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Hollow Hope

#### The United States Federal Government should prohibit labor protections in the gig economy, including at the state level.

#### State labor reforms are booming now due to strong labor movements. That’s key to jumpstart democratic localism and create durable worker protections, but the plan trades off.

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Along with administrative innovation, the new labor federalism described above entails significant constitutional innovation, again with relevance beyond the workplace. Over the last few years, labor has won (1) affirmative protection of collective labor rights through constitutional amendments and (2) new labor-friendly interpretations of existing state constitutional law, with implementation by both courts and legislatures. These efforts build on a long tradition of labor constitutionalism at the state level through which labor has sought to guard against corporate capture of legislatures, limit hostile decisions from courts, and enshrine as fundamental not only traditional individual rights, but also collective and positive rights.189 Taken together, labor’s state constitutional efforts suggest some possibilities for a more democratic approach to constitutionalism.

A. State Constitutional Protection of Labor Rights

1. History of Constitutional Labor Rights

Labor’s success at constitutional lawmaking at the state level marks a sharp contrast from the federal level. With the exception of a brief period during the mid-twentieth century, the U.S. Constitution has been interpreted by the Supreme Court to provide few labor rights. The Court has held that the First Amendment protects a right to associate in unions; however, there is no constitutional right to bargain or strike, and constitutional protections for labor picketing and protest are severely limited.190

Numerous scholars have critiqued this doctrine,191 and in the mid-twentieth century it looked like the Court might go in a different direction.192 Yet there is virtually no chance the current Supreme Court will expand constitutional protections for collective labor activity. To the contrary, the Court is increasingly using the Constitution to limit labor rights and to weaken unions, as in Janus v. AFSCME, 193 where the Court held that the First Amendment protects the right of a worker not to pay any union fees even when receiving the benefits of union contracts and representation, 194 or in Cedar Point Nursery v. Hassid, 195 where the Court held that the Takings Clause prevents a state from allowing union organizers access to talk to otherwise inaccessible farmworkers about unionization.196 Moreover, amending the Constitution has become, under the current political alignments, near impossible.197

State constitutions, however, are both more protective of worker rights, including collective worker rights, and easier to amend than the Federal Constitution. This is not surprising given that, from the outset, state constitutions were designed as a device for democratic majorities to control both elected government officials and the judiciary.198 As Emily Zackin has detailed, from the Civil War to the New Deal, labor organizers established state constitutional protections for labor rights in order to respond to judicial decisions finding that legislatures lacked power to enact pro-worker legislation. 199 They also drafted state constitutional provisions to try to force legislatures to protect workers— and to constrain wayward legislators. As Zackin writes, “[s]tate legislatures were often perceived as unscrupulous and on the payroll of corporations. Thus, some labor amendments were passed with the express purpose of circumventing or controlling these corrupt legislative bodies.” 200 Late nineteenth and early twentieth-century labor amendments to state constitutions were also important for movement building, helping to raise citizen expectations.201

Most of the early labor rights provisions added to state constitutions created individual rights to fair treatment at work or enabled legislatures to enact protective legislation. 202 For example, dozens of provisions enacted between the 1880s and 1940s created rights to safe workplaces, maximum hours, and minimum wages, among other rights.203 But several states also enacted protections for collective labor rights, with some guaranteeing the right to organize and bargain collectively,204 and others prohibiting employment discrimination because of union membership. 205 The advocates for constitutional labor rights offered three main justifications for why such provisions were needed: (1) to ensure that legislatures did not succumb to corporate influence and undermine collective bargaining contrary to popular preferences; (2) to prevent courts from invalidating collective bargaining legislation as violations of existing constitutional rights, by instead making collective bargaining rights coordinate with other traditional constitutional rights; and (3) to recognize that the right to unionize had become “deep seated,” “inalienable,” and “fundamental” in the same way as traditional constitutional rights and should be placed beyond the reach of ordinary politics.206

2. Amending State Constitutions To Protect Labor

Over the last few years, the labor movement has returned to active use of state constitutions, including by seeking amendments enshrining the right to unionize—and for largely the same reasons as the early twentieth century reformers.207 Most prominently, in Illinois, the labor movement mobilized to add a “Workers’ Rights Amendment” to the state constitution in 2022. 208 It declares that “[e]mployees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing” and also prohibits legislators from restricting union rights, including by enacting right-to-work laws. 209 Because of the preemption doctrine, the provision will not change the process by which private sector workers organize and bargain, but it has expressive value. In celebrating the passage of the amendment, Illinois Governor J.B. Pritzker invoked the state’s “rich union history” from “the 1887 Haymarket Affair to the 1894 Pullman Strike” and celebrated Illinois workers for being “at the forefront of fighting for fair wages, reasonable hours, and safe working conditions.”210 The amendment also has the potential to strengthen efforts to win union rights among those not covered by preemption who currently lack such rights, such as gig workers, domestic workers, and agricultural workers; indeed, it has already been invoked to support the right of workers in the state legislature to organize.211

Numerous other states are considering similar provisions. California’s Legislature is considering Amendment 7, which would constitutionally guarantee collective bargaining rights and prohibit right-to-work. 212 The bill will need to be approved by two-thirds of the members in each chamber and then by voters on a statewide ballot.213 In Pennsylvania, a proposal is moving through the General Assembly to add a clause to the State Constitution specifying that “no law shall be passed that interferes with, negates or diminishes the right of employees to organize and bargain collectively” over certain matters, including wages, terms and conditions, and would prohibit limitations on agreements “requiring membership in an organization as a condition of employment.” 214 Vermont’s Senate unanimously passed a similar provision in April; it next goes to the House.215

3. Litigating Constitutional Rights

In addition to amending state constitutions, unions and worker advocates have been **breath**ing new life into longstanding constitutional provisions. One strategy has been to use such provisions to extend union rights to workers excluded from the NLRA. 216 In New York, for example, worker advocacy groups brought a constitutional challenge to a Jim Crow–era exclusion that denied farmworkers the right to organize and collectively bargain.217 The Worker Justice Center of New York sued the State after its member was fired from his job as a dairy worker for meeting with coworkers and organizers to discuss workplace conditions.

218 They argued that, by excluding farmworkers from the State Employment Relations Act, the State violated the New York Constitution’s guarantee of equal protection and infringed upon workers’ fundamental right to organize and collectively bargain. 219 After the workers prevailed before a state appellate court, the New York Legislature enacted the Farm Laborers Fair Labor Practices Act, providing wage and hour protections; a new tripartite committee, discussed above; and robust organizing rights, including union recognition when a majority of workers sign union cards and a compulsory arbitration process through which farmworker unions can secure first contracts.220 Since the enactment of the law, more than six hundred farmworkers in the state have successfully organized across numerous farms and with several unions.221

In a number of states, public sector workers are turning to state constitutions in an attempt to protect their right to bargain and strike. The rate of labor activity among such workers has skyrocketed since 2018, when large numbers of teachers in red states went on strike and engaged in “sick outs” in what came to be known as “Red for Ed.”222 After a court enjoined a sick out in Las Vegas, the teachers’ union there sued the State and the county school district to try to invalidate a Nevada statute that makes it illegal for public sector employees to strike.223 The union argued the statute is in violation of Article 1, Section 8 of the Nevada State Constitution, which guarantees the rights of free speech and assembly, and claims the statute “‘impinges upon the fundamental rights of speech and association of [the Clark County Education Association] and its members, is overbroad, void for vagueness, and is not narrowly tailored to achieve a compelling state interest.’”224

Unions have also relied on state constitutional provisions defensively to persuade state courts to invalidate legislation that targets specific public sector unions for disfavored treatment as a violation of equal protection and employees’ labor rights. 225 In Missouri, for example, when the Legislature in 2018 limited the rights of all unions except public safety unions to engage in collective bargaining, public sector workers challenged the law on state constitutional grounds.226 The lower court emphasized that the law discriminated based on “an employee association’s exercise of the fundamental right to organize and to bargain collectively,” and that the State could not show that the rules were “narrowly tailored to further a compelling governmental interest.”227 The Missouri Supreme Court agreed, albeit on somewhat different grounds. According to the court, the legislation violated the state’s equal protection guarantee because the State could show no rational basis for “exempt[ing] only public safety labor organizations.”228 In so holding, it noted that Missouri employees have a state constitutional right to bargain collectively “through representatives of their own choosing.”229

B. A Model for Democratic Constitutionalism

The recent experience of labor unions with state constitutional law, like the experience with worker standards boards and administrative governance, offers a model that has relevance beyond the workplace.

First and foremost, **labor**’s experience highlights the promise of focusing energy on state constitutional law; states provide important fora for contestation of rights. Even though sharply constrained by federal preemption, labor’s state constitutional efforts in courts and via the amendment process have yielded both concrete and expressive benefits. That is, labor has won court victories using existing state constitutional provisions for some of the most politically powerless groups, like farmworkers; such victories are inconceivable at the federal level and had long been elusive in legislatures. In addition, by enshrining new rights in state constitutions, labor has been able to highlight the fundamental or essential nature of its claims, while also helping to ensure that legislatures do not undermine rights contrary to popular preferences and that courts do not invalidate popularly enacted labor legislation.

Second, labor’s successes in the states go beyond the effective use of an alternate forum, **offer**ing a fundamentally different approach to constitutional rights. That is, labor’s state constitutional law amendments and court victories support claims that the American orientation around individual rather than collective rights, and negative rather than positive rights, is not inevitable. Consistent with scholarly assessments in other contexts, labor’s recent efforts underscore that constitutional rights in the United States can be conceived as **collective** in nature, protecting the rights of citizens as a group and empowering them collectively. They can also be positive rights, providing social benefits and protecting individuals from the excesses of private power, as well as state power.230

Third, labor’s successes demonstrate the possibilities of using amendments as a strategy for movement building. That is, labor has used the amendment process as a way to build support for its goals and to strengthen its organization—constitutionalism as an organizing tool. Finally, the recent experiences highlight the extent to which courts can play an important role in progressive constitutional rights articulation, particularly under a system in which they have less supremacy. In pursuing constitutional claims in states, labor has positioned courts in a dialogical role with legislatures and with the people, including through the amendment process. Court practice here offers an alternative to the current U.S. **Supreme Court**’s commitment to extreme **judicial supremacy**; it also draws into question the wholesale rejection by some progressives of constitutionalism and courts.231

CONCLUSION: ASSESSING STATE INTERVENTIONS AND THEIR FUTURE

Although state innovation in labor policy is significantly **circumscribed** by **preemption** doctrine, and although the effect of recent state innovations on worker power, labor conditions, and broader public law is hard to measure, early indications are positive. State level reforms have resulted in significant improvements in wages and benefits for a host of workers.232 They have also augmented worker voice in numerous states, while increasing union membership, chiefly among quasi-public workers and, more recently, farmworkers and industrial workers, albeit not yet in large numbers. 233 Reforms have also increased worker participation in democratic governance, helped reshape state administrative and constitutional practice, and served an important expressive function regarding states’ fundamental commitments. These state innovations are all the more **important** given recent developments at the federal level. With Donald Trump having won the 2024 presidential election, federal labor policy is likely to become markedly more anti-union and anti-worker in the coming years.234 But even apart from the change in the executive branch, in the last few years, the Supreme Court has hamstrung federal administrative agencies’ ability to govern, while at the same time employing the Constitution as a weapon against workers.

With regard to administration, the Court has usurped increasing amounts of power from both agencies and Congress. Most recently, in its 2024 decision in **Loper** Bright v. Raimondo, 235 the Court overruled the decades-old Chevron doctrine that instructed judges to accept an agency’s reasonable interpretation of ambiguous statutory language, declaring “agencies have no special competence in resolving statutory ambiguities. Courts do.”236 Also in 2024, in **Ohio v. EPA**, 237 the Court imposed stringent judicial scrutiny on administrative processes, faulting the EPA for failing to respond to alternative proposals despite the agency’s detailed response to comments.238 And in SEC v. Jarkesy, 239 the Court undermined Congress’s longstanding judgment that administrative law judges can adjudicate civil penalties, holding that the Seventh Amendment requires the use of Article III courts to adjudicate securities fraud disputes.

240 These cases build on a series of other recent Supreme Court cases that have limited agencies’ capacity to govern, restricted Congress’s ability to make reasoned judgments about how to structure agencies, and made it easier for deep-pocketed corporate litigants to challenge government action. 241 Meanwhile, conservative lower court judges have gone even further, embracing right-wing corporate arguments that longstanding agencies like the NLRB are unconstitutional because of removal protections for Board members.242

Alongside this evisceration of administrative capacity and congressional discretion, the Court has reshaped federal constitutional law in ways increasingly hostile to working people. Among its recent holdings, it has reversed longstanding First Amendment precedent to find a constitutional right of public sector workers not to pay union fees, threatening union funding;243 and it has revised the Takings doctrine to invent a new property right, making union organizers’ access to employer property more difficult. 244 Meanwhile, for several decades, it has undermined Congress’s ability to effectuate constitutional rights under the Reconstruction Amendments, declaring repeatedly that the Court alone has the authority to define the scope of such rights. 245 More recently, it has repeatedly declined to defer to legislative efforts to limit corporate power and prevent discrimination in public accommodations under the guise of the First Amendment.246

These developments at the federal level make innovation at the state level even more important. To be sure, all of the labor-led state-level efforts are coming under sharp legal challenge from the same groups that pressed for federal retrenchment. That is, conservative and corporate interests are mobilizing many of the same constitutional attacks on the administrative governance at the state level that they have achieved at the federal level, while also engaging in specifically anti-worker mobilization, as discussed above. Nonetheless, the political economy analysis offered at the outset of this Essay suggests that states will continue to be a more fruitful venue for pro-labor and pro-democratic public law innovation, at least in the near term.

#### Even minor labor victories cause labor movements to turn their energy and efforts towards the federal courts.

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Tommaso Pavone citing Michael McCann, “Michael McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization,” Rights at Work, 04-03-2015, https://static1.squarespace.com/static/5d653034873abb0001dd9df5/t/5d6ee3a224a0c50001004009/1567548323238/McCann-+Rights+at+Work.pdf

At first, pay equity advocates won what were perceived to be some important victories. Two examples in particular are worth mentioning. First, the Supreme Court’s Griggs v. Duke Power Co. (1971) “provided new language that shifted the focus of fighting discrimination from discrete acts of individual “ill will” to systematic biases in institutional practices and policies. . . This judicial recognition of “systemic discrimination” provided a direct catalyst of unparalleled significance to new thinking and action on pay equity issues (Ibid: 50). Second, in County of Washington v. Gunther (1981) the Supreme Court “extended substantial support to the pay equity idea . . .While refusing to explicitly endorse the comparable worth idea, the majority’s willingness to extend Title VII provisions to cover discrimination among different jobs opened a potentially large crack in the door to future legal claims” (Ibid: 53). These courtroom cases generated a “tremendous amount of mainstream media attention,” which tellingly focused disproportionately on litigation rather than other political actions by the pay equity movement, such as labor strikes, union negotiation battles, and electoral campaigns (Ibid: 58-59). In short, these court cases contributed to women’s “perception of expanded opportunities for effective political challenge” (Ibid: 94).

4.2 The Closing of Political Opportunities for Litigation

Under the auspices of the Reagan Administration, in the mid-1980s the conservative legal movement had begun to permate American jurisprudence, and “the courts began closing the door of access to gender-based comparable worth claims” (Ibid: 84). It seemed that “all employers had to do to win judicial vindication in most cases during the 1980s . . . was simply to invoke a “free market” defense at every turn. . . and, if all else fails, to justify discriminatory policies as a legitimate business practice even where a prima facie case has been made” (Ibid: 41). Short of “smoking gun” evidence that “employers consciously designed action to exploit women,” judges were increasingly hostile to the claims of the pay equity movement (Ibid: 39). Hence in the final analysis the pay equity movement achieved “only limited success in federal courts,” and McCann’s interviewees recalled “much bitterness about the palpable conservative turn of the judiciary and government generally,” along with a sense that legal mobilization had been “sapped of its earlier energy” (Ibid: 47; 279). Once courtroom defeats became frequent, movement-associated lawyers were “quick to halt or revise their reliance on the courts” (Ibid: 294).

5 The Constitutive Power of Legal Mobilization for Pay Equity

Despite the short-lived, and ultimately minor, courtroom successes obtained by the pay equity movement, McCann argues that litigation strategies had a series of profound - and ultimately beneficial - effects, to which we now turn.

