization is dominated by the Silicon Valley giants), which allows these companies to invest more money in litigation and indirect sources of support--for example, media advertising or funding civil society. Part of it is the technology industry's prestige; their recent dip in popularity notwithstanding, Silicon Valley companies enjoy some of the highest brand recognition and favorability ratings, certainly higher than other industry sectors. 31

These real-world factors matter for how, as Jack Balkin describes it, implausible, "off the wall" constitutional arguments get "on the wall": "How people characterize positions along the spectrum of plausibility is always potentially in flux. By making and supporting constitutional arguments repeatedly, people can disturb settled understandings and create new ones. Through political activism and legal advocacy, determined parties can push positions from off-the-wall to on-the-wall. Indeed, this is the standard story of most successful social movements." 32Technology companies, with their legal, political, and cultural resources, are well placed to enable and take advantage of these legal transitions.

Second, unlike in most other industries, much of what technology companies do is to facilitate communications. Thus, speech-related issues come up constantly. For example, it's hard to think of a single part of Facebook, Twitter, or Google's business model that doesn't in some way involve facilitating or controlling communications. Even technology companies that we might not naturally think of as "communications" companies often have a strong communications component. For example, Amazon and other e-commerce sites like eBay and AirBnB facilitate communication between millions of buyers and sellers. Thus, when a technology company argues that some regulation impinges on its speech-related activity, the argument is more intuitive (and thus more legally compelling, at least as an initial matter) than when ExxonMobil or Monsanto makes the same argument. That's not to say that the technology-company argument will always win, or that a non-technology-company's argument will always lose, but only that, on average, the former will have a better chance. 33

Third, because the main product of technology companies is software, 34technology companies can benefit from the strong association of code with speech. 35The legal origin of this claim is the Bernstein case from the late 1990s. At that time the government imposed national-security export restrictions on certain types of encryption software and algorithms. A cryptography graduate student named Daniel Bernstein developed an encryption algorithm, playfully named "Snuffle," which he sought to make public both through a research article describing the algorithm and source code implementing it. When the government told Bernstein that Snuffle fell under the export-control restrictions and could not be publicly released absent prior government permission, he sued, arguing that the export-control restrictions served as an unlawful prior restraint on speech in violation of his First Amendment rights.

The district court held that Snuffle fell under the scope of the First Amendment. It held not only that the Snuffle source code was speech, but that even object code (compiled source code) would be speech: "Whether source code and object code are functional is immaterial to the analysis at this stage. . . . [T]he functionality of a language does not make it any less like speech." 36On appeal, the Ninth Circuit affirmed the district court, though it noted that in doing so it "employ[ed] a somewhat narrower rationale than did the district court." 37The Ninth Circuit held that, to the extent that "cryptographers use source code to express their scientific ideas," such code was speech protected by the First Amendment, 38though it expressly took no position on other uses of source code or the First Amendment status of object code. 39The decision was 2-1, with the dissenting judge emphasizing the functional nature of encryption source code. 40The concurring judge, although agreeing that "the speech aspects of encryption source code represent communication between computer programmers," recognized the merits of the dissent's position and urged Supreme Court review. Perhaps unsurprisingly given the panel's fractured decision, the Ninth Circuit withdrew the panel opinion and granted rehearing en banc. But by this point the nature of the dispute between Bernstein and the government had changed, so the court never reheard the case, and the Bernstein cases have no legal status in the Ninth Circuit.

Nevertheless, the persuasive reach of these opinions has extended far beyond their controlling legal force. They have proved influential to other courts grappling with similar problems, 41and, perhaps more importantly, they have an important place in the mythology of the technology sector. Bernstein's saga is featured prominently in journalist Steven Levy's Crypto, the popular account of the "Crypto Wars" of the 1990s. 42The Electronic Frontier Foundation (EFF), the leading digital civil-society organization, represented Bernstein--his lawyer, Cindy Cohn, is now EFF's executive director--and has described Bernstein as "a landmark case that resulted in establishing code as speech and changed United States export regulations on encryption software, paving the way for international e-commerce." 43

**<Condensed>**

Of course things are not as simple as the slogan "code is speech" would suggest. Properly understood, Bernstein stands for a far more limited and, in the twenty-first century, downright banal proposition: Just because something is code does not mean that it is not speech. But whether a particular piece of code is speech for First Amendment purposes--most importantly, whether the government action regulates the speech's expressive, rather than merely functional, aspect--is a separate question. 44Nevertheless, Bernstein remains a potent legal and rhetorical tool in technology companies' free-expression arsenals. II. COMING REGULATORY BATTLES This Part provides an overview of what I predict will be the main regulatory battlegrounds for Silicon Valley's free-expression arguments. Not all these arguments will be successful--though some already have been. But they are all doctrinally plausible and "on the wall," and, given their potentially broad reach, they are worth considering. In choosing which arguments to highlight, I have been guided by a combination of legal plausibility and real-world importance. Some of the arguments will probably not succeed in the courts (or in constitutional politics), but their impact would be so great if they did that it's worth taking them seriously. Many may resist some of the arguments described below because they conflict with strongly held legal or policy priors, especially for those who believe that government regulation plays an important role in our increasingly digital society and economy. Indeed, sharing that same belief, I myself have frequently been tempted to dismiss some of the more aggressive First Amendment arguments as beyond the legal pale. But history suggests that doctrinal priors, especially when it comes to constitutional law, should be held lightly. For example, the legal academy, with only a few exceptions, failed to predict--and indeed spent years vigorously arguing that it was impossible--that the Supreme Court would find the Affordable Care Act's individual mandate beyond the scope of Congress's Commerce Clause power. 45It would be unfortunate if, when it came to the First Amendment, we were caught equally unawares. A. Content Moderation Given the topic of this symposium, I start with content moderation and the observation that there is no such thing as a "neutral" platform; as Tarleton Gillespie notes, "moderation is central to what platforms do, not peripheral," and "is, in many ways, the commodity that platforms offer." 46Part of the appeal (or annoyance, depending on one's point of view) of buying an iPhone or iPad is that Apple bans "adult" content from its iOS App Store; by contrast, Google places far fewer restriction in its Android Play Store. Facebook and its subsidiary Instagram provide a different--and generally more sanitized--experience than does Twitter, which used to call itself the "free speech wing of the free speech party." 47While platforms have traditionally not exerted the same level of control over user content that a traditional publisher would over the books or articles it published, this may be changing as platforms increasingly invest in both automated and human content moderation. 48 First Amendment doctrine relating to content moderation is underdeveloped, largely because statutory law has generally fully immunized moderation decisions. In particular, Section 230 of the Communications Decency Act (CDA) of 1996 grants platforms broad immunity, both when they choose to host or promote harmful or offensive user content 49and when they choose to remove or otherwise moderate content. 50Although Section 230 is a statute, it has long been interpreted through a First Amendment lens. Although Congress initially enacted section 230 for a narrow purpose--to incentivize websites to moderate what their users post, by removing the danger that such moderation would give rise to publisher liability--it was quickly interpreted by the courts as a broad grant of immunity for the purpose of encouraging free expression on the Internet. As the Fourth Circuit argued in the landmark Section 230 case Zeran v. AOL, Inc.: Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. 51 Some scholars have argued that this view distorts Congress's intent, 52but this First Amendment-inflected interpretation of Section 230 has remained dominant. 53 But some scholars and litigants have gone farther, arguing not only that Section 230 should be interpreted against the backdrop of the First Amendment, but that the First Amendment requires at least some of the liability protections that Section 230 provides. Thus, as Jack Balkin argues, "Some aspects of intermediary immunity are probably required by the Constitution, so that if Congress repealed § 230, certain constitutional protections would still be in force." 54For example, Balkin argues that strict liability for platforms might be unconstitutional, 55as does Ashutosh Bhagwat, 56and this is a position that at least one district court has adopted. 57 Several ongoing lawsuits are testing the outer bounds of the First Amendment as it applies to platform content moderation. For example, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) 58amended Section 230 by removing the liability immunity for platforms that knowingly host content that facilitates sex trafficking. 59In response, EFF, representing individuals, organizations, and Internet platforms, sued to have the law enjoined, arguing that FOSTA imposed a "content-based restriction on speech by selectively removing immunities designed to promote online freedom of expression." 60Although the district court initially dismissed the suit for lack of standing, the D.C. Circuit reversed 61and the district court's decision on the merits of the plaintiffs' First Amendment arguments is pending. More recently, and in the wake of the high-profile banning of President Donald Trump from Twitter and Facebook after the January 6 attack on the Capitol, Florida passed a law restricting the ability of social-media platforms to moderate political candidates or media outlets. 62The law was quickly enjoined in district court, largely on the grounds that it violated platforms' First Amendment editorial right to do decide what to permit on their platforms. 63I address this example in detail in Part III.B below. 64

**<Integrity Returns>**

B. Government Surveillance

Technology companies use a broad range of legal, technological, and social techniques to oppose government surveillance, and the First Amendment plays an important role in what I have previously called Silicon Valley's "techniques of resistance" against government surveillance. 65

Sometimes companies invoke the rights of their users in addition to their own First Amendment rights. For example, after Twitter challenged an administrative subpoena to provide user information on the @ALT\_USCIS Twitter account, set up after President Trump's inauguration to criticize the administration's immigration policies, the government withdrew its subpoena. 66And Amazon challenged a law-enforcement murder-investigation subpoena for recordings from one of its Alexa smart speakers, arguing both that the subpoena would violate its users' First Amendment rights in the information they transmit to Amazon (in the form of their search queries) and Amazon's own First Amendment rights (in the form of the responses its software provides to those queries). 67Amazon ultimately dropped its challenge after the defendant gave it permission to share the requested recordings. 68

A rich target for First Amendment challenges has been nondisclosure orders, which prevent technology companies that receive surveillance orders from notifying their users or from publishing detailed statistics. In one case, Microsoft successfully argued that the Stored Communication Act's nondisclosure provisions 69violated both its own and its users' First Amendment rights. 70In the wake of Microsoft's lawsuit, the Department of Justice ended its policy of routinely using nondisclosure orders when issuing SCA orders, and Microsoft dropped its lawsuit. 71And in an ongoing case, Twitter is challenging the Department of Justice's prohibition on its ability to publish the precise number of foreign intelligence surveillance orders it has received as a violation of its First Amendment rights. Twitter lost the argument at the district court 72but has appealed to the Ninth Circuit. 73

The highest-profile First Amendment challenge to government surveillance came during Apple's challenge to a court order compelling Apple to write software that would help the FBI access the locked iPhone of one of the shooters in the 2015 San Bernardino terrorist attack. 74Among several other arguments, Apple contended that the First Amendment protected it from writing code that "advances" a view with which the company disagreed--namely, that it was ever appropriate for the government to access an individual's encrypted Apple device. 75I discuss this case in more detail in Part III.B below.

C. Competition

Supported by an influential group of scholars, 76technology companies have raised First Amendment defenses against claims that their search-engine results unfairly demote or exclude specific results. In one influential early case, a court held that Google's search-engine results--specifically the output of its PageRank algorithm--are "constitutionally protected opinions" and thus cannot be the basis of a suit for tortious interference with contractual relations. 77Google has also raised First Amendment defenses to claims that its search-engine results are anticompetitive. 78Thus, although antitrust law has historically raised few First Amendment concerns, 79including when it comes to the media industry, 80this may change as companies use all the legal tools at their disposal to head off the growing movement to apply antitrust law to Silicon Valley. 81

First Amendment arguments are similarly raised in the related area of common carrier regulation for internet service providers, which, while not usually included under the Silicon Valley label, are at least close cousins. For example, while still a judge on the D.C. Circuit, Justice Brett Kavanaugh argued that the FCC's net neutrality rules--which would have prohibited Internet service providers from blocking, slowing down, or charging different rates for specific content transiting their networks--violated the First Amendment rights of internet service providers to choose what content to transmit along their networks. 82

D. Privacy and Data Protection

The United States has historically lagged behind other jurisdictions, especially the European Union, in enacting comprehensive data protection legislation and regulation. Thus there is no analog to the European Union's General Data Protection Regulation (GDPR). But the situation may be changing. The GDPR proved influential as a model for the California Consumer Privacy Act of 2018 (CCPA), 83which imitates the GDPR in several important respects. For example, the CCPA instantiated a more limited version of the GDPR's "right to erasure" in that it allows consumers the right to delete information that companies have collected from them. 84

Unfortunately for proponents of the CCPA and similar regimes, 85sweeping data-protection laws are vulnerable to First Amendment challenges, especially after the Supreme Court's opinion in Sorrell v. IMS Health Inc., 86in which the Court held that a Vermont law that restricted the sale of data on physician prescribing practices violated the First Amendment. Sorrell has been recognized as posing a potentially serious threat to data-privacy laws across the board. 87For example, Sorrell could easily be applied to invalidate that part of the CCPA that requires companies to notify users before selling their information and allow them to opt out of the sale. 88

Some privacy scholars have argued that Sorrell was wrongly decided and that, in any case, it does not foreclose data-privacy law. 89As a theoretical matter these arguments may well be right; the Supreme Court is always free to overturn or limit precedent. But given the current composition of the Court, it is just as (if not more) likely that Sorrell presages a highly skeptical judicial approach to privacy regulation.

All of this will cast a long shadow over ongoing attempts to create a federal data privacy law. There is in principle broad agreement that one federal law would be preferable to a patchwork of state laws. Privacy advocates hope the law will provide strong coverage for consumers no matter what state they live in. And companies (and free-market legislators) would prefer only one regulatory mandate and thus a provision broadly preempting state law. 90But to the extent that courts apply the logic of Sorrell and like cases, we could end up with a regime in which state law is preempted (or simply held unconstitutional under the First Amendment) while federal law lacks substantial bite.

#### Data protection solves existential up AND downsides of AI.

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The future emergence of a general artificial intelligence is already raising serious concerns. A general artificial intelligence system may improve itself at an exponential speed and quickly become superhuman; through its superior intelligence it may then acquire capacities beyond human control. 10 In relation to self-improving artificial intelligence, humanity may find itself in a condition of inferiority similar to that of animals in relation to humans. Some leading scientists and technologists (such as Steven Hawking, Elon Musk, and Bill Gates) have argued for the need to anticipate this existential risk, 11 adopting measures meant to prevent the creation of general artificial intelligence or to direct it towards human-friendly outcomes (e.g., by ensuring that it endorses human values and, more generally, that it adopts a benevolent attitude). Conversely, other scientists have looked favourably on the birth of an intelligence meant to overcome human capacities. In an AI system's ability to improve itself could lie the 'singularity' that will accelerate the development of science and technology, so as not only to solve current human problems (poverty, underdevelopment, etc.), but also to overcome the biological limits of human existence (illness, aging, etc.) and spread intelligence in the cosmos. 12

The risks related to the emergence of an 'artificial general intelligence' should not be underestimated: this is, on the contrary, a very serious problem that will pose challenges in the future. In fact, as much as scientists may disagree on whether and when 'artificial general intelligence,' will come into existence, most of them believe that this objective will be achieved within the end of this century. 13 In any case, it is too early to approach 'artificial general intelligence' at a policy level, since it lies decades ahead, and a broader experience with advanced AI is needed before we can understand both the extent and proximity of this risk, and the best ways to address it.

Conversely, 'artificial specialised intelligence' is already with us, and is quickly transforming economic, political, and social arrangements, as well as interactions between individuals and even their private lives. The increase in economic efficiency already is reality (see Figure 2), but AIprovides further opportunities: economic, social, and cultural development; energy sustainability; better health care; and the spread of knowledge. In the very recent White Paper by the European Commission14 it is indeed affirmed that AI.

will change our lives by improving healthcare (e.g. making diagnosis more precise, enabling better prevention of diseases), increasing the efficiency of farming, contributing to climate change mitigation and adaptation, improving the efficiency of production systems through predictive maintenance, increasing the security of Europeans, and in many other ways that we can only begin to imagine.

The opportunities offered by AI are accompanied by serious risks, including unemployment, inequality, discrimination, social exclusion, surveillance, and manipulation. It has indeed been claimed that AI should contribute to the realisation of individual and social interests, and that it should not be 'underused, thus creating opportunity costs, nor overused and misused, thus creating risks.' 15 In the just mentioned Commission's White paper, it is indeed observed that the deployment of AI

entails a number of potential risks, such as opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes.

Because the need has been recognised to counter these risks, while preserving scientific research and the beneficial uses of AI, a number of initiatives have been undertaken in order to design an ethical and legal framework for 'human-centred AI.' Already in 2016, the White House Office of Science and Technology Policy (OSTP), the European Parliament's Committee on LegalAffairs, and, in the UK, the House of Commons'Science and Technology Committee released their initial reports on how to prepare for the future of AI16. Multiple expert committees have subsequently produced reports and policy documents. Among them, the High-Level Expert Group on artificial intelligence appointed by the European Commission, the expert group on AI in Society of the Organisation for Economic Co-operation and Development (OECD), and the select committee on artificial intelligence of the United Kingdom (UK) House of Lords.17

The Commission's White Paper affirms that two parallel policy objectives should be pursued and synergistically integrated. On the one hand research and deployment of AI should be promoted, so that the EU is competitive with the US and China. The policy framework setting out measures to align efforts at European, national and regional level should aim to mobilise resources

to achieve an 'ecosystem of excellence' along the entire value chain, starting in research and innovation, and to create the right incentives to accelerate the adoption of solutions based on AI, including by small and medium-sized enterprises (SMEs)

On the other hand, the deployment of AI technologies should be consistent with the EU fundamental rights and social values. This requires measures to create an 'ecosystem of trust,' which should provide citizens with 'the confidence to take up AI applications' and 'companies and public organisations with the legal certainty to innovate using AI'. This ecosystem

must ensure compliance with EU rules, including the rules protecting fundamental rights and consumers' rights, in particular for AI systems operated in the EU that pose a high risk.

It is important to stress that the two objectives of excellence in research, innovation and implementation, and of consistency with individual rights and social values are compatible, but distinct. On the one hand the most advanced AI applications could be deployed to the detriment of citizens' rights and social values; on the other hand the effective protection of citizens' from the risks resulting from abuses AI does not provide in itself the incentives that are needed to stimulate research and innovation and promote beneficial uses. This report will argue that GDPR [General Data Protection Regulation] can contribute to address abuses of AI, and that it can be implemented in ways that do not hinder its beneficial uses. It will not address the industrial and other policies that are needed to ensure the EU competitiveness in the AI domain.