5.1 Providing Politicizing Experiences

Activists are not born - they are forged by social experience. Most of the pay equity activists interviewed by McCann “recounted. . . remarkably parallel stories about specific politicizing experiences that transformed them into committed activists” (Ibid: 132). In particular, McCann found that a “large majority” of his interviewees “credited the [County of Washington v. Gunther ] decision and other early cases as primary educational cues that generated their own initial personal interest and involvement in the cause” (Ibid: 56)

5.2 Legitimizing Claims via Rights Discourse

Drawing from previous litigation efforts by the civil rights movement, pay equity activists drew upon a rich and empowering legal discourse. “Rights discourse,” argues McCann, “empowered women workers by enabling them to “name” - i.e. to identify and criticize - hierarchical relations in familiar, “sensible” ways” (Ibid: 65). Hence the pay equity movement was able to strategically draw on a language imbued with legitimacy to advance its claims. As economist and pay equity advocate Heidi Hartmann noted, “once the idea of comparable worth or pay equity could be framed by lawyers in terms of rights against wage discrimination, it took on a lot of credibility and power” (Ibid: 51).

5.3 Forging Political Opportunities and Raising Expectations

Early courtroom victories enabled pay equity activists to reference litigation “as a tactical resource to raise expectations among women workers that wage reform was possible. As a result, legal action greatly enhanced the opportunities for effective political organizing around the pay equity issue” (ibid: 48). Rights discourse empowered women to re-imagine the real, or to “imagine an act in light of rights that have not been formally recognized or enforced” (Ibid: 7). This, in turn, expanded the structure of political opportunities for further legal mobilization, as “new hopes and possibilities opened up by early litigation were translated into a generative force at the grassroots level” (Ibid: 58).

5.4 Cultivating an Enduring Legal Consciousness

What may have originated as the tactical referencing of courtroom victories to raise expectations and legitimate the pay equity movement eventually provoked a profound identity transformation. McCann’s interviewees “repeatedly emphasized. . . that perhaps the single most important achievement of the movement has been the transformations in many working womens understandings, commitments, and affiliations - i.e., in their hearts, minds, and social identities” (Ibid: 230). In particular, union activists repeatedly spoke “in enthusiastic and expansive terms” about how the benefits of legal mobilization for pay equity “transcended “mere” economic redistribution” (Ibid: 258). This “legal consciousness” was instilled not so much via “abstract intellectual inquiry” but from the “practical experience in political struggle for new rights” that followed initial courtroom victories (Ibid: 272). Importantly, this identity-transformation endured the closing of opportunities for litigation in the 1980s.

#### That structurally dooms labor movements.

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Ben Depoorter, “The Upside of Losing,” Columbia Law Review, 04/2016, https://columbialawreview.org/wp-content/uploads/2016/04/Depoorter-B..pdf

Conventional understanding holds that winning is the name of the game in litigation. Many fundamental social rights and liberties were established in historic court victories and influential judicial precedents.2 Constitutional law casebooks highlight the landmark decisions in which courts outlawed segregation, combated gender discrimination, improved labor conditions, created fundamental rights of privacy and free speech, and so forth.3 Historic judicial victories are considered an essential component in the process of developing social change.4

However, after the initial success of public interest litigation in, among others, the New Deal labor movement, the civil rights movement in the 1940s, and the women’s rights movement in the 1960s, contemporary scholarship now expresses a deep skepticism about the effectiveness of pursuing social change on the basis of litigation.5 First, there is a widespread perception that courts have become increasingly reluctant to adopt sweeping and progressive social changes in judicial decisions.6 Some have argued that this has greatly reduced the role of courts as agents of social change. Because judges are perceived as reluctant to declare new, controversial rights, social movements and legal reform communities are being cautioned about the pursuit of legal strategies and court-based activism.7 There is a fear that repeated losses not only strengthen adverse precedents but also reduce the support for the underlying cause.8 If so, litigation in pursuit of social change may prove futile and possibly counterproductive by draining movements of scarce resources. Second, it has been argued that rights-based strategies tend to produce narrow remedies that apply only in limited circumstances and provide no assurance about broader rights-based implementation and enforcement. Questioning the capacity to bring about social change on the basis of litigation, some have argued that legal strategies mostly provide false, “hollow hope” to social movements.9 Critics doubt the ability to bring about social change in litigation because it creates a process of legal cooptation of a social movement, a process by which “the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and transformative alternatives.”1

Other scholars and commentators remain more optimistic about the potential role of litigation in the pursuit of social change. The ultimate value of litigation, it is argued, is not determined by the outcome in court but rather by the ability of litigation to bring attention to and to induce support for the social causes at issue in the litigation.11 From this viewpoint, any individual case outcome is but a small step in a larger, multisequence process in which litigation can be a powerful tool to attract public attention, to communicate a legal and political agenda, and to place pressure on various levels of government and society.12 Accordingly, if the power of public interest litigation lies in generating attention and garnering political support, much of the criticism of rights- and courtbased strategies is misplaced. If an adverse decision can be used to mobilize support for a cause effectively,13 advocates and social movements should push on and litigate even in the face of likely defeat.14

This Essay presents the first examination of the ex ante strategic decisions faced by litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefit. It argues that adverse court decisions may be particularly salient in raising awareness about an underlying social cause. Unfavorable litigation outcomes can be distinctively powerful in highlighting the misfortunes of individuals under prevailing law, while presenting a broader narrative about the current failure of the legal status quo. The resulting public backlash may mobilize public and political forces and ultimately slow down legislative trends, and can even prompt legislative initiatives that reverse the unfavorable judicial decisions or induce broader reform.

The analysis presented here revises some common wisdom on litigation. First, the dynamics of successful defeat in litigation provide new and counterintuitive insights into the potential role of courts in the pursuit of social change. While it is traditionally understood that legal reform activists must persuade courts into recognizing unattended rights or to confirm new rights and activist positions,15 this Essay’s analysis suggests, to the contrary, that social changes can be obtained in litigation without requiring the involvement of courts as policymakers. Counterintuitively, as the Essay explains in more detail below, passive courts and judicial deference can even strengthen the mobilizing effect of litigation. Judicial deference clearly shifts the burden to policymakers and their constituents. First, for social movements, an adverse judicial outcome is an opportunity to construct a narrative about the routine failure of courts to effectuate desirable changes.16 This allows social movements to utilize antijudicial sentiments in order to mobilize the public. Also, passive courts and judicial deference render the pursuit of strategic litigation more predictable because courts are more likely to adhere to existing precedent. Additionally, if courts insist that their hands are tied by legislation, some of the public attention and pressure shifts to legislators.17

Second, standard models of litigation describe how a private litigant’s choice between settlement and litigation depends on the probability that he or she will obtain a favorable precedent.18 According to conventional wisdom, parties should only litigate when a favorable outcome is likely.19 Conversely, a litigant is more inclined to settle if the odds of losing are high.20 Similarly, the common understanding is that time and resources should be directed toward those legal disputes that have the best chance of success21 and that litigation is to be avoided if it may establish or strengthen unfavorable precedent.22 This Essay amends this elementary view of litigation. The mobilizing effect of litigation expands the considerations that figure into the decision to settle or litigate. The strategic potential of litigation complicates the decision of when or how to litigate or settle. A settlement eliminates the chance of establishing a favorable precedent but, in some circumstances, may also remove the opportunity to obtain the socially mobilizing effects of an unfavorable precedent. At the same time, in considering whether to pursue mobilizing litigation, a plaintiff must weigh the costs of an unfavorable judicial outcome against the uncertain benefits generated by the mobilizing effect of the adverse decision.

Third, the mobilizing potential of adverse court decisions presents a fascinating conflict between the immediate interests of the actual plaintiff and those of the litigation entrepreneur that supports the litigation with an eye on the underlying long-term goals of a social cause. Because a losing effort imposes immediate costs on the plaintiff, the litigation described in this Essay often features the active presence of a third party providing legal strategy advice and financial counsel to the plaintiff. As shown below,23 ideologically motivated litigation entrepreneurs often actively control the litigation process, making strategic decisions while keeping in mind the overall impact of the litigation on the underlying cause.

Finally, the potential benefits of adverse outcomes in litigation refute some of the criticism about the limitations and downsides of pursuing social change through courts. For instance, some commentators argue that court victories might be counterproductive because they create a false sense of security among supporters, who tend to overestimate the impact of court decisions.24 By the same token, however, the overestimation of the impact of judicial decisions might work to the benefit of movement mobilization because it makes an adverse outcome more salient and likely to generate substantial concern.25

The analysis presented here highlights the relative nature of legislative or judicial accomplishments. Major victories can instill a false sense of security in supporters of a cause, while inspiring opposing groups, who might have an easier road going forward, to erode the benefits of the judicial victory.26 Moreover, when a social movement obtains public support because of an unfavorable verdict, the resulting political reversal of the judicial outcome may in turn become a source of agitation and political mobilization for supporters of the initial court decision.27 Overall, the ongoing process of reaction and counterreaction may increase the degree of polarization in society.

#### Otherwise, those movements unlock gig worker protections.

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Caitlin Dewey, “States and cities eye stronger protections for gig economy workers,” Stateline, 09-19-2023, https://stateline.org/2023/09/19/states-and-cities-eye-stronger-protections-for-gig-economy-workers/

Joshua Wood remembers days during the COVID-19 lockdown when New York City’s streets were practically empty, save for workers like him.

That experience convinced the 25-year-old Brooklynite — who makes deliveries for both Uber Eats and a package delivery service — that the gig economy needed some urgent changes.

Roughly 1 in 6 American adults have engaged in gig work for platforms such as Uber, Lyft and DoorDash, according to a 2021 report by the Pew Research Center. But while those jobs promise flexibility and a low barrier to entry, they often pay less on an hourly basis than the prevailing minimum wage and lack basic protections such as overtime, sick pay and unemployment insurance.

“There was a sense among workers, coming off the pandemic, that something really needed to be done,” said Wood, a member of the labor group Los Deliveristas Unidos, which fights for gig worker benefits in New York City. “So much of the city is dependent on the work that we do — but if we want to make the conditions better for us, we have to be the ones to do it.”

New York City has since passed a package of legislation guaranteeing a minimum wage and other benefits for app-based food deliverers, and communities across the country are following suit. In the past five years, lawmakers in at least 10 jurisdictions — including cities such as Chicago and Seattle, and states such as Colorado, Connecticut and Minnesota — have proposed new protections for ride-share drivers and food delivery workers.

At least 10 states have also considered programs that would make it easier for gig workers to access traditional workplace benefits, such as retirement or paid family leave. Meanwhile, regulatory agencies and courts in states including Massachusetts, New Jersey and Pennsylvania have sought to force Uber, GoPuff and other tech platforms to grant their drivers the same benefits as regular employees.

The push comes amid a resurgent workers’ rights movement in the United States and a global reconsideration of labor rights in the age of the gig economy. Since the start of the summer, both Australia and the European Union moved to strengthen workplace protections for gig workers, while the U.S. Department of Labor is expected to finalize a new rule that may reclassify some gig workers as employees as soon as October.

But gig companies fiercely oppose any effort to reclassify gig workers, a change that would grant the workers new rights and protections under state and federal law. In public statements, legal filings and elaborate marketing campaigns, gig platforms have argued that any significant shake-up to their current labor arrangement would jeopardize workers’ flexibility and independence — as well as raise consumer costs.

In a statement, Uber spokesperson Alix Anfang told Stateline the company “supports comprehensive legislation that protects the flexibility drivers tell us they want while providing important benefits and protections.”

“They don’t want to pay drivers,” said James Parrott, an economist at The New School whose analyses of driver wages informed New York’s new pay standard. “But their pockets are infinitely deep when it comes to fighting regulations they disagree with.”

Pandemic spurred organizing

Tech companies and their detractors can at least agree that gig platforms forever changed work, for better or for worse.

Since their launch in the late 2000s, platforms such as Uber and Airbnb have spawned a sprawling ecosystem of on-demand digital marketplaces, spanning services from food delivery to therapy to child care and education.

For consumers, such marketplaces offer flexibility and convenience, and may fill gaps in existing transportation, logistical or social support systems. Workers flock to gig platforms for similar reasons: In a 2016 Pew Research survey of gig workers whose households relied on their platform income, 45% said they needed control over their schedules and 25% said they lacked other job options.

At the same time, gig work comes with an unusual level of precarity, said Daniel Ocampo, a legal fellow at the National Employment Law Project. Workers generally have no job security, no traditional benefits, no consistent income, and little opportunity to organize or advocate for themselves.

But that last part is changing in the wake of the COVID-19 pandemic, Ocampo said. Spurred by falling wages and growing safety concerns, new advocacy organizations have sprung up in cities from New York to Los Angeles to push for laws that establish minimum wages and mandate paid sick leave, among other protections.

“There’s been a real wave of legislative action, especially in the last year,” Ocampo said. “It’s a very difficult group of workers to organize … but people are fed up with the conditions.”

In addition to New York City — which approved a minimum wage for ride-share drivers in 2018, and for food deliverers in 2021 — gig workers have also notched a string of significant victories in Seattle. The city unanimously passed a minimum pay floor for ride-share drivers in 2020 and app-based delivery workers in 2022. Earlier this year, Seattle mandated paid sick leave and due process procedures for a broader swath of gig workers if they are suspended from the apps.

Lawmakers in Chicago also expect to pass a minimum wage ordinance for ride-share drivers in the coming months, said city Alderman Michael Rodriguez, a Democrat who introduced the bill with 25 co-sponsors. As of 2021, Uber and Lyft drivers in the city earned an average hourly wage of $12.72 after expenses, according to an analysis of 22 million trips by the University of Illinois at Urbana-Champaign and the Illinois Economic Policy Institute.

“Many of these workers have had issues with their pay and with deactivation,” Rodriguez said. “We’re working to get new protections for the people toiling day in and day to provide rides in a city that desperately needs better transportation.”

#### Otherwise, precarity in the gig economy causes extinction.

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Claire Parfitt and Tom Barnes, “Precarity and the Politics of Existential Crisis,” Marxist Sociology Blog, 05-13-2020, https://marxistsociology.org/2020/05/precarity-and-the-politics-of-existential-crisis/]

What new meanings does the concept of precarity adopt when society is suddenly plunged into a deep, prolonged, even existential crisis? While it has been used for decades, the publication of Guy Standing’s The Precariat in 2011 was critical to popularizing this concept. Today, precarity seems to be everywhere. The erosion of the 9-to-5 working day, the emerging gig economy, zero-hours contracts, rising self-employment and agency work are all signs that contingent work is the new normal. In Australia, where we write from, at least half of the workforce can now be regarded as contingent. This figure is much higher in many other places around the world.

But for many, there is nothing ‘new’ about this normal. Feminists in particular have pointed out that ‘standard’ employment relationships were always an exception enjoyed primarily by white men in wealthy economies. Arguments that hinge on the novelty of precarious work have unsurprisingly drawn criticism for their failure to acknowledge the diversity of economic lives across time and space.

In contrast to those who say that this concept has been stretched too far, our recent special issue in Critical Sociology emphasizes the value of a broad, multidimensional understanding of precarity. Following Nancy Ettlinger, we see precarity as a ‘condition of vulnerability relative to contingency and the inability to predict’. Although our work was compiled prior to the coronavirus pandemic, this broad orientation is useful in a context where lives and livelihoods are exposed to so many manifestations of risk. It invites us to think about what makes for vulnerability and resilience, the different types of risks we are exposed to, and how these can be negotiated individually and collectively.

What emerges through this kind of analysis is that exposure to risk and its social and economic impacts are widespread, even in wealthy economies and populations. Many of us find ourselves living in a ‘speculative life-world’ in which we are ‘condemned to decision making under uncertain levels of uncertainty, and to thus precarity and insecurity’. But just as we find exposure to risk in unlikely places, we also observe unexpected instances of resilience and collectivization of risk.

For us, a keynote example which preceded the coronavirus pandemic were the bushfires which ravaged Australia from September 2019 to January 2020. The destruction of forests released hundreds of millions of tonnes of carbon from the ground and increased emissions. In Australia, the coronavirus pandemic emerged on the back of the devastating experience of these bushfires, deepening a sense of widespread anxiety about the future.

Australia’s bushfires fires rendered material the existential threat of climate change in unprecedented ways. A textbook example of Ettlinger’s ‘condition of vulnerability relative to contingency and the inability to predict’, the fires revealed the limits of humanity’s control over nature, our inability to predict it, and the extent of our vulnerability to it.

The bushfires had a profound impact on the continent’s environment and population. Fires killed dozens of people, over one billion animals, and razed over 12.6 million hectares of forest. Around 3500 homes and countless livelihoods were destroyed while millions of people choked on smoke. The bushfires thrust the precarity of life to the forefront and generated a new national mood in which summer. Once a time to look forward to, it became a time to dread. This broader sense of fear intersected with the fields of work and education to generate new types of precarity. The fear of allowing children to play outdoors with hazardous air quality increased pressure on parents and educators. Outdoor-based workers in construction or horticulture were expose to the risk of respiratory illness from smoke haze. This reinforces the findings of one paper in our collection regarding the workplace as a site of ecological struggle.

Having endured the anxieties of the worst bushfire season on record, Australia was immediately drawn into the coronavirus pandemic. The full impact of this crisis is still being understood. But, like in many other countries, it has been met with an economic shutdown which has induced potentially the worst social and economic conditions since the Great Depression. Unemployment is predicted to triple to 15 percent, with some predicting a figure as high as 20 percent.

The depth of the crisis has brought about policy shifts which were unthinkable only weeks ago: the politically-conservative Australian Government has doubled the rate of payment for unemployment insurance, fully subsidised childcare for most households who need it, proposed a moratorium on evictions due to financial distress, and issued income support for businesses to continue paying their workers.

The policy response primarily defends capital from precarity by supporting on-going accumulation, while reinforcing established divisions within labor. The government has promised that the above measures are temporary features. A return to the old ‘normal’ is to be expected, including Australia’s punitive and workfarist model of unemployment insurance. There is no income support for more than a million migrant workers and short-term casual workers. Many migrant workers as well as international students have been denied access to healthcare. Refugees are confined to hazardous detention camps, as they are around the world.

For low-paid workers in Australia, the government’s asset-based approach to welfare is an empty gesture. Australia has a compulsory private pension system—known as superannuation – through which roughly ten per cent of workers’ wages is surrendered to financial institutions and held until retirement. This system enables those in secure, high-paid jobs to amass large savings with generous tax concessions, while denying low-paid workers cash when they need it. During the pandemic response, the Australian Government has encouraged workers to access their retirement savings. But those who are most in need of emergency funds, such as workers in tourism, hospitality and retail, tend to have some of the lowest savings balances. Furthermore, given the recent collapse in financial markets, superannuation accounts have been decimated. Workers who are required to draw on those funds will be forced to realize their losses rather than wait for a resurgence in the market.

The crisis is also generating precarity among seemingly stable sections of the population—so-called ‘Middle Australia’. Australia’s high levels of private home ownership are accompanied by unprecedented levels of household debt. Australia’s central bank has repeatedly warned of the risk these debt levels pose, not only to particular households, but to financial stability in the economy. Mass unemployment, and the prevalence of contingent work throughout the economy, has pushed millions of households to the brink of default on mortgages, rent and other debts.

While the financial dimensions of the crisis reflect familiar conflicts of interest between the wealthy and the poor, these interests manifest differently in an economy built on debt and financial assets. Several papers in our special issue consider the role of finance in a world of constantly shifting risks, exploring the ways in which finance can be both a tool for managing risk and a vehicle for its accentuation.

Perhaps unsurprisingly, those most able to manage the economic impacts will be those with access to household wealth, a conclusion that is brought into sharp relief by a paper in our special issue on the experiences of retrenched workers. At the same time, the social crisis of the pandemic, following the socio-ecological crisis of the bushfires, highlights different aspects of precarity. New iterations of vulnerability emerge and are filtered through familiar distinctions of class, gender and race.

### K---1NC

Restriction K---

#### Collective *bargaining* crystallized in a *contract*ual obligation is a shibboleth for the restricted, oligopolistic control of wealth in big employers, which is mutually exclusive with the general economy. Vote neg to embrace the gig economy.

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Grahame Thompson, “Where goes economics and the economies?” *Economy and Society*, vol. 26, number 4. November 1997.

Absence of a single and stable equilibrium

The existence of possible multiple equilibrium or non—stable equilibrium leads to many important implications for economic analysis. It means that ‘history matters' for the new economics in a way that it does not for optimizing perfectly competitive and efficient market models. With the competitively efficient market story all information, for instance, is immediately embodied in economic variables and behaviours. Any new situation (itself ‘exogenously' generated) thus leads to a reoptimizing round, resulting in the rapid movement to a new unique equilibrium. Thus we have a world in which economic agents are assumed continually to re-contract according to changed circumstances, where bygones are always bygones (because past optimizing is ‘instantaneous' and complete), and where the new equilibrium is ‘quickly' established in the face of only the current information. The past does not matter here since it is already embodied in current behaviour, which is itself ‘in equilibrium'.

However, if each new situation requires a bargaining game to be undertaken, which in effect 'strikes a deal' between the parties involved that might be to the advantage of one and the disadvantage of the other, or that locks 'the system' into the wrong technology or wrong product-mix, then you are stuck with this and its consequences through time. The 'choice' of technology or product mix at any particular time has historical consequences that linger. The outcome is thus 'path dependent', dependent upon a series of choices that have been made in the past and that had nothing necessarily to do with the system optimizing or moving towards a well-defined equilibrium. 'Hysteresis' is the term (itself drawn from the 'new' quantum physics) used to characterize this process in economics.

This idea that the outcome of a bargain might lead to different trajectories for the economy has opened up a number of different approaches to thinking and modelling the economy, not all of which are directly linked to game theory models. However, it was the implications of these models, I would argue, that originally (re)stimulated these other approaches. For instance, the realms of complexity and chaos theory do not embody notions of equilibrium or optimization on the part of agents. Complex behaviour of variables is here a product of the endogenous dynamic of those variables themselves, not of an exogenous 'shock' or change in their circumstances. But that behaviour is also highly dependent upon from which values those variables began, again reinforcing the importance of the 'choices' with which the dynamic process originated. A further consequence of these considerations is that biological and evolutionary models now abound in economics. The 'old' mechanical analogies and metaphors that served economics so well (or ill) are rapidly being replaced by 'new' biological and evolutionary ones, which are now slowly threatening to take over the mainstream ground of standard economics. The emphasis is upon 'waves' of optimism and pessimism, leading to bandwagon effects, or herding and stampeding behaviours. The analysis of cycles and switch-points is in again, this time conducted in a non-deterministic world according to non-linear dynamics. Perhaps Keynes' 'animal spirits' could be said to rule once again?

The second set of consequences of the move towards oligopolistic modelling is that 'intervention' in the economy can be justified as a straightforward implication of these models. The usual way intervention is pressed upon the economy (and very reluctantly by economists) is because of 'market failure' issues (by which is meant perfectly competitive market failure, or the existence of 'imper- fections' in one way or another). But with oligopoly the market is 'imperfect' by definition, so the question of imperfections cannot arise in the same way. Oligopoly is the normal result of 'success', and it is to press that success that intervention can be justified. If there are economies of scale as a normal feature of firm or industry organization, and some firms or industries are not operating at their minimum efficient scale, then welfare can be increased by encouraging them to move down their long-run average cost curves towards that minimum. Thus 'protectionism' can in principle be justified by these models, or rather not ruled out by them. And this happens as a normal consequence of market operation, not because of some 'failure' on its part. This is the basis of the policy implications of the new-trade theory.

In connection with the new-growth theory, this stresses the endogenization of technological advance (i.e. explaining it rather than considering it as a consequence of an exogenous time trend), and the existence of external economies of scale (also something stressed by the new-economic geography). External economies of scale imply spillover effects from one decision to others, so that if, for instance, an investment by one firm stimulates economic activity in another then both improve their position. Thus again, in principle, this could justify a subsidy to investment. Such a subsidy can genuinely improve overall welfare if it stimulates external economies of scale to such an extent that these are greater than the cost of the subsidy. These kinds of considerations are now at the heart of economic analysis, not something confined to a marginalized corner of 'market failure'.

Thus there has been something of a sea-change in the nature of economic analysis over the last ten to fifteen years. This is not to say that these changes have completely swept the 'old' economics aside, nor that there has been no opposition to them. They have presented an uncomfortable and problematic challenge to the orthodoxy of neo-classical economics, but they still embody many of its most cherished shibboleths (a production function, for instance).

Econometrics and statistical testing

However, in addition to this, there is great uncertainty among economists over their empirical work. A lot of the developments in theory outlined above have profound implications for empirical verification techniques. Many, for instance, imply non-deterministic and non-linear patterns of economic processes. Such developments have potentially fatal cffects on the validity of normal economet- rics and statistical testing procedures. Economists (along with many others) used to think that they had 'tamed chance', but 'chance' in a stochastic sense is not necessarily the relevant category for biological and evolutionary models of this kind. Probabilistic econometrics is put on the defensive by these developments.

It is here also that the 'rhetorical turn' has taught us something substantial about economic argument, I would suggest. The first major problem for empiri- cal economic work arose in the context of the 'big debate' between Monetarism and Keynesianism that emerged in the 1970s. However much they tried, neither side in this debate could persuade the other side of the validity of their own pet theory. Whatever empirical work was done on these models was not robust enough to persuade the other side to accept its validity. Indeed, each side could more or less use the same empirical raw material, data sets and testing tech- niques to support its own position. This came as a shock to economists! As a result they began to lose confidence in the ability of any econometric work not only to sort out which theoretical position could be substantiated, but also to convince the proponents of a theoretical argument of their own position. Although this produced a flurry of new testing procedures, it undermined the robustness of econometrics generally and produced a new scepticism among economists. This provided an opportunity for those advancing the 'rhetorical' argument to point out, with effect, how all disputes of this type are not just about the 'protocols of science' but also, and often more importantly, about the protocols of a wider form of argumentation in which a range of techniques of persuasion are brought to bear. It also served to provide a much-needed cor- rective on what the actual nature and limits of statistical testing amounted to in economics.

Inasmuch as there has been a general reaction to these problems, I would suggest it can be summed up by the way that conceptions of modelling with 'ideograms' are giving way to conceptions based upon 'diagrams'. Economics has always been a diagrammatically rich discursive apparatus, but it is becoming more so in a newly multidimensional way. The new economics relies more on 'simulations' than does its predecessor. And with computer advances, such simu- lations are increasingly taking a diagrammatic form. Thus almost 'virtual worlds' are being produced within economics, to simulate the operation of markets as complex and chaotic systems for instance (particularly financial markets it must be added). Although these are not yet, so far as I can judge, a true 'virtual reality' - which requires or invites participants to somehow 'take a journey' through such virtual worlds - they are approaching it. As yet they are really used only as scenario-building and exploratory tools. But they are not econometric in form. They are simulatory and diagrammatic.

The new sociology of the economy

The second register in which I want to discuss the changing nature of economic analysis concerns what I designate 'the new sociology of the economy'. Perhaps rather paradoxically, at the same time that oligopoly and the celebration of the big firm is invading orthodox economics, it is the fragmentation of economies and the reappearance of the small and medium-sized firm as an object of study that have appeared in a new sociological approach to the analysis of the economy. The processes concentrated upon here are the horizontal and vertical disintegration (or quasi-disintegration) of the firm: into commodity chains, supply networks, value-added chains and network organizations in general. This has often been summed up in terms of the way 'mass-produc- tion' is giving way to various forms of 'flexible specialization' in production and distribution matters. There are a number of different takes on this process, which I shall discuss below, but it first remains to be said that this (potential) process is not something ignored in orthodox circles either - so it is not con- fined to the heterodox approach. And, second, a number of the techniques and modelling strategies discussed above in relationship to the orthodox approach are being deployed in connection to, or can just as well be used in connection to, the reappearance of these smaller-scale organizational arrangements (e.g. in the case of biological, chaotic and complex systemic behaviour). This point will be addressed below.

The economy of excess

The economy of excess approach is closely tied to the notion of 'post-modernism'. It is a term coined and used by Bataille, Baudrillard and Derrida, among others, to describe a 'general economy' as opposed to a 'restricted economy'. The restricted economy is the economy of utility, the sort of economy described up to now in this paper, concerned with welfare, the good (and 'goods'), happiness, productivity, profitability and so on. 'Utility' is not confined to its individualistic sense in this approach, but is a general category describing anything that celebrates the positively productive. Thus Marx, along with Weber, much of Durkheim and all of conventional economics, is included under this same title.

As opposed to this we have the general economy of excess. This economy concerns itself with the tragic, evil and abandon, with the destruction of wealth, unproductive expenditure, profitless exchange, with ritualistic, sacred and symbolic activity. While the restricted economy concentrates upon the price mechanism and market exchange, the general economy concentrates upon the gift and symbolic exchange. With the restricted economy, economic activity involves well-worked-out and specified contracts, whereas there are no contracts (or, at best, only implicit contracts) within the general economy.

It is in the notion of 'the gift' that the concerns of the general economy most closely abut those of conventional economics and the restricted economy, and the importance of this in the context of the new sociology of the economy is developed below.

#### Restrictions of the political economy preclude the useless expenditure of the general economy, that’s existential.

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Oxana Timofeeva, “General Economy” in *Solar Politics*. 2022. Polity Press. ISBN-13: 978-1-5095-4964-1

General Economy

On a global scale, as Bataille says, there is no growth, “but only a luxurious squandering of energy in every form.”7 Restricted economies attempt to appropriate its flows and subordinate them to particular finite ends, from mere physical survival to the creation of new markets, but, after all, “beyond our immediate ends, man’s activity in fact pursues the useless and infinite fulfillment of the universe.”8 There is always a limit of growth, and an excess that must be spent this or that way. This excess is called “the accursed share.” The more we produce, the more we need to waste. If every surplus is invested in further growth of the system, like capital, a catastrophic outcome is just a matter of time. Warfare is an example of such an outcome: the prospect of nuclear war, in particular, was a matter of concern for Bataille and his contemporaries.

Be like the sun!

A superabundance of energy comes from the sun: “solar energy is the source of life’s exuberant development. The origin and essence of our wealth are given in the radiation of the sun, which dispenses energy – wealth – without any return. The sun gives without ever receiving.”9 Be like the sun! – this is basically Bataille’s motto for the possible future of the political economy adjusted to the planetary scale and balanced with the ecological whole. If we want our economies to be commensurate with our environments, we have to become solar. Bataille’s general economy is paradoxically rational: what it suggests is that we recognize the limits of growth and think through strategies of nonproductive expenditure as self-conscious activity. We should stop being greedy and stop striving for individual growth, which results in planetary energy restoring its balance in an uncontrolled and catastrophic way. Nonproductive expenditure must be taken seriously and organized as an economy of gifts without reciprocation – a glorious economy.

In The Accursed Share, Bataille tackles historical practices and traditions that represent different approaches to the problem of excess and the ways of dealing with it: sacrifices made by the Aztecs, potlach rituals, Islam, Lamaism, capitalism and bourgeois society, the Soviet system and the American initiative of the Marshall plan. Are there examples of the general economy in the sense that he implements when he connects it to the laws of the universe? Not really. There is always something wrong with the ways in which we interpret gifts. One would expect the last case analyzed by Bataille in his book – the Marshall plan – to be painted as a perspective solution, as it relates to the distribution of excessive American wealth among European countries devastated by World War Two. However, as Bataille emphasizes, even this is a Western political project, created in opposition to the Soviet Union, and considered by its proponents as an investment in the future of capitalism.

The general economy as self-conscious activity is something different, for what Bataille means by self-consciousness basically equates to sovereignty. It cannot be an investment, but only pure expenditure. Self-consciousness, in his interpretation, “has nothing as its object,”10 meaning that it does not want to increase its resources, does not strive to grow and prosper. Self-consciousness goes beyond the limits of the individual; its point of view is not that of the living organism seeking out where to get more stuff, but that of the planetary whole. The transition from consciousness of the individual, determined by needs and interests, to the generous self-consciousness is finally identified by Bataille as the last act of the transition “from animal to man.”11

This claim, which he immediately tries to detach from teleology (from the idea of the final goal of historical humanity, the achievement of which, according to Alexander Kojeve, would coincide with the end of history), today sounds obscenely anthropocentric, but let us take a closer look at it. Bataille’s generalization of all living organisms that behave in accordance with either their natural needs or their private interests as animals echoes Hegel’s description of economic estrangement and the division of labor given in the chapter of his Phenomenology of Spirit beautifully titled “The Spiritual Kingdom of Animals and Deception; or the Crux of the Matter (die Sache selbst),”12 where Hegel explains that individuals, indeed, do think that they are pursuing their private interests – for instance, when they sell commodities that they produce and try to cheat on each other – but this is only an illusion. In fact, without realizing it, these people contribute to the development of the overall economic structure. Bataille’s point, however, is different: yes, individuals pursue their interests, just like other animals that search for food when they are hungry, and entire national economic systems, too, can be compared to such egotistic individuals, but even if they think that they are struggling for universal prosperity, they actually contribute to overall planetary destruction.