### Plan---1AC

#### The United States federal government should substantially strengthen collective bargaining rights for federal civil servants in the United States.

### Solvency---1AC

#### Finally: SOLVENCY.

#### The AFF strikes down Trump’s EOs on the basis that he violated the First Amendment, patching a “gaping hole” in free speech.

Abigail Carter et al. 25. J.D. from the University of Michigan Law School. Ramya Ravindran, J.D. from Harvard Law School. Lane Shadgett, J.D. from the Georgetown University Law Center. J. Alexander Rowell, J.D. from the University of Michigan Law School. "Supplemental Brief of Plaintiff-Appellees In Support of Rehearing En Banc." United States Court of Appeals for the Ninth Circuit. storage.courtlistener.com/recap/gov.uscourts.ca9.6d0e42ce-d3bf-48be-a35b-ec26445a929d/gov.uscourts.ca9.6d0e42ce-d3bf-48be-a35b-ec26445a929d.66.0.pdf

ARGUMENT

Almost 50 years ago, Congress enshrined in statute the right of federal workers to join unions and engage in collective bargaining through their chosen representatives. The Executive Order challenged here, which excludes approximately two-thirds of the federal workforce from that statutory scheme, is unprecedented and unlawful. As the district court determined, the evidence shows that the President issued the order to retaliate against unions for engaging in speech protected by the First Amendment, and the government has not rebutted that evidence merely because it contemporaneously asserted national security as the reason for the Executive Order. GA 20-22.

Under the panel’s reasoning, the government can never be found to have engaged in First Amendment retaliation as long as the government states that it is acting to advance national security at the same time it engages in the retaliatory conduct. That principle, if accepted, would leave a gaping hole in the First Amendment. Indeed, in its most recent filing in this case, the government not only claims that the President has the authority to invoke the national security exception in § 7103(b) in response to protected speech, but also that he decides what the statutory language “national security” means in the first place. Dkt. 61 at 10-11. And even if the panel’s reasoning is understood as an interpretation of the factual record in this case, the panel exceeded established limits on its appellate authority by reweighing the evidence and replacing the district court’s factual findings with its own.

The panel’s errors have had real-world consequences for Plaintiffs and the hundreds of thousands of federal workers they represent. The government is treating the panel’s decision as an inflection point: while the government had previously represented that agencies have been instructed not to terminate collective bargaining agreements before litigation challenging the Executive Order has concluded—a representation the panel relied on when weighing the equities in this case—the government started terminating collective bargaining agreements just five days after the stay decision issued. As a result, Plaintiffs have been stripped of their integral functions as labor organizations and federal workers have been left without the statutory protections of collective action and union representation, protections that are critically important right now, when federal workers face unprecedented challenges.

#### Unions are…

#### 1. Sufficient.

#### Personnel is policy. Only collective bargaining unlocks expert bureaucracy.

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C. Restrictions on Unions

The Federal Labor-Management Relations Statute reflects Congress’s belief that federal labor unions provide certain benefits to the federal workforce. Nevertheless, President Trump has used his authority to undermine the ability of employees to unionize.

During his first administration, President Trump signed three executive orders aimed at curtailing the influence of federal labor unions in the workplace. 361 He declared that the Federal Service Labor-Management Relations Statute must be “interpreted in a manner consistent with the requirement of an effective and efficient government.”362 Citing his authority under Section 7301, President Trump barred employees from using agency resources for union-related activities.363 He further limited “union time” to no more than one hour per week, encouraged agencies to pursue removal rather than suspension for misconduct, and sought to restrict the availability of grievance procedures.364 These restrictions were reinstated during his second term, underscoring his sustained effort to diminish union influence within the federal workforce.365

In addition to limiting union activities, during his second term, President Trump significantly expanded the number of “national-security” agencies excluded from the Federal Service Labor-Management Relations Statute under Section 7103(b). Invoking this provision, President Trump excluded employees in the Department of Veterans Affairs, the Department of Health and Human Services, the Environmental Protection Agency, the Federal Communications Commission, and many other agencies from the protections afforded by the Federal LaborManagement Relations Statute. 366 By one estimate, the order would strip more than a million employees—nearly half of the federal workforce—of their collective bargaining rights.367

**<Condensed>**

While the connection of these agencies to national-security matters is limited, courts have generally deferred to President Trump’s determinations. 368 In American Federation of Government Employees v. Trump, the U.S. Court of Appeals of the Ninth Circuit held that the Trump administration was likely to show that these exceptions were a lawful exercise of the president’s authority.369 The district court had found “serious questions” suggesting that President Trump’s order was retaliatory against unions that had criticized the President. The Ninth Circuit, however, held that the government was likely to succeed on the merits because, even assuming a retaliatory motive, the record showed the President “would have taken the same action even in the absence of the protected conduct.”370 It emphasized that the order demonstrated a facially legitimate national security purpose rather than unlawful viewpoint discrimination. The U.S. Court of Appeals for the D.C. Circuit similarly held that enjoining the president “ties the government’s hands … in the national security context,” that any harm to unions could be remedied later, and that maintaining the stay served “the public interest by preserving the President’s autonomy under a statute that expressly recognizes his national security expertise.”371 D. Punishing Political Opponents This Article would be remiss, however, if it failed to acknowledge the very clear ways in which President Trump has violated the constitutional and statutory rights of federal employees. While an entirely separate Article could be written about those violations, just one example suffices for the moment. On March 6, 2025, President Trump issued an executive order imposing sanctions on the law firm Perkins Coie for “representing failed Presidential candidate Hillary Clinton” and collaborating with “activist donors including George Soros to judicially overturn popular, necessary, and democratically enacted election laws.”372 The order included a requirement that agencies “refrain from hiring employees of Perkins Coie, absent a waiver from the head of the agency, made in consultation with the Director of the Office of Personnel Management, that such hire will not threaten the national security of the United States.” 373 In a challenge to the lawsuit, Judge Beryl Howell granted summary judgment in favor of Perkins Coie, finding that the executive order was unconstitutional under the First, Fifth, and Sixth Amendments.374 Whether one views the Trump administration’s approach to personnel management as lawful or not ultimately turns on one’s interpretive commitments. Those who emphasize statutory purpose readily perceive the ways in which the Trump administration’s personnel policies undermine the spirit and structure of the civil service laws. 375 By contrast, a more formalist or textualist approach can plausibly view these actions as consistent with the statute’s broad text and with the president’s Article II authority to manage the executive branch—regardless of whether the interpreter perceives these policies as normatively desirable. Even when courts ultimately decide that the president’s policies are unlawful, the delay inherent in litigation can allow the very maladministration sought to engineer to occur anyway. Questions so existential to the functioning of the modern administrative state should not hinge on interpretive methodology alone. The stability of the civil service cannot depend on the president’s willingness to adhere to norms of good governance and the courts’ selection of a particular means of interpreting statutory law. Unless Congress clarifies the limits of presidential authority, the fate of the civil service will continue to rise or fall on interpretive happenstance rather than durable legal constraint. IV. Implications And A More Stable Equilibrium The Trump administration has exposed the fragility of the civil service and the risks inherent in the statutory authority vested in the president. Preventing administrative sabotage requires renewed recognition of Congress’s role in structuring the civil service. Richard Neustadt famously described the Constitution as creating “a government of separating institutions sharing powers” rather than one of “separated powers.”376 The overlapping constitutional powers of Congress and the president have long rendered the struggle for administrative control a political contest waged through law, rather than a straightforward division of responsibility fixed by constitutional text. 377 Consequently, the distribution of administrative power has ebbed and flowed throughout American history.378 Changes to the current balance of power over the civil service remain both feasible and appropriate. The political case for renewing Congress’s role requires reframing how legal scholars think about the civil service. Modern debates often center questions of policy control and subvert discussions of administrative capacity. Fundamentally, the civil service exists to ensure that the executive branch has the administrative capacity necessary to faithfully execute the laws enacted by Congress.379 Centering administrative capacity—rather than policy control—thus clarifies why Congress has a strong claim to restraining presidential authority over the civil service: The civil service is the mechanism by which Congress’s legislative authority is realized.

**<Integrity Returns>**

A. Threats to Congressional Power

Personnel policy is central to legislative design: it shapes who interprets statutes, how faithfully agencies carry out statutory mandates, and whether the federal government possesses the administrative capacity necessary to transform statutory commands into meaningful policy outcomes. When presidents exercise their authority to reshape hiring rules or diminish the size and expertise of the federal workforce, they effectively rewrite the terms of implementation without altering the underlying statutes. Congress has a compelling political and legal claim to assert stronger structural control over the personnel system that gives its legislation practical effect.