### CP---1NC

#### The United States Federal Government should

#### prohibit bankruptcy filings in the aviation sector,

#### eliminate collective bargaining rights in the aviation sector,

#### establish that securities laws supersedes collective bargaining rights,

#### increase investment in cybersecurity infrastructure including through international cooperation and disclosure regulations,

#### increase fraud regulations exercised by the FTC,

#### establish that patents do not qualify as property.

### DA---1NC

#### The United States Federal Government should side with Trump in V.O.S. Selections vs Trump.

#### The United States Federal Government should not side with Trump in V.O.S. Selections vs Trump.

#### SCOTUS will narrowly preserve *Humphrey’s Executor* in the *Slaughter* case.

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Adam White, “Is Humphrey’s Executor headed for Slaughter?” Major Questions, SCOTUS Blog, October 2025, https://www.scotusblog.com/2025/10/is-humphreys-executor-headed-for-slaughter/

So the key question remains: Will the court agree, too? As I noted above, the court seems likely to uphold Trump’s firing of Slaughter. The clearest indication came in the court’s brief order a few months ago in Trump v. Wilcox, when the court stayed lower court orders blocking Trump from firing members of the National Labor Relations Board and Merit Systems Protection Board. In its brief opinion, the court noted that “[t]he stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power.” The NLRB’s own powers – again, largely enforcement-centric, and increasingly partisan or ideological – strike me as very close to the FTC’s. (I unpacked the court’s Wilcox opinion in my previous column on the Federal Reserve’s own independence.)

But this need not entail completely renouncing Humphrey’s Executor, which I believe the court is unlikely to do, given Trump’s threats against the Federal Reserve’s own independence looming in the background.

The court already emphasized (in Wilcox) that it sees the Federal Reserve as fundamentally different from other independent regulatory agencies due to the Fed’s different structure and history. And, as I noted in my previous column, the Fed’s most important powers – its monetary power, and its supervision of the Federal Reserve Banks – are vastly different than normal regulatory agencies’ powers. As I wrote last time, the Fed’s powers seem to fit comfortably within the Humphrey’s Executor framework, more so than any other modern independent regulatory agency.

If the court were to categorically renounce Humphrey’s Executor, it would raise the very questions and fears that the court sought to avoid in the Wilcox order. At the very least, a Slaughter decision that renounces Humphrey’s Executor would restate a new framework for agency independence that clearly distinguishes between agencies that primarily wield “executive” powers and those that do not, thus preserving the constitutionality of our independent Federal Reserve Board of Governors.

Finally, the court’s brief order taking up Slaughter’s case would itself appear to distinguish Slaughter’s fortunes from Humphrey’s Executor. The Justice Department’s initial brief asked the court to take up a very broad question: “whether 15 U.S.C. 41 [the Federal Trade Commission Act] violates the separation of powers by prohibiting the President from removing a member of the Federal Trade Commission except for ‘inefficiency, neglect of duty, or malfeasance in office.’” Slaughter agreed that the court should grant review on that question. But the court’s order rephrased the question carefully: “Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether Humphrey’s Executor v. United States … should be overruled.” In posing the question as such, the court explicitly separated the constitutionality of Slaughter’s firing from the constitutionality of Humphrey’s framework.

Perhaps the court will recalibrate the Humphrey’s Executor framework, leaving us to cite a new Slaughter rule going forward. But when the court issues its decision, I will expect to see, at most, a “mend it, don’t end it” approach to Humphrey’s Executor.

#### Plan is a progressive legal win---Supreme Court will react to its fiated legality by ruling conservatively on *Humphrey’s Executor*.

Doerfler 21 – Professor of Law at Harvard Law School.   
Ryan Doerfler and Samuel Moyn, “Democratizing the Supreme Court”, October 2021, California Law Review, Volume 109, https://www.californialawreview.org/print/democratizing-the-supreme-court

The push for democratic legitimacy starts from the observation that much of the Supreme Court’s work remains inherently political. Especially in constitutional cases, many of the claims the Court evaluates are legally underdetermined or, at a minimum, epistemically opaque. As a result, Supreme Court justices inevitably rely upon policy inclinations in deciding what the Constitution requires or permits. Small-d democratic reformers must, then, question how to reconcile the ideological nature of these determinations with a commitment to democratic self-rule.

Proponents of disempowering reforms should address the apparent tension by redirecting decision-making authority away from the democratically unaccountable judiciary and toward the political branches. Take, for example, a statute that would strip state and federal courts of jurisdiction over constitutional challenges to the Green New Deal. Such legislation would eliminate the courts’ final authority over whether Congress may delegate expansive rulemaking authority to the Environmental Protection Agency or render the extraction and refinement of fossil fuels unprofitable through aggressive environmental regulation. Instead, those decisions would be made by Congress and the President and, in turn, voters, who hold those officials accountable—however imperfectly.

As a class, disempowering reforms reject the goal of restoring the sociological or normative legitimacy of the Supreme Court as an apolitical or neutral institution, allegedly lost through accident or mistake. Instead of safeguarding the extant power of the Supreme Court, disempowering reforms saps the institution of some of that power and transfers it to the political branches. It proposes to do so on the most straightforward definition of the democratic premise: that, all else equal, the people themselves should directly determine their arrangements.

The standard rationale for institutional disempowerment states that, in modern times, no one is entitled to rule the people other than the people themselves. As David Grewal and Jedediah Purdy have shown, this commitment stood at the very origin of modern constitutionalism and of modern politics more broadly. This rationale by no means settles how far a constitution can or should erect one or another set of institutions to represent the people. And for all its commitment to democratic self-rule, modern politics preserved and refashioned an older, premodern commitment to aristocracy. The U.S. Constitution in particular is celebrated in many quarters (and is notorious in others) for reconciling the modern novelty of popular government with continuing elite control.

Even to the extent that reconciliation remains plausible, however, it says nothing in particular about how much power an apex court like the Supreme Court should enjoy—something that Americans have differed about throughout their history. Conversely, criticisms of the undemocratic empowerment of the Supreme Court have risen and fallen in tandem with the empowerment and disempowerment of the institution.

If the rationale for Supreme Court reform calls for democratic legitimacy, it is distinct from, and indeed at odds with, the commonly voiced aspiration of restoring the apolitical and nonpartisan neutrality of the institution. The democratizing agenda begins with relatively more insistence that partisanship goes all the way down, even when transferred to allegedly neutral institutions. It also disputes the availability—especially on nationally contentious issues that divide the Supreme Court most regularly—of distinctively legal outcomes as opposed to resolution through political contest and deliberation. For progressives in particular, the ideal of democratic legitimacy thus challenges decades of mistaking the contestably moderate for the ideally neutral. For all these reasons, democratizing the Supreme Court is an openly political project to be judged based on the democratic character of both institutional means of reform and progressive output of policy results.

Returning to the specific example of jurisdiction stripping, the extent to which jurisdiction stripping legislation would be democratizing would depend upon the scope of the strip. Stripping only the Supreme Court of jurisdiction over challenges to the Green New Deal would, for instance, leave both lower federal courts and state courts a say in the ultimate fate of that legislation. Such a reform would still be democratizing because it would require greater judicial coordination to negate Congress’s decision in full. Still, compared to a comprehensive strip of the sort described above, the democratizing effect of a Supreme Court strip would be limited. Similarly, stripping courts of jurisdiction over only a small set of constitutional cases would leave courts with tremendous authority outside that limited space. A total or near-total strip over constitutional cases would, by contrast, dramatically reallocate decision-making authority within our constitutional scheme.

We take no position as to what scope jurisdiction stripping should have or, for that matter, whether jurisdiction stripping legislation should be preferred to other disempowering reforms. Voting rules like a supermajority rule for declaring federal legislation invalid would, for instance, similarly disempower the Supreme Court in contestable constitutional cases at least. By requiring a higher threshold of consensus for the exercise of judicial authority, such a rule would functionally reallocate decision-making authority to the democratically legitimate branches of government in cases in which a counter-majoritarian faction on the Court enjoys only a simple majority. Such a reform might be more palatable than jurisdiction stripping for those who believe, for example, that the Supreme Court is a critical protector of rights. This result happens because, under a supermajority rule, “clear” constitutional violations would continue to be identified and declared, even as disputable cases would be left to majority will. As with jurisdiction stripping, voting rule proposals vary in terms of scope and, in turn, democratizing effect. One could, for example, apply a supermajority rule to only the Supreme Court or to all courts with jurisdiction over constitutional challenges to federal statutes.

Similarly, some form of legislative override would transfer significant authority from the judiciary to Congress (and, potentially, the President). Like a supermajority rule, a legislative override would leave the Supreme Court with a meaningful say as to the constitutionality of congressional action, requiring an affirmative step from Congress beyond initial enactment in the event of constitutional disagreement. In this respect, a legislative override facilitates, at least in principle, a “dialogic” approach to constitutional interpretation, encouraging an extended exchange between the political branches and the judiciary. As Canada’s experience suggests, however, the dialogic, and, in turn, democratic, benefits of an override mechanism may be more theoretical than real.

Whereas disempowering reforms promote democracy by reallocating decision-making authority to the democratically accountable branches, personnel reforms might achieve this result by aligning judicial ideology more closely with that of democratic majorities. Reformers intend court-packing, most obviously, to reshape the judiciary such that it will get out of the way of progressive majorities. And, in this way, it would promote democracy in the short term. Over time, though, for it to be consistent with democracy, court-packing would have to be an iterative process, with each newly elected majority adding new justices and judges of their own. For this reason, court-packing proposals will result in either democratic redundancy or new risks to democratic control. Either these proposals require extra steps to extend legislative control already achieved through popular victory, or they threaten that control by delegating power from democratic principals to less accountable agents.

Supreme Court term limits are more promising. Unlike court-packing, term limit reforms intend to link Supreme Court appointments more consistently and more evenly to electoral outcomes over time. As we discuss below, there are reasons to doubt that term limits would achieve this aim to the degree advertised. More still, term limits would lead to incredibly modest democratizing effects because justices would remain democratically unaccountable upon appointment and because elections from almost two decades ago would have policy ramifications today. One could imagine a President Alexandria Ocasio-Cortez, for example, frustrated by the relative conservatism of Biden-era Democratic appointees. Term limits remain, nonetheless, distinct among personnel reforms because they result in systematic democratizing effects.

Other personnel reforms make no serious effort at promoting democracy. Merit selection proposals, for example, aim to limit democratic flux by entrenching a more moderate, more centrist judiciary. Beyond that ideological entrenchment, such proposals would have no predictable democratizing effect. Rather, these reforms would merely lead to the dynamics observers of judicial politics have observed for decades: the debate about the proper deployment of judicial power, with the background assumption that the Constitution or law in general, or institutional or professional ethics, will properly guide the deployment of power.

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

C. Rights

The most common objection to disempowering reforms to the Supreme Court focuses on the need for it to protect important rights, especially minority rights against hostile majorities. For many, rights protection is the leading criterion for assessing not just judicial reform, but the basic purposes of a judiciary in the first place. We need not review the gargantuan literature on the plausibility of the familiar claim that democracies empower judiciaries precisely to protect rights. As Justice Robert Jackson immortally put it, the goal is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” But a few targeted responses to that conventional wisdom from the perspective of Supreme Court reform are indispensable.

We will argue that (1) disempowering reforms open the possibility of much superior rights protection precisely because the progressive legislative agenda withdraws unjustifiable protection for the powerful and allows for or improves upon rights protection for both majorities and minorities alike; (2) disempowering reforms leave a range of plausible judicial mechanisms for rights protection in necessary cases; and (3) even to the extent that disempowering reforms imaginably threaten rights, it is not clear that personnel reforms have better credentials for ensuring their protection.

(1) The progressive frame disputes that majority rule endemically conflicts with rights protection. On the contrary, the historical record clearly demonstrates that legislatures serve as the chief historical source of rights, while judicially-enforced rights protections can easily devolve into technologies of minority rule. If true, as a general matter it is quite possible that disempowering leads to superior rights protection, not worse. On the one hand, it subjects to majority rule the powerful and wealthy minorities claiming and getting the protection of the courts. On the other, progressive reform through the political branches of government can potentially lead to superior legislative protection of the rights of majorities from those powerful and wealthy minorities, as well as superior legislative protection of the rights of vulnerable or weak minorities.

The American (and, even more, global) progressive default was long, not the absence of rights as a political goal, but “legislated rights.” The privilege of the judiciary led to the Lochner era. No doubt, if that case is anticanonical in American memory, it is so precisely as a form of illicit rights protection and was cast aside to achieve better rights protection through legislative means. As Roosevelt accurately explained, “the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.” This sometimes requires putting courts in their place in order to privilege legislatures pursuing rights for all and balancing the claims of majorities and minorities alike.

In this spirit, the legislature can be seen as the first and most important defender and propagator of rights, and majority rule the default source of legitimacy for assessing the scope of rights and resolving conflicts among rights and between rights and other priorities. Roosevelt’s “Second Bill of Rights” envisioned a suite of economic and social entitlements of modern citizenship, but not one that judicial authority would enforce and whose scope remained to be determined in light of other interests and values. And though they did not enact it, Americans have remained within a legislated rights frame in propounding civil rights acts that effectively did more than any judicial decision to confront exclusions based on race, gender, or disability.

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

By contrast, while not everything an H.R. 1 democratizing statute, Green New Deal law, or other progressive legislative reform should be conceived as the elaboration or substantiation of a right, much of it is easy to understand that way. Many of their key planks—access to the polls and other voting entitlements, job guarantees vindicating the right to work, high-quality food, health care, housing, or water correlating with well-known rights, promises for high-quality education not only at the primary but secondary level—fit. Even its “green” part can be seen as rights protective. The more general rhetoric of facing down inequality after decades of its expansion bears not only on basic rights, but also can be conceived to involve rights beyond sufficient provision to an entitlement to rough equality in life chances.

Ronald Dworkin has epitomized a stereotypical view of judicial authority that was absolutely required for rights to be invoked as principled “trumps” against aggregating legislatures. This picture entirely missed whether legislatures might be fora of principle equal or even superior to defending extant rights commitments and propagating new ones. (Dworkin did acknowledge that “fit” with American traditions forbade any very expansive understanding of our constitutional rights.) Shifting away from recent Dworkinian assumptions is especially pertinent when it comes to so-called positive rights, none of which are protected under the U.S. Constitution and few of which have ever been sought—even at the zenith of liberal power on the Supreme Court—through judicial interpretation. As Dworkin’s assumptions more or less accurately reflect, Americans boast a small number of rights that they protect in absolutist ways through judicial intervention. Other countries proceed differently by propounding a much wider variety of rights, which their legal systems protect less robustly through proportionality balancing against other interests and distributed institutional control over rights.

It is, of course, true that judge-led interpretation of the Constitution’s rights applied most of them to the states in the middle of the twentieth century, and in doing so revolutionized protections in criminal procedure. It also extended individual rights not mentioned in the constitutional text across the century—in the phase since the 1960s, mostly under the Due Process Clause’s promise of liberty, freed from the constitutional protection of freedom of contract as a right. In this vein, the Court protected rights like freedom from compulsory sterilization, and to choose to abort a pregnancy or marry a spouse of a different race or the same sex. And the Equal Protection Clause banned formal apartheid, and especially formal segregation of races in schools. These results account for the familiar anxiety that Supreme Court disempowerment would threaten rights protection. And no one should pretend that a legislated rights regime would match the set of entitlements achieved through judicial interpretation precisely. Even if a legislated regime provides for many rights on its own, or more of them, it may miss others.

But it is pivotal to any genuine comparison that it is not a matter of exclusive principled defense of rights in judiciaries on one side against unprincipled majoritarian action on the other. Instead, it is a comparison of some schedule of rights and some modicum of protection on both sides of the line. Minimally, rights concerns do not cut against legislative empowerment per se. And more maximally, progressives assume that rights protection may well be available in superior form through political branches as agents of national transformation. However, judicial empowerment to achieve the current spotty and weak protection of rights generally serves debatable ends, and primarily protects the rights of powerful and wealthy interests. Not only can legislatures protect rights for majorities and minorities, but judiciaries can convert rights protection into illicit minority rule. Indeed, if existing entitlements for the needy are weak and for the powerful are strong, judicial empowerment can at least as plausibly be construed as a project of rights violation as of protection and disempowering as instrumental for the sake of rights themselves.