1. Personnel Is Policy

Congress must legislate against the background of policy implementation. Legal scholars have long recognized that procedural design shapes the substantive outcomes produced by law. 380 Congress deliberately crafts procedure—such as notice-and-comment rulemaking and judicial review—to channel agencies toward decisions grounded in expertise and deliberation rather than politics or expedience. 381 Procedure thus functions not merely as a set of technical requirements but as an integral part of Congress’s legislative strategy.382 Yet the personnel who follow these procedures often exert substantial influence over the policy outcomes produced. 383 As Michael Lipsky observed, “the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively become the public policies they carry out.”384

Personnel policy determines who implements law and what incentives shape their choices. A merit system attracts individuals with specialized knowledge, professional training, and long-term career incentives to invest in their competence and judgment. A spoils system, by contrast, prioritizes loyalty over expertise and encourages employees to align their behavior with the preferences of the president rather than the substantive demands of statutory law. These structural choices shape not only the skill set of the workforce but also the incentives that guide day-to-day decisionmaking. In this sense, personnel policy is part and parcel of legislative design. By determining who implements the law, Congress shapes the normative commitments that guide implementation.

Modern administrative governance often requires the federal government to hire employees from varied professional backgrounds. Employees must work in teams of experts to tackle complex policy problems related to the environment, banking, immigration, healthcare, and a myriad of other issues touched upon by federal law. Each profession brings its own norms, expectations, and methods to performing this work.385 Attorneys, for example, operate within a professional culture shaped by ethical duties—such as duties of candor, confidentiality, and independent judgment—that influence how they approach legal analysis and advise decisionmakers.386 Michael Herz has explained that agency attorneys often confront a tension between “the obligation (and personal desire) to facilitate the president’s or the agency head’s policy program, on the one hand, and the obligation to ensure that the program proceeds within legal limits, on the other.”387 Scientists, economists, and engineers likewise rely on disciplinary standards that guide how they collect evidence, evaluate competing claims, and make policy recommendations.388

For better or worse, the professional norms that employees bring with them help shape an agency’s culture and, in turn, influence how it carries out the authority delegated to it by Congress. 389 Changes to the Postal Service’s personnel structure in the nineteenth century transformed it into a more professionalized organization whose growing expertise and reputation enabled meaningful policy innovation and more reliable, efficient service delivery.390 Of course, Congress sometimes seeks to conserve resources by assigning new responsibilities to existing agencies—even when those agencies’ cultures may relegate the new policy to a secondary priority. 391 The IRS, for instance, is staffed largely by accountants whose fiscal conservatism sometimes creates “obstacles to accomplishing congressional goals of alleviating poverty, improving access to health care, or encouraging the pursuits of the nonprofit sector.” 392 Even if one disagrees with Congress’s policy choices, they are choices that Congress—not the president—must make when drafting legislation.

Congress has legitimate reasons to cultivate a workforce capable of faithfully implementing its laws, policies, and programs. Members of Congress are generalists who often lack the specialized expertise needed to address modern policy problems. Indeed, they regularly rely on the civil service’s knowledge and experience when drafting legislative proposals. 393At the same time, Congress worries that agencies may exercise delegated authority in ways that diverge from legislative preferences. 394 To mitigate these principal-agent problems, the enacting coalition seeks to embed certain normative commitments within the agency. Personnel choices serve as a cultural constraint that helps bind the executive branch to those commitments. Personnel policy is therefore inextricably intertwined with legislative design. In some cases, Congress might well have drafted a different statute—or declined to legislate altogether—had it anticipated an agency workforce guided by different normative commitments.

Congress’ ability to cultivate a workforce with certain expertise, experience, and professional norms requires a personnel system capable of recruiting and retaining certain types of employees. Civil service protections foster the sort of stability and autonomy that attract expert and experienced individuals to government. 395 Without these structural guarantees, the workforce becomes more susceptible to politicization through patronage efforts. As politicization increases, federal employees invest less in their own professional development and express a greater desire to leave public service396 Congress’s own legislative authority, therefore, depends on its ability to set personnel policy.

At times, presidential control of the civil service undermines the legislative bargain by steering agencies toward hiring employees who lack the normative commitments Congress assumed would guide implementation. The continual pursuit of political control and patronage creates a workforce increasingly responsive to the president’s immediate policy agenda at the expense of expertise, stability, and professional norms. Policies such as Schedule C, Schedule G, and Schedule Policy/Career illustrate this trend: each seeks to heighten responsiveness to presidential priorities while diminishing the expertise Congress expects to anchor administration. Defending the merit system is thus important not only because it improves government performance but also because Congress itself embraced merit to ensure that its laws would be carried out by qualified and expert employees.

#### Meta-analyses vote AFF…

Kohei Suzuki 25. Assistant professor of public administration at Leiden University, Ph.D. in public policy from Indiana University. "Government efficiency or administrative backsliding?: warning signs from global experience with administrative decline." *Asia Pacific Journal of Public Administration*, 47(2), 91-94.

The second Trump administration has initiated unprecedented reforms of the federal civil service system. On inauguration day, 20 January 2025, President Trump established the Department of Government Efficiency (DOGE), launching a dramatic transformation of federal workforce management. Within its first month, the administration has implemented a three-pronged strategy: a near-total hiring freeze, a deferred resignation programme, and widespread terminations without regard for individual performance or position criticality. The scale and speed of these reductions are without precedent in American administrative history (Schoop, 2025).1

The most controversial aspect of these reforms is the “Schedule Policy/Career” classification, a revised version of Schedule F that would create a new category of readily dismissible political appointees. This change could expand the number of political appointments more than tenfold, affecting approximately 50,000 federal employees. These reforms reflect Trump’s first-term experiences, where his policy agenda was reportedly impeded by what his allies termed the “deep state” - career civil servants resistant to his directives (Fukuyama, 2024). The administration’s clear aim is to replace career bureaucrats with officials more aligned with its agenda.

While such reforms might yield short-term efficiency gains and expenditure cuts, they raise serious concerns about the long-term consequences for bureaucratic autonomy and institutional capacity. The fundamental question is whether these changes will truly create an “efficient government” and “make America great again” or instead undermine the professional foundations of American public administration.

To address this question, we must consider why professional bureaucracies are essential to modern governance. Effective policy implementation requires both political direction and administrative expertise. While elected officials establish broad policy goals, they lack the specialised knowledge needed for the thousands of technical decisions that government operations demand daily. Career civil servants bridge this gap, providing the expertise and continuity necessary for effective public service delivery.

Career civil servants’ expertise becomes evident when we examine the complex tasks of modern governance. Daily operations include activities like collecting pension premiums, analysing economic data, implementing financial regulations, and managing defence procurement. These functions demand not just specialised knowledge but years of practical experience and institutional understanding – qualities that cannot be rapidly replaced or replicated.

The effective functioning of democratic governance thus depends on a careful balance: elected officials provide policy direction while professional bureaucrats handle technical implementation. Critical decisions – from monetary policy to drug safety certification – require deep technical expertise rather than political judgement (Fukuyama, 2024). When politicians overreach into these technical domains, their limited specialised knowledge and focus on short-term political gains often leads to suboptimal or even harmful outcomes.

While the need for professional bureaucracy is universal, countries vary considerably in how they balance political leadership and administrative expertise. A 2020 expert survey by the Quality of Government Institute at the University of Gothenburg, Sweden, offers valuable insights into these differences, measuring how strongly countries adhere to merit-based principles in their personnel practices (Nistotskaya et al., 2021). Their survey data in Figure 1 reveals significant variation across OECD member and Asian countries and regions, with higher scores indicating stronger merit-based practices and correspondingly lower levels of political intervention in personnel decisions.

Under merit-based systems, civil service appointments primarily depend on educational background and professional experience rather than political connections. Countries like Norway, Hong Kong, the Netherlands, Singapore, Sweden, and Japan have developed particularly robust merit-based practices. The American system stands out especially among developed nations for its relatively extensive use of political appointments higher degrees of political interference in personnel matters. The contrast becomes stark when comparing specific numbers: while Japan maintains only about 80 political appointments in its entire civil service, the United States replaces approximately 4,000 high-ranking positions through political appointments during administrative transitions (Kobayashi, 2024). Such high degree of political influence in personnel matters has long distinguished the U.S. federal bureaucracy from its counterparts in other advanced democracies.

The extensive use of political appointments in the U.S. federal bureaucracy reflects a broader phenomenon that public administration scholars term “politicisation” - the practice of basing civil service personnel decisions on political criteria such as party relationships, personal connections, or ideological alignment rather than merit criteria (Peters & Pierre, 2004). The current reforms under the second Trump administration would significantly expand this already distinctive feature of American public administration.

The consequences of such politicisation have been extensively studied. A robust body of research, drawing from diverse national contexts including both developed and developing countries, demonstrates that increasing political control over bureaucracy tends to undermine, rather than enhance, government performance. Empirical studies around the world have found strong correlations between excessive politicisation and increased corruption, decreased organisational performance, and reduced operational efficiency (Cornell, 2014; Dahlström & Lapuente, 2017; Lapuente & Suzuki, 2020; Lewis, 2011; Nistotskaya & Cingolani, 2016). In fact, our recent systematic review of over 1,000 peer-reviewed papers provides compelling evidence that merit-based systems yield significantly better outcomes than politicised ones, including reduced corruption, improved efficiency, increased public trust, and enhanced civil servant motivation (Oliveira et al., 2024).

In light of these empirical findings, the current reforms warrant examination within a broader global context. Public administration scholars have increasingly focused on how populist politics affects bureaucratic capacity and civil service performance (Michael W. Bauer et al., 2021). This research has identified a pattern that Michael W Bauer (2024) terms “administrative backsliding” - the systematic weakening of bureaucratic institutions in countries experiencing democratic decline.

The consequences of such reforms are well-documented. Brazil’s experience shows how political appointees lacking adequate expertise decreased administrative efficiency (Story et al., 2023). In Hungary, politically motivated personnel decisions demoralised civil servants and led to a critical loss of organisational expertise (Hajnal & Boda, 2021). In Turkey, the Justice and Development Party (AKP) governments intensified antibureaucratic discourse, framing the bureaucracy as an extension of a privileged elite. This rhetoric reinforced the populist dichotomy between the “pure nation” and the “enemy of the nation”, positioning the AKP as the true representative of the people while portraying the bureaucracy as a “servant of a specific elite group” and, consequently, an “enemy of the people” (Yılmaz Uçar, 2025). Similar patterns emerged during Trump’s first term, where expert staff were often viewed as “political resistance forces”, leading to a devaluation of expert judgement and loss of organisational expertise as experienced staff resigned (Kucinskas & Zylan, 2023).

Radical bureaucratic reforms, as exemplified by the Trump administration, can be understood as both a response to problems within existing bureaucratic systems and a reflection of public distrust in bureaucracy. However, excessive politicisation of bureaucratic systems compromises administrative expertise and autonomy, risking a long-term decline in policy implementation capabilities and public service quality. Achieving better quality of government requires operating bureaucratic systems under appropriate political control without excessively weakening them, while leveraging their expertise. American public administration and practitioners should now make use of the experiences of countries that have faced administrative decline and draw on insights from comparative research on quality of government.

#### … while every NEG author will be a partisan hack.

J. Edward Kellough 25. Professor of public administration and policy at the University of Georgia, Ph.D. from Miami University. "The Fragility of Merit: Erosion of the Foundation of Public Service Under Trump." *Review of Public Personnel Administration*," 45(1), 20-21.

Discussion and Conclusion

Government employees implement policies and programs, issue rules and regulations, and ensure the operation of public agencies. Given these responsibilities, it is essential that the federal workforce be staffed with people who act on the basis of politically neutral competence. Employees’ decisions should be based on expertise. They should be loyal to the Constitution and federal statutory law rather than to any particular party or politician. Passage of the Pendleton Act of 1883 represented a decision by the United States to establish such a system—to develop a capable and professional public service selected on merit principles and protected from partisan abuse.

The fledgling merit system of 1883 was nurtured and sustained. Over the past 140 years, it grew to become the primary mechanism for filling jobs in the federal workforce. There was wide consensus that merit should be the foundation for public service. Nevertheless, as we have seen, the merit system is vulnerable to attack. The virtues of the structures erected to secure merit are many. Included among them are the promotion of competence in government and commitment to the rule of law (Aberbach & Rockman, 2023). But the merit system will not endure unless our consensus on its underlying principles is upheld, and we maintain a general agreement that we will abide by those principles.

Today, that agreement is threatened by a politicians and conservative policy and legal scholars dedicated to changes that will overturn core aspects of the merit system. Examples of their views are found in statements and policy papers from the Heritage Foundation (2017; Muhlhausen 2017a, 2017b) and in the writings of analysts such as Philip K. Howard (2017). James Sherk, of the Heritage Foundation and later the America First Policy Institute, is another forceful and articulate spokesperson for these views. Sherk served in the Trump Administration on the White House Domestic Policy Council and advocated in carefully argued essays for reforms to make the dismissal of federal workers easier and for the implementation of Schedule F (see, e.g., a statement on these positions in Sherk, 2021). Sherk was the architect of President Trump’s Executive orders of May 25, 2018, and of the President’s Executive Order establishing Schedule F (Sherk, 2022).

Reforms advocated by Sherk and others and implemented during the Trump years are examples the kinds of transformations that opponents of traditional concepts of merit wish to impose. Civil service policy changes advocated by the Trump Administration illustrate the vulnerability and fragility of merit in the U.S. government, and while President Biden’s reversal of the Trump policies was a victory for merit as we have known it, advocates for the kinds of reforms initiated under President Trump remain at work today. The threat to the merit system did not end with the Trump Presidency in January 2021. Former officials of the Trump Administration and Republican members of the U.S. House of Representatives have argued recently that if Trump or another Republican wins the White House in 2024, they will push their plans for the civil service forward again (Swan, 2022a, 2022b; Wagner, 2022a, 2022b). In addition, if the Republicans gain control of the Senate in the fall of 2024, those advocating for change in the civil service will be in an even stronger position. Under these circumstances, there would be little that could be done to stop implementation of a new round of Trump-style reforms. In theory, Congress could pass legislation prohibiting certain kinds of actions. In fact, the House of Representatives passed a bill in September of 2022 (H.R. 302) to prohibit future versions of Schedule F (see, Wagner, 2022c), but in the Senate the bill required the support of at least ten Republicans to avoid the filibuster, and it died when the 117th Congress ended on January 3, 2023. Even if such a bill was passed and signed into law, however, given the enormous authority granted to the President by the Constitution, such legislation would likely not withstand judicial scrutiny. The federal merit system is vulnerable because of the way the U.S. Constitution structures authority over the civil service. That is, in all practical effect, a permanent vulnerability.

In an insightful article on the Trump Presidency and the federal bureaucracy, political scientist Bert Rockman (2019) notes that the neglect or downgrading of merit and efforts to elevate personal loyalty to the President during the Trump years were tools to delegitimize government, damage neutral competence, and facilitate an authoritarian conquest of the civil service (p. 26). As Rockman (2019) explains, a public bureaucracy with a measure of independence is essential for the rule of law (p. 14). The reforms initiated under President Trump, however, were oriented toward a different objective—political loyalty. Ultimately, the effectiveness of government was threatened, especially given the devaluing of administrative capability and expertise underlying the Trump agenda.

In the 1990s, the reinventing government movement and the concept of new public management rested in part on an assumption that you can deregulate public personnel management through dramatic reforms intended to increase “managerial flexibility” because politicians had fully accepted merit principles and recognized the importance of politically neutral competence in the public workforce. The rise of right-wing populism and the Trump Presidency proved this assumption wrong.19 Administrative reforms are usually grounded on political motives and, at the federal level, are almost always oriented toward augmenting Presidential control (Rockman, 2019). The federal merit system was initiated and developed to promote the growth of administrative expertise needed for effective government. Work should be undertaken to rebuild a national consensus in support of merit as the foundation of public service. A failure to do so will place the effectiveness and stability of government at risk.

#### Unions fund litigation, protect employees from firings, and lobby to check mission creep.

Nicholas Handler 24. Lecturer at Stanford Law School, J.D. from Yale Law School. "Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power." *New York University Law Review*, 99(45), 77-80.

1. The Value of Unions

The civil service's move toward unionization reflects a broader recognition of the value of organized groups in protecting rights and pursuing key political objectives.160 Unions accumulate resources and expertise, allowing civil servants to mount sophisticated and well-financed defenses in labor disputes and to lobby effectively on key issues.161 Unions, for instance, are more effective at litigating employment disputes, a key tool in resisting the disciplinary efforts of management.162 They achieve higher win rates than unrepresented employees before arbitrators, a key strategic consideration for union-side counsel, as well as a key source of criticism from opponents of unionization rights.163 Unions also bolster the ability of civil servants to successfully litigate employment disputes against agencies in other ways. Through FLRA litigation, unions have secured civil servants Weingarten rights: the right to have a union representative present during a disciplinary investigation.164 Unions have likewise fought, with mixed success, to bargain for specific substantive rights for civil servants during interviews by agency inspectors general.165 Unions also provide extensive financial and logistical support to individual employees. The National Border Patrol Council, for instance, has established legal defense funds for CBP officers who are under investigation for their involvement in "critical incidents," such as the use of force.166

Even when unions do not litigate labor disputes directly, the threat of litigation - the possibility of losing, the need to delay policy implementation, the drain on budgets, and the attendant uncertainty - incentivizes agencies to cooperate with unions, and to take their preferences into account when staffing political positions and formulating policy. For instance, powerful unions, including those representing ICE and the EPA, can and do express their opposition to certain agency heads, dissuading the President from appointing them for fear of souring labor relations and inciting costly litigation battles.167

Perhaps the best example of labor's deterrent power is President Clinton's National Performance Review (NPR) program, launched in 1993. NPR's goal was to "reinvent[]" government by streamlining agency operations, reducing the size of the federal workforce, and reducing labor-management litigation.168 In exchange for union support for a variety of cost- and personnel-cutting measures, President Clinton granted unions substantial new powers.169 The National Partnership Council, which shaped agency reorganization policy, was given four union representatives (one from AFL-CIO, and one each from the largest federal unions - NTEU, AFGE, and NFFE).170 Further, in exchange for union cooperation, President Clinton issued Executive Order 12,871 requiring agencies to bargain over formerly optional subjects, effectively waiving a broad range of management rights and significantly expanding union bargaining power.171 Unions also took a substantial role in shaping the federal government's downsizing to ensure union positions received protection during workforce reduction.172

In addition to litigation, unions also have extensive statutory power to lobby Congress, often acting as one of the only sophisticated, proregulation advocacy groups in a competition of political influence dominated by private interests and well-funded nonprofit groups. The CSRA created unions that are, in effect, federally subsidized by dues, "official time" (time during which union officials are paid to engage in organizing and bargaining work), and protections against unfair labor practices.173 To facilitate union lobbying, Congress also created numerous exceptions to rules governing political engagement by civil servants, including the right to lobby on behalf of a labor organization and Hatch Act exemptions to participate in politics.174

Unionized federal employees have been politically engaged since the enactment of the CSRA, lobbying on a range of budgetary and regulatory reform issues.175 Unions lobby on issues ranging from regulatory enforcement policy, to the selection of agency leadership, to questions of funding - and their efforts have had substantial influence in Congress.176 Unions representing the employees of the NLRB, Department of Education, and IRS have all, for instance, lobbied for increases in appropriations for regulatory efforts that have been regular targets of under-funding.177 Labor also endorses political candidates, testifies routinely before Congress, and speaks to the press on high-visibility policy issues, often expressing views contrary to the views of agency leadership.178

#### The cumulative effect of collective bargaining is greater than the sum of its parts. Also, FLRA enforcement is effective.