Sometimes progressives may rely on accounts of the comparative institutional bias of judiciaries (relative to legislatures) towards views of elites and outcomes favoring them. Sometimes they may even—as in Karl Marx’s early writings and in the critical legal studies movement—claim that individual rights are especially susceptible to the production of those same outcomes. And those suggestions deserve careful scrutiny. But even if neither kind of account is persuasive, disempowering reform can be construed as a project of rights expansion and vindication, beyond the narrow list and weak protection of Supreme Court doctrine, currently and even historically.

One should question whether the Supreme Court’s unimpressive baseline protection of the rights of vulnerable minorities, even as it has come to systematically favor neoliberal outcomes in First Amendment jurisprudence and beats back at legislative protection in areas like affirmative action or voting rights, suffices to justify its empowerment as guardian of basic entitlements. When we consider the likely obstacle the Court would pose to rights expansion as a progressive agenda, the answer to that question is not hard. Disempowering reforms would count as a far greater victory for rights than an empowered victory could ever deliver.

(2) Furthermore, while the functional effect of disempowering reforms like jurisdiction stripping and supermajority rules on the Supreme Court reduces the significance of judicial review, it is not a matter of either-or. Functional disempowerment of the Supreme Court leaves a series of stopping points short of full negation of judicial review through some institutional reform, which only a persistent but tiny minority of followers of Thomas Jefferson in American life supports.

Indeed, many proponents of weakening judiciaries have offered stopping points to manage judicial rights protection. If they have generally failed—leaving too many protections for the undeserving and too few for those in need—it by no means obviates a new compromise leaving some crucial judicial rights protection intact. James Bradley Thayer’s proposal merely to subject majority legislation to rationality rule left room for policing irrational results. More boldly, the original move in the 1930s, first defended in the fourth footnote of the Carolene Products opinion and canonically justified by John Hart Ely, was to “bifurcated review.” This framework subjected economic legislation to rationality review after the abandonment of the old substantive due process while protecting some schedule of rights and some kinds of minorities. Where personnel reforms do not react to the general failures of past compromises either to deal with underenforcement of rights or “juristocratic” excesses, disempowering reforms hardly abandon the possibility of a more successful one. Relative democratization hardly means total disempowerment of judiciaries to protect rights. The same verdict applies to Ely’s defense of judicial review to remedy participatory exclusions and failures. While there is no reason on its recent track record to believe that the Supreme Court will pursue his vision, attractive in theory but dead in practice for several decades, nothing forbids a disempowered judiciary from doing so.

If properly calibrated, jurisdiction stripping statutes, for example, could insulate precisely the attempted expansion of legislative rights from judicial limitation in the name of various provisions of the Constitution weaponized by the right (notably, the Free Exercise and Free Speech Clauses), while leaving judges power to protect other rights from unsuspected majoritarian excess. Similarly, supermajority rules have a distinctive capacity compared to personnel reforms for counteracting the reality that controversial minoritarian tyranny today very much works through the Supreme Court, while leaving room for justices to intervene in the case of genuine majoritarian tyranny when enough justice agree it is real, rather than a smokescreen for illicit capture.

Finally, unlike personnel reforms, disempowering reforms do not rely on judicial self-restraint as a mechanism to ensure democratic choice. Thayer’s proposal relied on judicial self-restraint, and Carolene followed suit insofar as it ultimately consecrated a purely judicial determination as to when to cross the line from rationality review to heightened forms of scrutiny. The result was, arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically. Judges allowed democratic will-formation, blocking it contingently (sometimes for better, regularly for worse) based on their own evolving doctrines of intervention. What all of these reforms shared was a rejection of Thayerian deference de facto, and an expansion of judicial authority uncontemplated and undesired in the middle of the twentieth century. “A lesson that some will take from today’s decision,” one conservative justice remarked bitterly at the end of the day, “is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means.” If he was right, however, it was because judicial self-restraint failed to ensure conservative (not just liberal) self-policing. Even with personnel reforms, any bench will face the temptation to overstep, whereas disempowering reforms specifically deprive them of the temptation. Disempowering reforms limit the Court’s power to act or abstain from acting in the first place.

(3) Finally, even to the extent disempowering reforms hypothetically threaten rights, personnel reforms do not plausibly provide superior protection.

Generally, the goal of relegitimation of the Supreme Court—the rationale for many proposed reforms today, as discussed above—is orthogonal to rights protection. There is no reason to believe a court with comparable powers as now, but with improved legitimacy, would improve rights protection. To make out a case that it would, one would have to correlate legitimation with rights protection, and it seems churlish to suggest credibly doing so. As we suggested above, most approaches to legitimacy define it in terms of partisan neutrality rather than rights protection. To be sure, there are some accounts of normative legitimacy of apex judiciaries that may be less about nonpartisan neutrality than most, and may even put rights protection at the very heart of what a normatively justified Supreme Court would do. The trouble is that none of the personnel reforms credibly advance that form of legitimacy. It is, alas, unclear that any reforms of the Supreme Court we can imagine would do so—thus it cannot be an argument against disempowering reforms that they fail to do so.

Of course, personnel reforms might plausibly stave off the threat posed by the current conservative majority on the Supreme Court in the short term—though evidence suggests that the most extreme fears of the majority’s consequences for abortion and other rights have proved premature. Our point is that, even conceding the possibility of threats to rights, relegitimation is hardly well-designed to achieve this end exclusively and narrowly. On the contrary, given recent baselines before the need to “save” the Supreme Court became apparent, relegitimation involves far greater risk for confirming the endemic judicial underenforcement of rights of the vulnerable and weak, and potentially even overenforcement of those of the powerful and wealthy.

And if the suggestion is that personnel reforms achieve short-term democratic legitimacy by updating the bench to match the popular will, then any improvement they might achieve in rights protection is also available legislatively.

Either way, there is no way to conclude that disempowering reforms would lead to more abuse of rights than other reform options, and may well lead to their greater vindication.

D. Regularity

A separate aim of many reforms is to regularize the appointment of Supreme Court justices. According to the standard narrative, the Supreme Court appointment process has grown increasingly fractious since the Senate rejected Robert Bork’s nomination in 1987. Today, it is popular to insist that the appointment process is “dysfunctional[,]” “broken,” or otherwise in disrepair.

Complaints about the dysfunction of the appointment process are typically coupled with worries about undue “politicization.” As discussed above, worries about politicization go to the Supreme Court’s legitimacy. Apart from legitimacy, however, several reformers allege concern with the functionality of the appointment process. According to these scholars and advocates, increased “polarization” and the stakes of judicial appointments have resulted in a system burdened by gridlock and that encourages destabilizing political tactics.

Most of the contestation over Supreme Court appointments is tied directly to important normative disputes within our political community. As such, so long as Supreme Court justices continue to wield tremendous authority, it is both predictable and appropriate that political actors will fight aggressively for control of the Court. Given the stakes, efforts to regularize the appointment process through mere shifts in personnel will predictably fail.

To see why, take the proposal to impose term limits on Supreme Court justices. As described above, this proposal would, in its most popular form, allot one Supreme Court appointment per congressional term, with each justice permitted to serve for a period of eighteen years. One of the supposed advantages of this reform is that it would help regularize the appointment process by lowering the stakes of individual appointments. Because each president “gets two appointments per term,” the motivation to contest specific appointments is, we are told, substantially less.

Notice, however, that each president “get[ting]” two appointments is more hope than promise under this scheme. Because its advice and consent function would remain the same, an opposition Senate would retain the incentive to reject nominations, thereby helping to accrue partisan advantage on the Supreme Court over time. Even if quorum and vacancy rules would eventually force the choice of confirming a nominee or rendering the Supreme Court incapable of issuing binding judgments, a strategic opposition might easily prefer to effectively empower the courts of appeals, building partisan advantage at that level through similar tactics.

The point here is that Supreme Court term limits would do little to deter an opposition party from engaging in constitutional hardball. While true that the stakes of an eighteen-year appointment would be lower than an appointment of an indefinite tenure, determining the ideological character of the Supreme Court would remain an enormously high-stakes affair. If the fate of climate or health care legislation, say, were to continue to rest with that institution, it would be malpractice for progressives not to do everything within their power to ensure that the Supreme Court was progressively inclined.

Other purportedly regularizing personnel reforms suffer from similar defects. Partisan-balance requirements, for example, would present an opposition Senate with the same opportunity to refuse to confirm nominees to seats assigned to the President’s party. Again, an opposition Senate might be left with the choice of confirming a nominee or depriving the Supreme Court of a quorum, but as our current politics shows, such aggressive tactics are sometimes appealing. Merit selection presents similar issues, though this time with both the President and the Senate. Barring constitutional amendment, any potential nominees chosen by a nonpartisan or bipartisan panel would have to be nominated by the President formally. Given a cooperative Senate, a boldly progressive or conservative President would have little reason to assent to the sort of centrist or moderate candidate such panels are designed to produce. The same would be true for a stridently progressive or conservative Senate. Why settle for a “compromise” nominee when one has the leverage to demand more?

The complication with lottery systems is slightly different. As described above, such proposals would replace our system of permanent Supreme Court justices with panels composed of randomly selected judges from the federal courts of appeals or permanent associate justices drawn from an enlarged pool. Pursuant to this reform, although the Supreme Court as such would retain its authority, the authority of the individual judges who make up the Court would be substantially reduced. On this scheme, individual judicial appointments would be less significant than the appointment of justices today. Still, because this proposal would make every federal court of appeals judge a potential Supreme Court justice, the stakes of filling court of appeals vacancies would increase accordingly. Given the already rising level of contestation over such nominations, it is hence easy to imagine a panel system causing appointment “dysfunction” merely to spread.

Again and again, we see the same basic issue. Under our constitutional scheme, both the President and Senate have a say in the appointment of justices. Because Supreme Court justices wield tremendous authority and because ideology determines in part how they wield it, those two parties will be disposed to fight should their ideologies differ. The intensity of that disposition will depend, of course, on the strength of their ideological disagreement. In a country racked with intense political disagreement, however, that disposition is going to be incredibly strong at least some of the time. Given the intensity of that disposition, comparatively small adjustments like the imposition of term limits would barely affect, say, an opposition Senate’s decision-making calculus. With the stakes of appointments so incredibly high, such modest if salutary reforms are not at the requisite scale.

By comparison, more aggressive disempowering reforms might at least register with a president or opposition Senate. Stripping courts of jurisdiction over constitutional cases or requiring a supermajority to declare federal legislation invalid, for example, would meaningfully reduce the stakes for Supreme Court appointments and judicial appointments more generally. Even with its authority so limited, the Court’s ideological character would continue to matter even outside of constitutional or politically significant cases. Still, in terms of stakes, disempowering reforms would make the appointment of justices more akin to the appointment of agency officials. To be sure, the appointment of such officials is also increasingly contested, as should be expected in polarized times. In terms of regularization, then, even aggressive disempowering reforms can only promise modest benefits.

E. Pragmatism

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

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

Routinely, pragmatism really amounts to what one might call a Supreme Court liberalism of fear. It greets the fact that justices have not eroded past progressive gains, while also restraining the conservative majority from experiments that are too perilous—as if such triangulation were a worthy cause. This pragmatic sensibility surges in real time at the end of each Supreme Court term as observers, though far from celebration, welcome individual case results as examples of the institution not doing its worst. Chief Justice John Roberts has, over the last decade, become the icon for this approach, sometimes abetted by due respect for Justice Elena Kagan as a master strategist of achieving harm avoidance through compromise with conservatives.

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

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

The limitations of pragmatism—normally deployed by those uninterested in or wary of institutional reform debates—make it a weak candidate for justifying Supreme Court reform. As a potential rationale for reform, pragmatism faces the threshold worry that it is the default stance of those who complacently accept the institution as it is. It is hard to imagine a compelling justification for institutional reform that appeals to slightly better outcomes and does not shift major baselines. Nor, if pragmatists called for reform out of exasperation with enough bad news, does their framework obviously help select among reforms.

There is no denying that Supreme Court reform in the name of pragmatic output legitimacy could make sense on its own terms—a slightly less scary nightmare is worthwhile if waking up is not an option—even if it entrenches the prevailing low expectations for output. It might face a constituency problem: if those interested in Supreme Court reform at all move to put pressure on the mainstream acceptance of the institution in current form, it is because they are dissatisfied with how little pragmatism currently boasts. If they adopted a pragmatic rationale for evaluating their prospects, advocates of Supreme Court reform would have to rationalize embarking on an agenda that will be decried as radical when their ends are merely to reinstate low expectations at a somewhat higher level. And if it is true that the Supreme Court could indeed get even worse either by abandoning favorite progressive precedents or minting novel conservative doctrines, pragmatic reform would not necessarily change this.

The framework also provides little help for selecting among imaginable reforms, especially compared to a democracy criterion for evaluating them. Once again, contrast a partisan balance scheme with a jurisdiction stripping one. The first might well aim to “reset” the current lopsided ideological configuration of the Supreme Court by repopulating the justices and depriving conservatives of their current majority. But while this scheme is a pragmatic choice to reset the Supreme Court to a stage prior to Justice Neil Gorsuch, a Justice Merrick Garland on the bench instead would have resulted in modest doctrinal variation at best. Such reform does nothing to reverse decades-long drift or to prepare the ground for progressive legislative reform, which in fact it leaves almost as endangered as before.

Supreme Court personnel reforms on pragmatist terms might achieve slightly better outputs than before. But the same is true of disempowering reforms. At worst, jurisdiction stripping simply leaves things the way they are, made no worse by Supreme Court intervention—this time because it is disempowered to act. The same is true of a supermajority rule. At worst, it would stabilize current doctrine because not enough votes are available for a conservative majority to erode past progressive victories or to set off in radical new directions of its own. In short, whatever modest improvement of current baselines that personnel reforms justified pragmatically can achieve, those justified democratically can as well. At best, those latter reforms may make room for political branches to alter existing baselines by passing legislation that a disempowered Supreme Court can no longer block as easily.

Contesting a pragmatic view through progressive beliefs, personnel reform sounds like a choice between resting content with the current Roberts Court or turning it back into the one in which Roberts could indulge his priors while allowing Justice Kennedy to control the right instead of him. By contrast, disempowering reforms, by sidelining the institution altogether, far more plausibly allow a potential shift away from a pragmatism of harm avoidance and reduction to make room for progressive reform if the political branches settle on it. That may, in the end, be the only durably pragmatic hope Americans have in the future.

IV. Feasibility

Part III assessed reform proposals in terms of desirability. Here, we turn to feasibility, asking which reforms stand a chance at successful implementation. To do so, we evaluate the various proposals according to two criteria. First, we consider whether a given proposal would be legal, which is to say consistent with the Constitution without amendment. Second, we look at political feasibility, examining whether a stable coalition might emerge in support of a reform.

As we show below, both personnel and disempowering reforms are subject to legal objection. In most cases, however, those objections admit of rejoinders, leaving the two approaches roughly on par. Similarly, while any reform faces an uphill political battle, we argue that disempowering reforms have at least as good a chance as personnel reforms at garnering coalitional support.

A. Legal

The legality of different reform proposals has been covered exhaustively by existing scholarship. In this brief survey, we suggest that both personnel and disempowering reforms are fairly characterized as legally plausible. Because both types of reforms are vulnerable to judicial obstruction, the fate of either would depend on the willingness of the political branches to push back in support.

1. Personnel Reforms

Among personnel reforms, court-packing is probably the most uncontroversially legal. As others have documented, the number of seats on the Supreme Court has been set since its inception by statute, and Congress has adjusted the size of the Court—from six to seven, to nine, to ten, back to nine—numerous times. This longstanding congressional practice couples with relative constitutional textual silence. While Article III assumes the existence of a Supreme Court and Article I, section 3 that there will be a Chief Justice, nothing else in the text seems to bear on how large or small the Court must be.

Such historical and textual evidence notwithstanding, court-packing has been and continues to be subject to legal objection. For instance, the 1937 Senate Judiciary Committee declared President Franklin Roosevelt’s court-packing proposal unconstitutional. According to the Committee, the apparent purpose of the reform was to “appl[y] force to the judiciary,” coercing it to adopt a “line of decision” that it otherwise would not. The proposal, the Committee continued, was “an invasion of the judicial power such as has never been attempted” before, alleging that prior adjustments to the Court’s size were not intended to “influence . . . decisions.”