Nicholas Handler 24. Lecturer at Stanford Law School, J.D. from Yale Law School. "Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power." *New York University Law Review*, 99(45), 84-90.

III Bargaining as Bureaucratic Power in Contemporary Practice

Part II provided a typology of federal labor rights and examined how different rights can constrain presidential power. This Part provides data and real-world examples from three policy areas - immigration, tax, and environmental regulation - to show how these different forces can work in tandem to shape bureaucratic culture and affect policy outcomes throughout very different areas of federal law. These case studies are critical to understanding the true power of labor rights to reshape the executive branch. In isolation, the different contractual rights outlined above can hinder or redirect certain managerial initiatives. But when many of these contractual rights are deployed simultaneously, over years and decades, by sophisticated and well-organized unions, they can profoundly change an organization's culture, its institutional practices, and its mission.

These rights have been used differently in the different policy areas surveyed below. In immigration, labor rights have been increasingly weaponized by bureaucrats and their political allies to pursue certain ideological objectives. In the tax and environmental areas, they have been used more defensively, as a shield against structural deregulation. But each study demonstrates the role that labor can play in pushing back against presidential administration.

This Part consists of four subparts. Section III.A examines a novel dataset of 986 FLRA cases involving immigration, tax, and environmental regulation over the past 40 years. A central claim of this Article is that labor rights exert an important influence on the executive branch. The data confirms that hypothesis: Labor often prevails in contract disputes with agency management, including under hostile presidential administrations and hostile FLRA majorities. Many of these cases carry important implications for presidential control of specific agencies. The data also demonstrate that as labor is increasingly weaponized to contend with more aggressive versions of presidential administration, it is becoming more controversial. As measured by the number of dissents filed in FLRA cases and the rate of reversals of putatively neutral arbitration awards, labor litigation has become more divisive and harder fought over the last decade. Sections III.B, III.C, and III.D then provide case studies of how labor rights have reshaped bureaucratic-presidential relations and policy outcomes in immigration, tax, and environmental regulation.

A. Data

This Section presents an analysis of 986 FLRA adjudications spanning more than forty years, from 1979 to 2022, across seven agencies in three policy areas. Despite the importance of bargaining to modern bureaucracy, there exists very little empirical research on its implementation, including on fundamental questions such as how frequently labor and management prevail in labor disputes, how frequently litigations implicate particularly contested questions of managerial control, and how frequently disputes generate controversy. This Section seeks to fill that gap by providing a broad overview of how labor disputes play out over time across the immigration, tax, and environmental policy spaces. It first examines how frequently labor and management prevail in disputes to determine whether the CSRA serves its original purpose of promoting a relatively stable balance of power between the President and the bureaucracy. It then seeks to determine the degree to which labor disputes have generated controversy or become sites of legal or political contestation.

A caveat is necessary at the outset. The three-person FLRA is, in most instances, an appellate body. Most contractual disputes are resolved in the first instance by internal grievance processes or third-party arbitrators. Disputes over unfair labor practices are generally adjudicated first by administrative law judges.206 Disputes over bargaining unit recognition are heard first by FLRA Regional Directors; and negotiating impasses are typically resolved by the Federal Service Impasses Panel (FSIP).207 But the FLRA plays a formative role in setting federal labor policy, issuing authoritative constructions of the CSRA, and determining appeals from the hardest fought labor disputes. I therefore treat it as a reasonable proxy for which party the labor regime favors, and the controversy attending its decisions.

1. Wins and Losses

Key to understanding the effect of labor rights on bureaucratic relations is understanding which parties benefit from its provisions. Federal sector labor rights were designed to secure industrial peace within the executive branch. As described above, federal sector labor rights were the product of compromise between a presidency seeking greater freedom to structure the executive branch and a labor movement, supported by congressional Democrats, seeking more robust protections for federal employees. If they are serving that purpose, one would expect both labor and the President to prevail a meaningful percentage of the time. Guarantees of moderating power would be useless if one side gains a decisive or permanent advantage.

The data indicates that both labor and management do win a meaningful percentage of the time.208 As shown in Figures 1 and 2, this is true across presidential administrations, from 1979 to the present. It is true in periods of labor turmoil, such as the Reagan Administration, as well as times of relative rapprochement, such as the Clinton era.

As shown in Figures 3 and 4, while labor wins slightly more frequently when the FLRA has a Democratic majority (51.7% versus 48.0% during Republican majorities), the difference is relatively modest. Indeed, win rates for labor are much higher than for equivalent disputes before the MSPB, where surveys have consistently shown that agencies win over 75%, and perhaps as much as 90%, of the time.209 This data supports labor and Congress's assumption that unionized representation could serve as a more effective check on managerial authority than traditional civil service protections.

One other aspect of this data is worth noting. The total number of cases declined dramatically from the 1980s to 2020s. This is not a quirk of the specific agencies studied here. The total number of FLRA decisions has declined over the past four decades. From January 1, 1979 to December 31, 1989 the FLRA issued 4,196 opinions; from January 1, 1990 to December 31, 2000, it issued 3,147; from January 1, 2001 to December 31, 2010, it issued 1,514; and from January 1, 2011 to December 31, 2020, it issued 1,176.210 The decline of the total number of FLRA cases does not mean that the federal labor regime has declined in importance. First, many disputes that were litigated in the CSRA's first decade are now settled informally through grievance procedures and labor-management programs such as those established under President Clinton's NPR program.211 These efforts reflect the bargaining power of federal workers. FLRA litigation is costly and disruptive. While there is no clear data on management council outcomes, anecdotes suggest that labor has a meaningful role in shaping management policy, and the councils are responsive to unions' concerns.212 Likewise, many disputes that might otherwise be litigated are instead now resolved through negotiated grievance procedures. Here again, anecdotal evidence suggest that these procedures can be more favorable to labor than the alternative.213

2. Controversy

The data also appear to show relative stability through the Trump Administration. This is significant, given President Trump's overt hostility to labor and the many ways in which his administration departed from traditional norms of labor relations.214 Observers have presumed that the FLRA majority appointed by President Trump was more hostile to labor than previous boards, including those with Republican-appointed majorities.215 Indeed, these accusations were so frequent that the FLRA's Chairman was questioned by the House Oversight and Reform Government Operations Subcommittee over her alleged "`anti-union' modus operandi."216 In terms of raw numbers on wins and losses, there is no clear indication of a strong anti-union bias. However, I reviewed additional metrics to examine whether there was any empirical support for the claim that the Trump-appointed FLRA was uniquely hostile to labor. Consistent with observations of labor hostility, and consistent with the general trend toward greater politicization of democratic institutions,217 these data do provide some indication that labor has become more politically divisive in the past decade.

#### 2. Necessary.

#### Bargaining uniquely defuses disputes AND improves morale.

Casey Keppler 24. Major in the United States Air Force, L.L.M. from the George Washingtom University Law School, J.D. from the University of Iowa College of Law. "The Propriety of Restraint: Assessing the Viability and Wisdom of Executive and Legislative Branch Action to Eliminate Collective Bargaining Rights in the Department of Defense." *Hofstra Labor & Employment Law Journal*, 41(297), 357-358.

C. The Benefits of Collective Bargaining Extend Beyond the Tangible Results Obtained Via Negotiation and Litigation.

An individual employee is significantly disadvantaged when attempting to seek relief from his or her employer.523 Collective bargaining gives employees a collective "voice" in an effort to level the playing field.524 A primary driver behind employees' efforts to organize and collectively bargain is, in fact, to gain a voice in the conduct of operations.525 Exercising their voice not only permits employees to improve their working conditions but also results in information sharing between employees and management that can produce a more effective and efficient working environment.526

The Supreme Court has acknowledged the important role that collective bargaining serves in providing an opportunity for employees to communicate information and suggestions that may be helpful to management.527 Unions can effectively gather information from their membership, bring concerns to management's attention, and provide clarification to their membership regarding rules or policies being proposed or implemented by management.528 There is significant evidence, in fact, that collective bargaining serves as an effective mechanism for employees and employers to work together, thereby giving employees a voice and boosting their performance and morale.529 Studies have shown that employee engagement with management is more productive when employee communications are channeled through an independent representative such as a labor union.530 Given the adversarial approach that naturally results due to the parties' commonly conflicting interests, the statutory requirement to bargain in good faith serves an invaluable purpose of securing a channel of communication.531 Removing that requirement increases the likelihood that open communication will cease and workplace disputes will linger without resolution.

Giving employees a voice in the conduct of operations reaps benefits beyond information sharing; it also positively impacts morale and productivity.532 Direct engagement that results in even small concessions from management can generate a sense of employee empowerment that has out-sized effects on morale.533 According to a report published by the World Bank, countries with higher unionization rates tend to exhibit higher productivity, and a sizable population of labor union members tends to have a stabilizing and beneficial effect on the national economy.534 Empirical evidence also shows a positive correlation between participation in collective bargaining and participation in societal democratic processes.535 Collective bargaining's positive impact on communication, morale, and productivity demonstrate that its importance extends beyond the tangible gains yielded by negotiation and litigation.

#### And provides a “collective identity” that strengthens governance.

Robert Bruno & Brandon Grant 16. Director of the Labor Education Program and Project for Middle Class Renewal, professor of Labor and Employment Relations in the School of Labor and Employment Relations at the University of Illinois, Urbana-Champaign. Ph.D. candidate in labor and employment relations at the University of Illinois. “The Relationship Between Unions and Meaningful Work: A Study of Public Sector Workers in Illinois.” IUIC School of Labor and Employment Relations. 10/14/2016. lep.illinois.edu/wp-content/uploads/2021/08/Public-Sector-Meaningful-Work-Report-FINAL.pdf#:~:text=union%20as%20a%20primary%20source,experience%20while%20on%20the%20job

This report, The Relationship Between Unions and Meaningful Work describes findings from a survey of a small group of Illinois public sector workers which investigates the work motivations of public employees. The study shows new evidence that government employees are strongly motivated to find “purpose in work that is greater than the extrinsic outcomes of the work.” Additionally, we find that government employees view their public sector union as a primary source of intrinsic motivation.

The unions that public sector workers belong to, do more than simply negotiate and enforce collective bargaining agreements. As our findings suggest, they are also related to the competence and performance level of public sector employees. But perhaps more provocatively, it is likely that the union plays an important role in the meaningful work that they experience while on the job, the job satisfaction they experience, and the prosocial values they maintain; some of the very factors that draw individuals into public service.

The policy implications for Illinois and other states are obvious. First, by taking away the right to unionize or denigrating the value of collective bargaining, as occurred in Wisconsin, Indiana, and Michigan the state may be removing one of the most important incentives to recruit highly educated people to public service. Second, a weaker or nonexistent unionized government labor force may transform the choice of public service into merely a self-interested financial exchange; labor becomes just another commodity.

Finally and most potentially troubling, if workers are without a collective identity that potentially facilitates their quest for meaningful work and subsequently, they perceive their employment as primarily or solely as a way to earn living, then public service itself loses a significant portion of its service dimension. Ironically, weakening the institution that is unjustifiably characterized as imposing a financial burden on citizens may produce a workforce that labors for little more than a paycheck. Fair compensation should be a minimum requirement for government employees, but so should a commitment to preserving the people’s common assets.

Our study challenges the claim that public sector unions act contrary to the common good. We found evidence that not only do workers who choose to pursue careers in the public sector do so in spite of the comparative lower wages that they earn, but that the unions they belong to strongly related to their desire to accomplish more thorough work than earning an income. Work in the public sector serves as a vehicle to fulfill, at least in part, a personal need to experience a meaningful life and job.

#### The signal sent by collective bargaining rights is key.

Andrea Hsu 25. Journalist. "How Trump is decimating federal employee unions one step at a time." NPR. 8/31/2025. npr.org/2025/09/01/nx-s1-5515633/trump-federal-workers-labor-unions-va

Fears of a brain drain

Across the federal government, some workers aren't waiting around to see what happens. They're quitting now, having decided a government job just isn't worth it anymore. Many workers fear with unions gone, they won't have a say in matters such as telework or family leave policies that make a difference to their quality of life.

"Although they came to the federal government because of their passion for public service, they also came because of the flexibility of the government, and those flexibilities are just being wiped away," says Anthony Lee, a longtime Food and Drug Administration employee who's also president of NTEU Chapter 282, representing some 9,000 FDA employees across the Mid Atlantic.

Although the FDA has not yet terminated the union's contract, it has ordered the union to pack up its offices.

Lee says the government is losing chemists, toxicologists, engineers and others who ensure drugs and medical devices are safe and effective and food ingredients aren't poisonous.

"It is already, in my view, harming the public because we're losing that institutional knowledge. We're losing that subject matter expertise," Lee says. "As much as the current administration thinks that everyone is just quickly replaceable, they're not."

#### Uncertain processes fail.

EPI 25. Nonprofit think tank. "Trump administration attempts large-scale federal employee layoffs during government shutdown." Economic Policy Institute. 10-28-2025. epi.org/policywatch/trump-administration-attempts-large-scale-federal-employee-layoffs-during-government-shutdown

Prior to the government shutdown beginning in October 2025, the Trump administration had already pursued several avenues to attempt to dramatically slash the size of the federal workforce, including terminating or limiting collective bargaining agreements with federal employees unions, offering a deferred resignation package to all federal employees, closing agencies or offices whose mission does not align with the administration’s political agenda, wand proposing a new worker classification that would make it easier to for federal employees to be fired for political reasons. Most of these moves have been challenged in court by federal employee unions or other interested parties, and in some cases the government has been blocked from firing more employees while the litigation proceeds.

Impact: The Trump administration’s recent actions have added to the chaos and uncertainty experienced by many federal workers by months. At at least one agency where workers received layoff notices on October 10, the Centers for Disease Control and Prevention, some were speedily rehired. Most others may now need to look to proceedings in the lawsuits brought on their behalf by federal employee unions to determine the ultimate fate of their jobs. These continued attacks on federal employees continue to undermine the public sector, weaken the effective operation of countless government programs and public service, and to harm the federal employees who may lose employment or be forced to seek out other jobs due to the uncertainty.

#### Rehiring can’t solve morale.

Sophie Gardner 25. Healthcare reporter. "Inside the CDC whiplash." Politico. 11-21-2025. politico.com/news/2025/11/21/inside-the-cdc-whiplash-00664632

Hundreds of workers at the Centers for Disease Control and Prevention who were fired in October returned to work this week, thanks to a provision in the shutdown-ending deal passed by Congress.

For many, however, the trip back to the office is far from joyful.

Over the past nine months, under the supervision of Health Secretary Robert F. Kennedy Jr., CDC employees have experienced more turmoil than most under the Trump administration.

They’ve faced several rounds of firings and sporadic reinstatements, witnessed the dramatic ousting of their director and the resignation of top career leaders in protest. Some were shot at by a gunman targeting the agency’s Atlanta headquarters in August and all have watched as Kennedy fired and then replaced a key panel of CDC vaccine advisers.

In addition to all that, like most federal workers, many CDC employees went without paychecks during the longest-ever closure of the federal government.

On Wednesday, as some employees returned to buildings riddled with bullet holes, morale took another hit with a surprise update to the CDC’s vaccines and autism webpage. It suggests that vaccines may cause autism and states that “studies supporting a link have been ignored by health authorities.” The move upended decades of work by senior career vaccine scientists to combat misinformation about a potential link between vaccines and autism – which many large studies have found no evidence of.

In a statement, HHS spokesperson Andrew Nixon described the change as a “common-sense update” to fulfill a “commitment to transparency and Gold Standard Science.”

He also said that Kennedy is trying to restore a “broken” CDC: “His focus is on returning the CDC to its core mission and ending the culture of insularity that has undermined public confidence.”

Some employees have a different take.

“On top of the never-ending feeling that we have metaphorical targets on our backs, a lot of employees feel like they have literal targets on their backs,” one CDC employee said. “The mood among CDC staff is ‘dead man walking.’”

The congressionally-mandated reinstatement of fired CDC workers marks at least the fourth time the administration has had to backtrack on planned firings of large chunks of the agency’s workforce.

POLITICO interviewed current and recently departed CDC employees about the changed work environment. Most of them were granted anonymity for fear of retribution.

Taken together, the eight workers described a culture of declining faith in the agency and a lack of guidance and communication from leadership. In his nearly three months on the job, CDC Acting Director Jim O’Neill has sent only one agency-wide email, two employees said, about how the agency should improve.

“Usually we have regular ‘all hands’ calls with the director. And the director takes time to meet the agency,” said a second CDC employee. “We’ve never heard the man even speak.”

Nixon said that O’Neill is having “almost daily meetings with CDC leadership” and has led the response to a recent infant formula recall.

In early October — just 10 days into the shutdown — the Trump administration laid off around 1,760 HHS employees, primarily hitting the CDC. It later reversed about half of those firings, citing “data discrepancies and processing errors.”

Democrats negotiated a provision in the continuing resolution that requires the CDC employees laid off during the shutdown and not initially reinstated — and the hundreds in the same situation at other agencies — be brought back. But CDC employees are skeptical that their reinstatements will stick.

“These people, especially those who received the reduction-in-force notices on Oct. 10, are wondering what happens Jan. 31,” the day after the continuing resolution expires, said Yolanda Jacobs, president of American Federation of Government Employees 2883 representing CDC workers in Atlanta.