After court-packing, the legality of personnel reforms gets murkier. Panel systems, for example, typically require individuals to be appointed both as a federal circuit court judge and as an associate justice. As Epps and Sitaraman concede, one could argue that such dual appointments would be unconstitutional, reasoning that both Article III and the Appointments Clause understand those two offices as distinct and so not to be combined or jointly held by some individual. Maybe more worrisome, transitioning to a panel system could be characterized as effectively removing sitting justices from office in violation of Article III.

Term limits for Supreme Court justices are vulnerable to analogous objections. Imposing term limits on all federal judges would plainly require constitutional amendment. For the Supreme Court, the proposed workaround is for appointees to serve as active justices for a fixed term, after which those individuals would transition either to “senior” status, sitting only in the event of recusal or temporary disability, or to acting as judges on the federal courts of appeals. The senior status proposal invites charges of effective removal from office. Rotating justices to circuit court judges is more promising (though not without concern). And even that approach leaves the issue of sitting justices, who would either have to be removed without being “removed” or allowed to depart the Supreme Court over time.

Partisan balance reforms are open to challenge as well. Partisan balance is a familiar feature of agency design and has generally been upheld by courts, though we lack a definitive endorsement along the lines of Humphrey’s Executor. Partisan balance on courts, however, raises distinctive questions. For one, the Supreme Court is, unlike the Federal Elections Commission or the Securities and Exchange Commission, a creature of the Constitution, suggesting that Congress may have less discretion in setting qualifications for Supreme Court justices. More still, depending on the formulation, conditioning appointment to the Court upon the party affiliation of the appointee or the appointing president or on the approval of some congressional block would present either First Amendment or Appointments Clause concerns.

#### Strong *Humphries* reversal destroys FERC---bulldozes energy investment and the economy.

Howland 25 – Contributor for Utility Dive.   
Ethan Howland, “Former FERC commissioners urge Supreme Court to uphold agency independence”, 11/14/25, Utility Dive, https://www.utilitydive.com/news/ferc-commissioners-supreme-court-humphreys-executor/805479/

“Eliminating for-cause removal protections would expose energy investors to political uncertainty and policy volatility, which risk higher costs for American consumers and producers,” the former FERC commissioners said. “With FERC sitting at the center of the nation’s energy renaissance, discarding its structure could damage America’s global economic position.”

Rates set by FERC help finance $40 billion in new pipelines and power lines annually, and last year more than $1 trillion of oil, natural gas and electricity flowed through that infrastructure, they said.

#### Energy investment ensures grid resilience.

Welch 25 – State Director of Conservative Texans for Energy Innovation.   
Matt Welch, “Lack of grid infrastructure undermines economic growth and costs Texans billions”, 3/31/25, Express News, https://www.expressnews.com/opinion/commentary/article/texas-grid-transmission-lines-20249635.php

Investing in transmission infrastructure is not just about meeting demand, it’s about securing long-term prosperity and national security. Reliable, affordable energy keeps Texas businesses competitive. Reducing congestion lowers costs, attracts investment, and enhances grid resilience and energy independence.

Beyond making economic sense for our state, proactively deploying the infrastructure we need also aligns with the Trump administration’s energy dominance goals — deploying transmission infrastructure has been directly called out as vital for national security and economic strength.

Furthermore, the U.S. must lead in AI, rather than ceding ground to China or other adversaries. Texas, with its abundant but bottlenecked energy resources, is uniquely positioned to power this technological revolution if we start building again.

It’s true that more energy means more security, but only if we can get it to where it needs to go. History proves that smart investments in transmission pay off. By acting now, Texas can reduce congestion and pave the way for a more robust, secure and cost-effective energy future.

#### Extinction.

Guterl 12 – Executive editor, Scientific American

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

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

### T---1NC

T CBR---

#### “Collective bargaining rights” refer to the right to “bargain collectively” over wages, hours, and conditions of employment.

Witlin 25 – Partner & Administrator, Labor & Employment Department, Barnes and Thornburg. J.D., Stanford Law School. The Best Lawyers in America, 2024-2025.

Scott J. Witlin and Michael P. Witczak, “REPLY by Knauf Insulation, Inc. re 15 Motion to Dismiss,” Guerra V. Knauf Insulation, Inc., US District Court for the Eastern District of California, 01-21-2025, filed, Lexis.

Tellingly, Guerra's Opposition concedes that the NLRB defines "collective bargaining rights" as the right to "bargain collectively" about wages hours and other terms and conditions of employment. (Plaintiff's Opposition, 4: 25-28.) It is also clear that the phrase "concerted activity" refers to the act of "employees . . . band[ing] together in confronting an employer regarding the terms and conditions of their employment." N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 835, 104 (1984). Accordingly, Guerra's Complaint explicitly seeks to unite or band together all alleged class members with the express purpose of improving the wages and working conditions of the alleged class members.

#### To strengthen means to increase ability to overcome opposing interests.

Schauer 82 – Distinguished Professor of Law, UVA Law, and Stanton Professor of the First Amendment, Kennedy School of Govt. at Harvard

Frederick F. Schauer, David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law and Frank Stanton Professor of the First Amendment at Harvard University's Kennedy School of Government, *Free Speech: A Philosophical Enquiry*,(New York: Cambridge UPress), 1982, at pp. 134-136

It would seem therefore relatively uncontroversial to assert that freedom of speech is not and cannot be an absolute right. This broad statement, however, must be tempered by two highly per- tinent qualifications. First, it is important to recognize not only the distinction but also the relationship between the strength of a right and the scope of a right. This terminology is but another way of expressing the distinction between coverage and protection that I discussed earlier, but the terms ‘strength’ and ‘scope’ are particularly illuminating here. The scope of a right is its range, the activities it reaches. Rights may be narrow or broad in scope. Defining the scope of free speech as freedom of self-expression is very broad, defining it as freedom of communication substantially narrower, and defining it as freedom of political communication narrower still. The strength of a right is its ability to overcome opposing interests (or values, or other rights) within its scope. This distinc- tion is nothing new, although it is often ignored in popular dialogue about freedom of speech. The point I wish to make here is that although the scope of a right and the strength of that right are not joined by a strict logical relationship, they most often occur in inverse proportion to each other. The broader the scope of the right, the more likely it is to be weaker, largely because widening the scope increases the likelihood of conflict with other interests, some of which may be equally or more important. Conversely, rights that are narrower in scope are more easily taken to be very strong within that narrow scope. It is much easier, for example, to say that there is a very strong, almost absolute, right to purely verbal political speech than it would be to say that a right to self- expression can be as strong. Any examination of rights must first recognize this interrelationship and then try to preserve someequilibrium between scope and strength. This is easiest but not necessarily best at the extremes. Meiklejohn, for example, definedfreedom of speech as freedom of political speech by those without profit motives. Within this narrow scope it was easier for him to define the right as absolute (which he did) than it would have been had he broadened the scope to include other forms of com- munication. Yet the more narrowly we define a right, the more likely we are to exclude from coverage those acts that may fall within the justification for recognizing the right. Freedom of speech as freedom of political deliberation gains simple absolutism at the cost of excluding much that a deep theory of the Free Speech Prin- ciple would argue for including.

Second, there is an important distinction between the absolute- ness of a political right and the absoluteness of a legal right. A strong but not absolute political right may still at the level of appli- cation be converted into an absolute legal right. The question con- cerns the level at which the weighing process will take place, and which people or institutions will be entrusted with the weighing process. In this respect the issues parallel the considerations involved in act-utilitarianism and rule-utilitarianism. We may balance the issues at the rule-making level, concluding that it is best to have an absolute right in order to preclude judges, juries, or (in the case of constitutional rules) legislatures from possibly giving insufficient weight to the Free Speech Principle in a parti- cularized balancing process. Or we may instead allow the balancing to take place at the level of application, thus permitting judges, for example, to determine in the individual case whether counter- vailing interests outweigh the strength of the Free Speech Princi- ple. It is commonly supposed that this type of ad hoc or particular- ized weighing results in an insufficiently strong principle of freedom of speech, that there is danger of freedom of speech being ‘balanced away’.\* This is probably true as an empirical observa- tion, but it is hardly a necessary truth. It is possible to create prin- ciples of insufficient strength at the rule-making level, and it is equally possible for a judge at the level of application to apply a principle in a way that gives it great power. A full analysis of any political principle must deal with the degree to which any insti- tution can protect that principle, and hence the problem of the strength of a principle is intertwined with the problem of design- ing institutions for the protection of political principles in general.

#### Violation: The 1AC establishes that CBAs cannot be invalidated in bankruptcy. That’s distinct from the right to bargain.

#### Voting issue for limits and ground. They explode the topic into anything tangentially related to labor which is unworkable and makes negative preparation impossible.

### CP---1NC

#### The United States District Court for the District of Delaware ought enjoin the failure of the United States federal government to strengthen bankruptcy collective bargaining rights. If appealed, the Supreme Court ought uphold this decision.

#### Injunction ruling eliminates the rule of law. That zeroes the case AND causes extinction. The counterplan revives it.

Lithwick & Stern 25 – former visiting faculty at numerous law schools, has provided award-winning coverage of the courts for decades for *Slate*, J.D.s from Stanford and GU Law respectively

Dahlia Lithwick, also the 2023 Visiting Professor of Public and Urban Affairs at the McCormick Graduate School, UMass Boston, and Mark Joseph Stern, “No Right is Safe,” episode of the podcast *Amicus With Dahlia Lithwick*, released 28 June 2025, available online at: https://slate.com/podcasts/amicus, transcript available online at: https://app.podscribe.com/episode/135189599?transcriptVersionReqId=b008fb6c-e583-4032-a2c6-04b1d745137c

Dahlia Lithwick (1m 4s):

I'm Dahlia Lithwick. This is Amicus Slate's podcast about the courts and the law and the Supreme Court.

Mark Joseph Stern (1m 12s):

If this decision is carried out to its logical conclusion, then it may be that everybody who has a constitutional violation inflicted upon them has to hire a lawyer, go to court, get their own personal injunction at least until the Supreme Court rules and we know the Supreme Court can drag its feet and take years to get there.

Dahlia Lithwick (1m 34s):

The Supreme Court term rolled to its abrupt conclusion on Friday morning with a gut punch to the constitutional order in Trump v CASA, the birthright citizenship case that came to The court dressed as a nationwide injunctions case alongside a log jam of other cases that would in any other term with any other president count as blockbusters. But that barely break through the legal chaos of this past few months. The October, 2024 term has seen a slow but unrelenting erosion of so many of the pillars of American democracy an an erosion of government regulatory power, the erosion of congressional authority, the brazen dismantling of decades of judicial precedent and the flourishing of a shadow docket that all but dwarfs the public facing actions of The court itself.

Dahlia Lithwick (2m 25s):

That slow erosion on Friday ended with a constitutional landslide. My co-host, Mark Joseph Stern is here with me to talk through these last few decisions. And of course we will gather again next week for our annual term ending breakfast table where we are gonna try to think through the big themes of the term and grapple with the summer. That may be far from quiet because of the emergency docket. So welcome back Mark.

Mark Joseph Stern (2m 52s):

Hi Dalia. I would say I'm happy to be here, but under the circumstances I'll just say I'm happy to see you.

Dahlia Lithwick (2m 57s):

Yeah, you know, I think we were both braced for a catastrophically bad morning and then it was somehow worse. Yeah, it was worse than even we anticipated. And I wanna start with the birthright citizenship nationwide injunctions case because this was about as bad an outcome as we could have imagined. I think, and this is in a case where it seemed at least from argument, that even the conservative justices appeared aware of both the chaos that it could unleash. And also I think we thought after argument aware that the arguments about the 14th amendment itself were kind of without merit.

Dahlia Lithwick (3m 38s):

And yet here we have Amy Coney Barrett writing for all six conservatives with her sort of very lawyerly civ pro professor originalist hot take on the excesses of nationwide injunctions. It is hard to overstate how disastrous this really is.

Mark Joseph Stern (3m 55s):

It's an appalling decision across several dimensions. It's hard to know where to start. But I guess where I do wanna begin is just by reminding everyone that for four years Joe Biden and his administration were hit with an unceasing stream of universal injunctions from a handpicked crew of conservative judges, mostly in Texas and Louisiana. And the Supreme Court did nothing to stop it for four years. Key elements of Biden's agenda were halted nationwide by these judges. And the Supreme Court not only refused to step in, but also sometimes upheld those decisions when they came to The court.

Mark Joseph Stern (4m 36s):

So four years of that was fine for a Democratic president, but now Trump has been in the White House again for barely five months. And suddenly the Supreme Court has seen fit to act to abruptly take away this critically important tool in some circumstances, including this one to reign in a president's lawless actions. The fact that The court waited all that time while Biden toiled under these injunctions and then sprung into action, leapt in to relieve Trump from these injunctions really tells you everything you need to know, in my view about what's truly animating this decision.

Mark Joseph Stern (5m 16s):

And beneath all of the civil procedure and historical geek, I think that the majority is made up of six justices who just think that Republican presidents have a greater claim to legitimacy when they're in the White House, have more executive authority than democratic presidents deserve, and they wanna get these lower courts out of the way so that Trump can rule as much like a king as is conceivable in a democracy if we still have one. So let's

Dahlia Lithwick (5m 42s):

Just talk for a second about what The court found in effect as we knew would happen. They didn't get to the merits question, they didn't get to this question of is birthright citizenship still protected as a kind of cornerstone of the 14th Amendment? They instead took the bait that had been proffered by the Trump Justice Department and said, we're going to use this as a way to say these nationwide injunctions are very, very, very bad and they exceed the authority of the courts. And so here we are now trying to figure out, I think as a practical matter what district courts around the country can do. They have 30 days, we're seeing class actions being filed, we've got district courts who have a certain amount of time in which to readdress these issues that will be brought in a different form.

Dahlia Lithwick (6m 34s):

The intramural academic debate is really interesting right now, mark, it slightly reminds me of the intramural academic debate after the immunity decision, right? Where you could lawyer the heck out of this, you can say, oh, it's not that bad because you'll come and you'll bring it in a different form as a class action. And maybe this can be remedied and lawyer's gonna lawyer and we can probably still protect plaintiffs who were otherwise protected all mass by these broad injunctions. But my view is pull away from the very lawyerly tendency to lawyer this problem. There are huge disadvantages. I think there's no other way to look at this.

Dahlia Lithwick (7m 15s):

For every single individual plaintiff who is affected now by an executive order having to muster the finances, hire a lawyer and bring a lawsuit because they have lost the broad protection of a nationwide injunction.

Mark Joseph Stern (7m 29s):

Right? And The court says, oh, maybe class actions can fill the void. I don't believe it for a second. This is a court that has spent the last few decades weakening class actions making them even harder to win. And in a concurrence, justice Alito joined by Justice Thomas actually said, Hey, lower courts don't just replace universal injunctions with class actions. 'cause that's not okay either. I think that the thrust of this decision is that courts don't get to grant the broad relief that they have been granting in specifically cases where Trump has brazenly and egregiously violated the Constitution. This is a focus of Justice Jackson's dissent. And I think it's worth harping on if this decision is carried out to its logical conclusion, then it may be that everybody who has a constitutional violation inflicted upon them has to, like you say Dalia, hire a lawyer, go to court, get their own personal injunction at least until the Supreme Court rules and we know the Supreme Court can drag its feet and take years to get there.

Mark Joseph Stern (8m 29s):

So this does create potentially a “catch me if you can” system of relief where everybody is vulnerable to having their rights violated because nobody gets to go to court and say: “please freeze this policy nationwide, it is patently unlawful and it it's harming millions of people.” But I just kind of wanna take a step back to look at how we got there because you mentioned The court doesn't talk about the merits of the case. I agree, of course The court does not say birthright citizenship, good or bad, bad right or wrong. But The court sort of looked at two different alleged wrongs here. So the first wrong was what the plaintiffs say, which is that birthright citizenship is a constitutional right, which is true, it's enshrined in the 14th Amendment.

Mark Joseph Stern (9m 9s):

It is a guarantee that the president cannot take away by executive fiat. That's what the plaintiffs say, the defendants, the United States government, the President, they argue that the wrong is actually how courts reacted to those arguments that the real wrong here, the egregious harm is nationwide injunctions, universal injunctions that prohibit the implementation of this policy on the ground anywhere. And so the Supreme Court looking at this debate really could choose one or the other of those questions to address, they could have used this case to say, you know what birthright citizenship is in the 14th Amendment. Trump can't take it away. That resolves the question. But instead they use this case as a vehicle to further empower Trump, to hand Trump even more authority and to sap the lower courts of their ability to reign him in in the face of a policy that I really believe in the end The court will find to be unconstitutional by a lopsided vote, even though the majority doesn't say anything about it on the merits.

Mark Joseph Stern (10m 6s):

I think the law and the history are super clear that Trump cannot take away birthright citizenship from the children of immigrants without changing the constitution. I think the majority will agree, but now they have given him the ability to start trying to do that on the ground because you know, in their view of the correct priorities here, the biggest issue was Trump having his power trimmed to implement an unconstitutional policy. The problem wasn't the policy itself,

Dahlia Lithwick (10m 34s):

Right? We've been talking about this for weeks now, that the posture, the litigation posture continues to be like, wait, the single greatest injustice here is that the president can't do his unconstitutional executive order. And as I said, The court just hook line and sinker took the bait that that was the constitutional wrong here. When this case was argued, we talked a lot you and I about how this outcome, while not deciding the question of birthright citizenship, would surely result in some kind of crazy quilt patchwork where birthright citizenship is the law in some states and it's not the law in others.

Dahlia Lithwick (11m 14s):

And you and I have now just said we're gonna have to wait and see if there's some vehicle whereby it is challenged in every state. We're gonna have to see, and this was another sort of ongoing question at oral argument, whether the Trump administration would ever even bring one of these cases if they lost it back up to scotus, right? There's no promise they'll do that. And yet here we are, we are about to unuse the chaos and the majority is sanguine about all that.

Mark Joseph Stern (11m 43s):

Yeah, I mean the majority actually discusses the patchwork issue and seemingly acknowledges that it could be a problem, but then doesn't address how that problem can be resolved, which is creating a lot of confusion for us commentators, and I don't know exactly what the right answer is. Some, including our friend Ian Millhiser at Vox suggest that there could be a, a new kind of nationwide injunction that rises from the ashes in this case that could somehow be justified on the grounds that we shouldn't be having a patchwork of laws where, you know, some children in some states get citizenship and others don't. But I find it hard to extract that from the decision. I'll just quote from what Justice Barrett writes. She says nothing like a universal injunction was available at the founding or for that matter, for more than a century thereafter.

Mark Joseph Stern (12m 26s):

Thus under the Judiciary Act, federal courts lack authority to issue them. I mean, she was pretty clear. No more universal injunctions. So the question is, can really creative lawyers find a way to finagle some kind of nationwide class action that perfectly substitutes for it? And that's what they're trying to do right now and all power to them. But I think they're going to run into the problem that Justice Barrett is concerned about here, which isn't just the scope of the relief geographically, but the fact that the relief benefits non-parties, and I know this sounds a little bit wonky, but this is really at the heart of her decision. So she says basically the only kinds of injunctions that are lawful today are the kinds that would've been available at the high court of chancery in England at the time of the founding and in founding era American courts.

Mark Joseph Stern (13m 14s):

I'm not gonna get into why as an originalist matter, she thinks that that is the rule. Justice Sotomayor responds, I think very persuasively that that is not In fact the rigid rule that the framers created a judiciary that was meant to have flexible remedial powers to decide in emergency cases how to grant relief. But Barrett says, under my rule back then, in the old days, judges could not grant relief to non parties. They could only grant relief to the people and litigants who are before them hat in hand saying, please help us. And so if that is truly the new rule, and I think it sounds like it is, then I do think that finding a substitute will be impossible because what we need in this case, what the constitution should require is an injunction that benefits every single person who would have their citizenship stripped away from them.

Mark Joseph Stern (14m 5s):

Every single parent who would have their children denied citizenship and potentially rendered stateless. Not every single one of those people's gonna be able to go to court. Dalia, not every single one of those people can hire a lawyer and pay the filing fees. There need to be injunctions that protect all of them, even if they do not have the ability to get their own lawyer or join one of these lawsuits. And so that I think is the big question now and the big harm that we're going to see on the ground. You know, Trump said he's gonna do this 30 day on-ramp to start implementing this policy. That is not a lot of time. And if truly the most egregious harm here was an injunction that benefits non parties, well then there are going to be people who fall through the cracks.

Mark Joseph Stern (14m 46s):

Many people who are not party to these lawsuits who wind up risking their infant citizenship simply because Barrett decided as a quasi originalist. And I think very unpersuasive matter that our current judicial rules are forever chained to something that the high court of chancery in England was doing in the 1700s. That just doesn't sound like justice to me.

Dahlia Lithwick (15m 9s):

Mark, you've kind of nodded to the dissents in this case, but I wanna unpack them a little bit because both Justice Sotomayor and Justice Jackson Sure go there. They go to full on Defcon Sotomayor starts with Dred Scott, justice Tji Brown Jackson talks about this decision as a quote, existential threat to the rule of law. So there is sort of no denying that they both see this as an utter unmitigated disaster. I both want you to sort of reflect on what is in these dissents, but also the tone that the justices take with one another, just sort of dripping contempt that we're hearing in the majority opinion.

Dahlia Lithwick (15m 54s):

And these dissents I find it like makes the hair on the back of my neck stand on edge when you hear justices talking about each other as though they're stupid small children.

Mark Joseph Stern (16m 7s):

It's pretty remarkable rhetoric, especially from Justice Barrett toward Justice Jackson. Justice Barrett writes, we will not dwell on Justice Jackson's argument, which is at odds with more than two centuries worth of precedent. Not to mention the Constitution itself. We observe only this justice Jackson Decries an Imperial executive while embracing an imperial judiciary. So Barrett says, justice Jackson, you're not even worth seriously engaging with. I'm just going to write you off in one line and claim that you are obsessed with turbocharging the power of the courts. Whereas I am deferring to the democratic branches and ensuring that the President can exercise his sovereign prerogatives. But I think that she had to respond in some way because what Justice Jackson is saying here is basically that the Supreme Court just ended democracy.

Mark Joseph Stern (16m 55s):

Justice Jackson writes, I'll quote again that “today's decision will surely hasten the downfall of our governing institutions, enabling our collective demise.” And she said, “lawlessness will flourish, executive power will become completely uncontainable, and our beloved constitutional republic will be no more.” So Justice Jackson is saying this is the end of democracy as we know it, and the most that Barrett could really muster is a kind of, oh turn away, this isn't worth engaging with, which is extraordinarily arrogant and I think a really ugly attitude to take toward a colleague who is jumping up and down warning in the starkest possible terms that The court has just plunged American democracy off of a cliff.

### CP---1NC

## Filings

### Turn---1NC

#### No economy internal link. Dilawer is miscut and says bankruptcies are inevitable for a slew of reasons they don’t solve.

1AC Dilawer ’24 [Awais; December 2; an investment professional with 17 years of experience in private markets, specializing in both debt and equity; Enterprising Investor, “Navigating Troubled Waters: What the Surge in Bankruptcy Filings Means for the Economy,” https://blogs.cfainstitute.org/investor/2024/12/02/navigating-troubled-waters-what-the-surge-in-bankruptcy-filings-means-for-the-economy/]

The financial landscape is showing signs of strain as bankruptcy filings surge, with businesses and consumers alike feeling the pressure of shifting economic conditions. Despite Federal Reserve rate cuts aimed at stabilizing the market, historical patterns suggest that monetary policy alone may not be enough to stem the tide. As cracks in the system become more apparent, understanding the drivers of the rise in bankruptcies is crucial for navigating the challenges ahead.

Statistics reported by the Administrative Office of the US Courts show a 16% surge in bankruptcy filings in the 12 months before June 30, 2024, with 486,613 new cases, up from 418,724 the previous year. Business filings saw an even sharper increase, rising by 40.3%. These figures indicate growing financial stress within the US economy, but the real storm may be just around the corner.

During the 2001 recession, the Federal Reserve’s aggressive rate cuts failed to prevent a sharp increase in corporate bankruptcies. Despite lower interest rates, the Option-Adjusted Spread (OAS) for high-yield bonds widened significantly, reflecting heightened risk aversion among investors, and increasing default risks for lower-rated companies.

<<FIGURE OMITTED>>

The Disconnect Between Monetary Easing and Market Conditions

As a result, the period saw a sharp spike in corporate bankruptcies as many businesses struggled to manage their debt burdens amid tightening credit conditions and deteriorating economic fundamentals. This disconnect between monetary easing and market realities ultimately led to a surge in bankruptcies as businesses struggled with tightening credit conditions.

A similar pattern emerged during the 2008 global financial crisis. For 218 days, the ICE BoFA US High Yield OAS Spread remained above 1000 basis points (bps), which signaled extreme market stress. This prolonged period of elevated spreads led to a significant increase in Chapter 7 liquidations as companies facing refinancing difficulties opted to liquidate their assets rather than restructure.

<<FIGURE OMITTED >>

The sustained period of elevated OAS spreads in 2008 serves as a stark reminder of the crisis’s intensity and its profound impact on the economy, particularly on companies teetering on the edge of insolvency. The connection between the distressed debt environment, as indicated by the OAS and the wave of Chapter 7 liquidations, paints a grim picture of the financial landscape during one of the most challenging periods in modern economic history.

The Federal Reserve’s interest rate policies have frequently lagged the Taylor Rule’s recommendations. The Taylor Rule is a widely referenced guideline for setting rates based on economic conditions. Formulated by economist John Taylor, the rule suggests that interest rates should rise when inflation is above target, or the economy is operating above its potential. Conversely, interest rates should fall when inflation is below target or the economy is operating below its potential.

The Lag

The Fed’s rate adjustments lag for several reasons.

First, the Fed often adopts a cautious approach, preferring to wait for clear evidence of economic trends before making rate adjustments. This cautiousness can lead to delayed responses, particularly when inflation begins to rise, or economic conditions start to diverge from their potential.

Second, the Fed’s dual mandate of promoting maximum employment and stable prices sometimes leads to decisions that diverge from the Taylor Rule. For example, the Fed might prioritize supporting employment during economic slowdowns, even when the Taylor Rule suggests higher rates to combat rising inflation. This was evident during prolonged periods of low interest rates in the aftermath of the 2008 financial crisis. The Fed kept rates lower for longer than the Taylor Rule suggests to stimulate economic growth and reduce unemployment.

In addition, the Fed’s focus on financial market stability and the global economy can influence its rate decisions, sometimes causing it to maintain lower rates than the Taylor Rule prescribes. The rule’s goal is to avoid potential disruptions in financial markets or to mitigate global economic risks.

Historical Fed Funds Rate Prescriptions from Simple Policy Rules

<<FIGURE OMITTED>>

The consequence of this lag is that the Fed’s rate cuts or increases may arrive too late to prevent inflationary pressures or curb an overheating economy, as they did in the lead-up to previous recessions. Cautious timing for rate cuts may also delay needed economic stimulus, which prolongs economic downturns.

As the economy faces new challenges, this lag between the Fed’s actions and the Taylor Rule’s recommendations continues to raise concerns. Critics argue that a more-timely alignment with the Taylor Rule could lead to more effective monetary policy and reduce the risk of inflation or recession, ensuring a more stable economic environment. Balancing the strict guidelines of the Taylor Rule with the complexities of the real economy remains a significant challenge for policymakers.

As we approach Q4 2024, the economic landscape bears unsettling similarities to past recessions, particularly those of 2001 and 2008. With signs of a slowing economy, the Federal Reserve has cut the interest rate by 0.5% recently to prevent a deeper downturn. However, historical patterns suggest this strategy may not be enough to avert a broader financial storm.

Furthermore, easing monetary policy, which typically involves lowering interest rates, will likely shift investor behavior. As yields on US Treasuries decline, investors may seek higher returns in high-yield sovereign debt from other countries. This shift could result in significant capital outflows from US Treasuries and into alternative markets, putting downward pressure on the US dollar.

The current global environment, including the growing influence of the BRICS bloc, the expiration of Saudi Arabia’s petrodollar agreements, and ongoing regional conflicts, make the US economic outlook complex. The BRICS nations (Brazil, Russia, India, China, and South Africa) have been pushing to reduce reliance on the US dollar in global trade, and petrodollar petrodollar contracts are weakening. These trends could accelerate the dollar’s depreciation.

As demand for US Treasuries declines, the US dollar could face significant pressure, leading to depreciation. A weaker dollar, geopolitical tensions, and a shifting global economic order could place the US economy in a precarious position, making it increasingly difficult to maintain financial stability.

While Federal Reserve rate cuts may offer temporary relief, they are unlikely to address the underlying risks within the financial system. The specter of widening OAS spreads and rising bankruptcies in 2024 is a stark reminder that monetary policy alone cannot resolve deep-seated financial vulnerabilities. As we brace for what lies ahead, it’s essential to recognize the potential for a repeat of past crises and prepare accordingly.

#### Plus, overhang from the pandemic.

Altman 25 – Professor of Economics at NYU.

Edward Altman, “Exploring the underlying causes of corporate bankruptcies in the U.S.”, NPR, 12/13/2025, https://www.npr.org/2025/12/13/nx-s1-5640132/exploring-the-underlying-causes-of-corporate-bankruptcies-in-the-u-s

SCHMITZ: I'm well. Thank you. Why are so many companies going bankrupt right now?

ALTMAN: Actually, it's a combination of things. Going back to the days of COVID, interest rates fell dramatically due to the central banks lowering the interest rates so that companies could access capital and survive during lockdowns. And companies took out loans, paying those loans based on what's called a floating rate basis. That implies that as interest rates changes, up or down, the cost to the companies change in the same way. So there was a big buildup in debt at very low interest rates. And this continued for several years through 2022. Subsequent to that, interest rates started rising in 2023, '24, '25. And so as a result, companies which were able to survive under very low interest rates no longer could withstand those higher interest rates across many different sectors.

SCHMITZ: Yeah. So it sounds from what you're saying is that a lot of this actually is sort of a hangover from the pandemic and the economic impact of that.

#### And tariffs

Altman 25 – Professor of Economics at NYU.

Edward Altman, “Exploring the underlying causes of corporate bankruptcies in the U.S.”, NPR, 12/13/2025, https://www.npr.org/2025/12/13/nx-s1-5640132/exploring-the-underlying-causes-of-corporate-bankruptcies-in-the-u-s

ALTMAN: I'd say that's definitely a significant part of it. But the other part is the tariff situations, and particularly, it's hitting small and medium-sized firms across the country. Farmers, for example, have had a record amount of bankruptcies as well. And the reason for that is these companies generally operate at very vulnerable margins. Their costs are being increased without them being able to increase the demand and pass it along to customers.

#### C’mon Michigan, this is economics 1-0-1. It’s not caused by labor!

Cunningham 26 – Economics Journalist at CBS News.

Mary Cunningham, “More Americans are filing for bankruptcy. Here's what's behind the surge.,” CBS News, 01-16-2026, https://www.cbsnews.com/news/bankruptcy-filing-rise-consumer-business-epiq/

The surge in filings comes as American consumers — and businesses — face a slate of economic pressures, ranging from sticky inflation to elevated borrowing costs, experts told CBS News.

John Rao, a senior attorney with the National Consumer Law Center, said Americans typically hold off on filing for bankruptcy as long as they can, meaning the conditions that led them to file for bankruptcy may not necessarily be tied to current economic issues.

"There is often a lag before economic conditions translate to higher bankruptcies," he said.

Still, he said the rising cost of medical insurance, mounting credit card debt and the restart of student loan repayments are serving as some of the major catalysts for bankruptcies. Inflation has also made it tougher for Americans to cover expenses while paying down their debt, he added. Inflation has cooled since hitting a 40-year high in 2022, but prices are still rising faster than the Federal Reserve's 2% annual target.

"There comes a point where the mounting bills, the increasing balances on credit cards, all those things just weigh people down so much," Rao said.

#### That means the plan can’t prevent them, but it can nuke firm restructuring.

Miller 7 – LLB from Columbia University, Former Adjunct Professor at Columbia Law School, Lecturer at Harvard Business School and Yale Law School, Called “the most prominent bankruptcy lawyer in the nation” by the New York Times.   
Harvey R. Miller, Michele J. Meises, & Christopher Marcus, “The State Of The Unions In Reorganization And Restructuring Cases”, 2007, American Bankruptcy Institute Law Review, Volume 15, https://commission.abi.org/sites/default/files/955a93bbfec04e66a31a89f1b4f92be1%20(1).pdf

\*\*DIP = Debtor in Possession

Potentially, some might posit that section 1113 of the Bankruptcy Code works and that it causes a more realistic final round of collective bargaining. However, if union members are free to strike after a CBA is rejected on the basis that rejection is necessary to allow a debtor to reorganize, the relief afforded under section 1113 of the Bankruptcy Code often turns into a "suicide weapon," as the court in Northwest noted.198 The power to strike against an employer in financial distress who does not have an alternative workforce to hire in the event of a strike often forces such employers to capitulate to the union's demands or risk liquidation, which, in the end, neither benefits the company, the union, nor other stakeholders.