“Are they going to be back [to] … being used as bargaining chips?,” Jacobs said. “When this administration makes threats, it does everything that it possibly can to make good on those threats.”

Max Stier, president and CEO of the Partnership for Public Service, a nonprofit that promotes government service, said those concerns are not baseless.

“Come Jan. 31 — the CR ends Jan. 30 — all bets are off,” Stier said. He added that other protections governing the firing of federal workers still apply.

The laid-off CDC staff who were not initially reinstated include employees on the Institutional Review Board, which evaluates research studies, the Technology Transfer Office, which deals with patents, and the Employee Assistance Program, which provides counseling and emotional support for the agency’s staff, former CDC Chief Medical Officer Debra Houry said on a call with reporters in October. Houry also noted that CDC employees who worked on a critical nutrition survey were not initially reinstated, as well as employees who worked on communications and policy.

The shutdown-ending deal means those employees are now being reinstated.

The agency has seen three large scale layoffs, in February, April and October — making it one of the hardest hit agencies during the Trump administration. In the days or weeks following each round, some employees have been told their firings were a mistake and asked to return.

“We know of people who have now received three RIF notices,” a third CDC employee said.

An agency in chaos

Despite the volatility, Amy Kirby had assumed her team — which had been working on a project to centralize CDC disease surveillance data from across the agency — was safe.

Kirby has been part of the leadership for the One CDC Data Platform effort since 2024, and the Trump administration had indicated it was a priority. O’Neill’s lone email to CDC staff after he assumed the acting director role in August pointed to the 1CDP project as an example of innovation, Kirby told POLITICO.

Kirby was shocked to learn that, on Oct. 10, the majority of employees working on the project – around 16 people — had received reduction-in-force notices.

Unlike many CDC employees that HHS has said were mistakenly fired, the 1CDP staff did not have their reduction-in-force notices rescinded the following day. HHS and CDC told Kirby’s bosses that the firings had been a mistake, she said, but “it was never reversed. It only got reversed when Congress put it in the bill.”

“It’s very odd that in a month, they couldn’t reverse what they were saying was a mistake,” Kirby said.

She believes the firings were purposeful. “Even if you’re working on an agency priority, they will still fire you.”

Kirby herself never received a reduction-in-force notice. But she decided to quit after most of her team was fired.

Her team is now returning, but they “don’t feel safe,” she said. “They are working under the assumption that in February they’re going to get RIFed again.”

“It is heartbreaking,” Kirby said. “I’m sad for the people that are still there having to struggle through all of that. I’m sad for our country that we don’t have CDC at its best.”

A fourth employee said they have struggled to plan for the future without a clear picture of what it will look like — and who will be left.

“We simply can’t do the kind of transformative long-term thinking that is needed for this work (or this administration) to be a success,” they said.

Several leadership positions have been left vacant, including chief medical officer. Houry resigned from that job in August, citing politicization of the agency.

The Office of Public Health Data, Surveillance, and Technology lost its director, Jennifer Layden, after she too resigned in August. Kirby’s division — which sits inside that office — also had lost some staff, and needed to restructure.

But because no one had been tapped as acting director of the office, “there was no one to approve those changes” and the plan had to be tabled, Kirby said. “Then the shutdown hit and the RIFs added other pressing issues to resolve.”

Layden’s position is still vacant.

‘Basically a hostile work environment’

In addition to logistical challenges, the volatility has also created an environment where employees often feel they can be ousted at any moment. And they’ve also lost a key layer of protection.

In August, HHS moved to stop recognizing several unions, including one that represents CDC workers at the agency’s Atlanta headquarters.

Nixon, addressing HHS’s decision to stop recognizing the unions, said President Trump implemented Executive Order 14251, which excluded many agencies from collective bargaining, “to remove unnecessary obstacles to mission-critical work and space previously used for union activities.”

As a result, said Jacobs, there is no one to de-escalate conflicts, and more employees than usual are facing disciplinary actions.

Jacobs said they’ve seen more employees placed on performance improvement plans or suspended.

“When the union is in the building, a lot of these disciplinary actions don’t have to escalate to that point, because a lot of times, a lot of those situations can be resolved at much lower level,” Jacobs said.

#### Protections against politicization are key.

Erin Schumaker 25. Health care reporter, covering the National Institutes of Health. "The ‘deep state’ is proving to Trump it’s a worthy foe." Politico. 9-14-2025. politico.com/news/2025/09/14/trump-federal-workers-deep-state-civil-service-00558940

But if Trump’s goal was to dismantle the workforce he calls the “deep state” — and blames for the failings of his first term — he’s got a long way to go. Although he’s disrupted swaths of the government, the vast majority of career federal employees who avoided the firings of the past seven months are sticking it out, according to Labor Department statistics and the White House’s own admission.

Many of those who’ve chosen to remain are keeping their heads down. Some aren’t — and their open defiance of Trump administration policies may make it harder for the administration to achieve Trump’s goals — much like Trump complained they did in his first term.

At the end of the day, career staffers still believe that politicians come and go and it’s them who will persevere, the survivors told POLITICO.

“They are staying in their jobs — the vast majority of people, even though they could get a job somewhere else or look for a job somewhere else,” said Rushab Sanghvi, general counsel for the American Federation of Government Employees, whose bargaining agreements at at least six agencies Trump has sought to scuttle. “There will be a new administration, with new priorities.”

For many, that’s true, but for others, such as those in highly specialized fields like foreign aid, the job market for former government workers is limited. The Bureau of Labor Statistics said Sept. 9 it likely overestimated past job growth by hundreds of thousands, painting a grimmer picture of the employment market than previously thought. That too could be a factor in federal workers’ apparent resolve to stay.

While 200,000 federal workers have left the government this year, the most in a single year since World War II, Trump still employs about 2.2 million civil servants.

By year’s end, the administration expects to cut loose 100,000 more federal workers, according to the White House Office of Personnel Management. That’s a lot, but it amounts to a cut of about 12 percent.

Some agencies have taken bigger hits. Health Secretary Robert F. Kennedy Jr., for one, says he expects the staff of the Department of Health and Human Services will shrink by a quarter. Others, such as the Department of Education and the EPA, have taken deep blows.

In terms of sheer numbers, the biggest hits have come at the Department of Defense, which has shed 56,000 workers out of about 900,000 civilians; the Department of Agriculture, down 22,000 from about 98,000, and HHS, which has 13,000 fewer people on the payroll compared to a year ago, when there were 93,000, according to a tally as of the end of August compiled by the Partnership for Public Service, a nonprofit group that opposes Trump’s downsizing.

But for all of Trump’s broadsides — he’s called civil servants “crooked” and “dishonest” people who are “destroying this country” — the percentage of federal workers quitting each month hasn’t budged, according to Bureau of Labor Statistics data. The quit rate is holding steady at 0.5 percent as of July, the same percentage as last year before Trump took office and down from 0.7 percent at the height of the pandemic.

A minority of federal workers back Trump and support what he’s doing. Thirty-eight percent of them voted for him last November, according to a Washington Post-Ipsos poll conducted in early March, and 83 percent of those who voted for Trump approved of his job performance, despite the turmoil in their workplaces that was well underway at the time.

The quit rate among federal workers is still far below the 2.2 percent rate of the private sector.

That’s despite the White House’s estimate that 80 percent of the departures were voluntary.

It’s not clear how many of those workers were planning to quit, or retire, anyway — and enjoyed a few extra months’ pay thanks to the “deferred resignation” deal Elon Musk’s Department of Government Efficiency offered. The White House doesn’t have the data yet on the retirement eligibility of workers who took Musk’s “fork in the road” — or even hard numbers on how many did — but expects at least a third and as many as half had enough service to start collecting their pensions.

Rather than go quietly, workers who resent Trump’s attacks, as well as the damage they say the president has done to the programs they work on, intend to fight it out.

In response to Kennedy and Trump’s firing of the director of the Centers for Disease Control and Prevention on Aug. 27, more than 1,000 civil servants, some current, some former, published an open letter demanding Kennedy’s resignation. CDC workers at agency headquarters in Atlanta held a “clap out” to thank three departing colleagues who’d quit in protest.

At the National Institutes of Health, workers have publicly accused Director Jay Bhattacharya of prioritizing politics over human safety, prompting him to meet with them. Bhattacharya promised to permit open debate and said he wouldn’t retaliate against them for speaking out.

In an interview with POLITICO, Trump’s personnel chief, former venture capitalist Scott Kupor said: “I don’t fault anybody for having views that are different from what the administration is doing.” Kupor added: “This is a completely different motion than anybody’s ever seen. So it’s not surprising to me at all that people are reacting to it.”

Agency leaders have, in other cases, punished workers who’ve resisted Trump’s moves. The Environmental Protection Agency fired employees who wrote a letter criticizing agency leadership and the Federal Emergency Management Agency suspended workers who warned in a letter that the Trump administration’s actions were preventing the agency from fully responding to extreme weather events like hurricanes and floods.

Those in the crosshairs say they’re leaning on the extensive system of protections Congress created to shield the civil service from political interference. “I’m grounded in what the rules are,” said a career senior executive at the Department of Health and Human Services, who was placed on administrative leave and offered a transfer to the Indian Health Service.