Labor management issues are not resolved in a vacuum. They involve many other interests and constituencies, particularly in the circumstances of a bankruptcy reorganization. Unfortunately, many labor representatives are caught in a time warp and believe that the economy still is operating in the economic climate of the 1950s and 1960s. They cannot continue to be "oblivious to the obvious." The recent General Motors/UAW settlement may demonstrate that reality finally has reached labor representatives.

Notwithstanding potentially draconian consequences for the possibilities of reorganization, unions continue to lobby Congress for special interest legislation in an effort to gain more leverage, apparently because of the dissatisfaction with the victory they won in 1984 in causing the enactment of section 1113. As a result, on September 25, 2007, Congressman Conyers introduced a bill199 to amend title 11 of the United States Code to improve protections for employees and retirees in business bankruptcies. This supposed effort to "re-level the playing field" in chapter 11, if enacted, would, inter alia, increase priority claims, limit executive compensation and enhancements, and make the possibility of a successful reorganization more remote.

If the current state of the law is unsatisfactory, rather than emasculate the possibilities of reorganization, the following options should be considered: Congress could (i) amend the NLRA and expand the power of the bankruptcy court to enable it to enjoin unions threatening to strike upon compliance with certain threshold standards; or (ii) empower bankruptcy courts to require DIPs and their respective unions to enter into mandatory arbitration with court-appointed arbitrators who are experienced and expert in labor negotiations and the DIP's industry. While mandatory arbitration might limit the jurisdiction of the bankruptcy court, it ultimately could prevent the liquidation of a distressed company that is unable to reach a consensual resolution with its unions over their CBAs.200

Ill-considered proposed amendments that fail to take into consideration the other interests and constituents involved in a chapter 11 reorganization case are antithetical to the policy of rehabilitation and reorganization of distressed businesses. The adoption of the proposed amendments, together with the enactment of the Pension Protection Act of 2007,201 may preordain the failure of a reorganization to the real prejudice and detriment of all employees and other stakeholders.

#### That turns growth and economic shocks.

Wang 22 – Professor of Finance at Queen’s University Smith School of Business.  
Wei Wang, “The Costs of Bankruptcy Restructuring”, 4/13/22, Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3985613

Financially distressed and insolvent firms file for bankruptcy to either reorganize or liquidate under court supervision. Fundamentally, bankruptcy law is designed to resolve creditor coordination and holdout problems. It not only sets up rules and guidelines to allow firms to restructure their debt claims but also provides means for firms to reallocate their assets to other users. Although an efficient bankruptcy system can help mitigate bargaining frictions and maximize asset value and thus creditor recovery by avoiding inefficient liquidation or excess continuation, the bankruptcy process itself can be costly.

Understanding and quantifying the costs of bankruptcy restructuring are important not only to financially distressed firms but also to the capital structure decisions and the pricing of securities of healthy firms. More broadly, efficient bankruptcy mechanisms are important for economic growth, productivity of firms in an economy, and the resiliency of the economy to adverse shocks. In the past few decades, the literature has flourished, with a growing number of empirical studies investigating the efficiency of the bankruptcy system and different aspects of bankruptcy costs.

Bankruptcy costs are typically classified as either direct or indirect costs. The former refers to out-of-pocket expenses associated with the retention of professionals, while the latter refers to opportunity costs incurred as a result of the adverse effect of bankruptcy filing on business operations, human capital, and investments. Indirect costs are typically larger and more difficult to measure and quantify than direct costs, which studies show to be a small fraction of a bankrupt firm's assets.

Because of significant economic frictions such as conflicts of interest, information asymmetry, and judicial biases presented in the system, bankruptcy can be a lengthy process. Since delay allows both direct and indirect costs to accumulate, a number of studies show that shortening the bargaining process can effectively help preserve firm value. Besides delay, bankruptcy costs can be manifested in inefficient liquidation, excess continuation, fire sales, loss of human capital, and managerial turnover, which impose real costs on bankrupt firms. How to mitigate frictions and minimize costs has been the central theme of bankruptcy research in the past few decades. The past few decades have also witnessed several notable changes to the US bankruptcy system, including the rise of specialized distressed investors, the strengthening of secured creditor control rights, and the increasing intensity of asset sales. These changes have important implications for the restructuring landscape.

#### No internal link. Jones is about defense tech not aviation.

Jones ’22 [Laura; 2022; Air Force special operations pilot currently serving as a PhD student at the Fletcher School of Law and Diplomacy at Tufts University, CV-22B Osprey instructor pilot and a first assignment instructor pilot in the T-6A Texan II, led a RAND Corporation research team, provided translation support to the Office of Defense Cooperation at the U.S Embassy in Paris, France, and was deployed to East Africa as a liaison officer to the French Air Force, member of the Irregular Warfare Initiative and sits on the board of directors where she oversees production of the Irregular Warfare Podcast, National Defense University, Center for the Study of WMD Program for Emerging Leaders Fellow; The Fletcher Forum of World Affairs, “The Future of Warfare is Irregular,” vol. 46]

Conventional overmatch is also being met with an evening of technology on the modern battlefield. As the world becomes more urbanized, it will be more and more difficult for military operations to bypass large urban centers. Urban warfare is considered a great equalizer, especially if the attacking force is concerned with civilian casualties. Although that claim is overblown,10 urban warfare does degrade some conventional capability, and defending forces can more easily exploit vulnerabilities in the attacking force. Along with the increase in urbanization, Dr. Audrey Kurth Cronin points out that accessibility to technological innovations in warfare is rapidly increasing.11 The lowering of barriers to entry for cyber tools, small drones, wireless communication, night vision, and other technology allows even remote armed groups to take advantage of modern military technology. This increases the burden of innovation for the United States military and pushes the goalposts for maintaining conventional overmatch across all battlefields. The fighting in Ukraine has shown how much damage a numerically inferior force can inflict with light, shoulder-fired weapons against armor and low-flying aircraft. Further, the war has highlighted the efficacy of arming a proxy force to fight a geopolitical rival on the periphery of their influence, a more irregular approach to warfare. The losses being suffered by both sides in Ukraine show how destructive conventional, large-scale combat operations can be with modern technology. A better way forward is to invest in the competition phase, before the costs of fullscale conflict must be paid.

#### No influence of airpower.

**Ferris 25** - Lieutenant Colonel in U.S. Air Force

Phillip Ferris, “Air Force Under Fire: Time To Own Base Defense,” The Mitchell Forum, 8/5, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=5651752

It was a clear morning, and the sun had just begun to rise over the air base, casting a golden glow over the rows of aircraft. The base’s personnel started to bustle around to meet the day’s tasks. In an instant, the tranquility was shattered by the thunder of explosions and then the scream of incoming cruise missiles and the buzz of one-way attack drones. Airmen scattered to try to take cover in the confusion. The base, not properly prepared or defended, was caught off guard by a surprise air attack. Even as the strike ended, the sounds of chaos and panic continued to fill the air as personnel rushed to respond to the disaster, but it was too late, as the damage was done. Aircraft were damaged or destroyed, their metal skins torn apart by shrapnel and flames. The base’s fuel storage facilities were ablaze, its runways cratered and unusable. Worse yet was the effect on human life; the toll was stunning, with many killed or injured in the blasts. The results were nothing short of catastrophic.

How had this happened? The Air Force was relying on the Army to provide protection for the base and assumed the Army’s air defense assets would be sufficient to deter or defeat any potential threats. However, the Army was stretched thin, its limited assets already committed to supporting other joint and high-priority missions, and many of the Army’s systems were too logistically cumbersome to meet the Air Force’s needs. Despite the Air Force’s requests, the Army was unable to allocate its scarce resources to defend every air base, leaving many installations, including this one, vulnerable to attack. As a result, the base faced disastrous consequences.

As the hours turned into days, the true extent of the disaster became clear: the base was unable to generate combat power sorties, leaving its ability to project airpower crippled. The once-thriving air base was now a shadow of its former self, a haunting reminder of the importance of robust defenses and mitigation measures, as well as the terrible consequences of being unprepared for the expected. The tragedy served as a stark warning to Air Force leaders: they should not assume others would provide for their defense.

The Air Force must take charge of providing its own force protection to cover the gaps in joint force coverage by improving and modernizing its air and missile defense (AMD) and air base ground defense capabilities, and it must be funded accordingly. The alternative is to accept the possibility of the scenario above, in which valuable air bases could be rendered useless— unable to generate combat power or protect high-value air assets and personnel in the air or on the ground. Without theater air bases to project power and establish air superiority, U.S. forces can conduct very few, if any, joint operations in contested environments.

The party responsible for the air defense of bases, despite the importance of the mission, seems ambiguous, as it has for decades; regardless, it is not budgeted for accordingly. Many believe the Army is responsible for providing point defenses for Air Force installations.1Various leaders have been quoted, and many media articles state that the Army is responsible for the air defense of air bases in accordance with the Key West Agreement or Department of Defense (DoD) directives.2 However, that is only partly true. The 1948 Key West Agreement, which defined the roles and missions of the U.S. armed services, never explicitly gave that mission to the Army.3 It does state that one of the primary functions of the U.S. Army was to “provide Army forces as required for the defense of the United States against air attack.”4 However, it also lists primary functions of the U.S. Air Force that include “be responsible for the defense of the United States against air attack…” and “provide Air Force forces for land-based air defense, coordinating with the other Services in matters of joint concern.”5 The closest delineator of responsibility for air defense of air bases in writing was a memorandum of understanding signed by the Army and the Air Force in 1984 stating that the Army would be primarily responsible for air defense of air bases. It also included an important caveat, though: if inadequate funding was applied to the mission, the Air Force could conduct its own point defense.6 A joint air base working group was also directed. However, the Army did not increase its support, and the working group never met. Regardless, those agreements have expired. Furthermore, per DoD Directive 5100.01, “Functions of the DoD & Its Major Components,” missile defense (and force protection and base defense as a whole) is a common military function for all the services.7 The Army is tasked to “conduct air and missile defense to support joint campaign and assist (emphasis added) in achieving air superiority,” but the directive also states that the Air Force will “conduct offensive and defensive ops, to include appropriate air and missile defense (emphasis added), to gain/ maintain air superiority.” Even if the Army was tasked more explicitly by Congress or the Department of Defense to provide air defense of air bases, history shows that something will occur during the conflict to cause the diversion of these assets elsewhere. In fact, a great deal of research on air defense of air bases over the years, to include several RAND studies, urged the Air Force to take a more active role in its base defense.8 As far back as 30 years ago, RAND asserted that “Air Base Defense commanders cannot count on other U.S. or allied forces being available to support their operations; in an operationally meaningful sense, they will be on their own.”9

Whereas the Army has historically provided most of the air defense for air bases due to a variety of factors, this assumption and expectation are unfortunately no longer valid, especially for countering small UAS and cruise missiles. The tacit understanding that the Army has the responsibility to protect Air Force air bases may endure because they fielded Patriot and Terminal High Altitude Area Defense (THAAD) batteries at many Air Force installations in the Middle East and Mitchell Forum 3 elsewhere. Importantly, the Army does have an organize, train, and equip responsibility to assist in achieving air superiority, in accordance with DoD Directive 5100.01, and Combatant Commands traditionally allocate air defense units to air bases, as they are high on the critical asset list. However, the reality of bases in the Western Pacific theater, especially given the dynamics of basing in agile combat employment (ACE), suggests that the Army is likely not able to adequately support the Air Force. The Air Force must increasingly rely on smaller bases with small footprints and logistics tails, and such bases cannot support the fielding and maintenance of large pieces of equipment like Patriot, THAAD, or even the relatively smaller indirect fire protection capability (IFPC) batteries. Even if the airfields can accommodate the aircraft needed to move such large systems, the number of aircraft needed may place too great a demand on the limited number of mobility air assets available to be considered a wise use of resources. The Air Force needs to return to the days of providing some of its own organic, service-retained air defense as it did during the Cold War in order to defend its bases from small UAS and cruise missiles while still relying on the Army to defend the Air Force’s larger bases from ballistic missiles and more exquisite threats. Air bases are the center of gravity for the Air Force’s ability to execute most of its assigned core missions to support joint force operations, and as the air threat grows more grave, there is no sanctuary. This emerging reality is particularly concerning when considering the U.S. pacing challenge, the ongoing conflicts in Ukraine and the Middle East, and increasing threats to base defense from small UAS. In short, the Air Force must plan for a more active role in AMD to cover the gaps in the joint force’s coverage, and Congress and the Department of Defense have a duty to allocate the necessary funding and manpower for the Air Force to effectively execute this mission.

## Bankruptcy

### No Spillover---1NC

#### No spilover. The plan gets neatly distinguished and specific to bankruptcy statutes.

Updike 8 – JD from Boston College.   
Christopher Updike And Ingrid Bagby, “Collective Bargaining Agreements and the Bankruptcy Code: Are Damage Claims for Rejection of Collective Bargaining Agreements Available Under Section 1113?”, 2008, Pratt’s Journal of Bankruptcy Law, https://www.cadwalader.com/uploads/books/60f09cd30c301f48dfa211ec37cbdb25.pdf

In its decision discussing the intersection of the RLA and the Bankruptcy Code, the Second Circuit specifically addressed the effect of contract rejection under Section 1113. The Second Circuit held that before it could evaluate what the AFA's rights and remedies were subsequent to a court-approved rejection under Section 1113, the court had to determine the effect of such rejection.63 Under Section 365, the Bankruptcy Code "treats rejection as a breach so that the non-debtor party will have a viable claim against the debtor. '64 However, as the Second Circuit stated "Northwest did not reject the CBA at issue pursuant to §365. It acted with the authority of a court order entered pursuant to § 1113. Contract rejection under § 1113, unlike contract rejection under §365, permits more than non-performance; it allows one party, with the court's approval, to establish new terms that were not mutually agreed upon...,"65 The court added that "Congress [in § 1113] sought to ensure that carriers would not avoid their agreements with their employees immediately upon entering bankruptcy; rather it made contract avoidance possible only after the debtor procured court permission. But under § 365, if a debtor rejects an executory contract, courts assume a breach as of "the date immediately prior to the debtor's filing for bankruptcy." Rejection under § 365 thus leads to a legal fiction at odds with the text of (and impetus behind) § 1113. Consistent with Congress's purpose, we are obligated to construe the statutory scheme to distinguish the legal consequences of rejection under § 365 - including our suggestion that employees aggrieved by the rejection may strike from the legal consequences of rejection under § 1113. '' 66

### !D---Cyber Attacks---1NC

#### No cyber impact – no intent, de-escalatory, empirics, and comprehensive data.

Valeriano et al. 25 – PhD, Lecturer at the University of Glasgow; Bren Chair of Military Innovation at the Marine Corps University, Senior Advisor at the Cyber Solarium Commission; PhD, Director of Information Operations for Research at the U.S. Department of Defense; Professor at the Department of Defense Analysis at the Naval Postgraduate School.

Brandon Valeriano, Ryan Maness, and Benjamin Jensen, “Cyber War," What Do We Know about War?, Ch. 12

In practice, however, cyber escalation is rare. Stuxnet (2007–2010) is often cited as the prime example of cyber escalation yet, put in the context of the wider dispute between the West and Iran over the development of nuclear weapons, the Stuxnet attack is actually a de-escalatory move because the other options on the table at the time were conventional strikes that would have caused death and destruction.

Talmadge (2019a: 864) makes the point that technology itself is rarely a sufficient condition for escalation, “cast[ing] doubt on the idea of emerging technologies as an independent, primary driver of otherwise avoidable escalation.” Technology became the mask for the processes that enable escalation, rather than the cause of escalation itself. It is not the domain that produces escalation, but the action in the domain that produces outcomes.

We have ample empirical evidence that escalation is limited in the cyber domain. Even in its simpler form, there is little retaliation, let alone escalation, in the domain or even out of the domain when cyber actions are the triggering events. When conflicts do escalate in cyber space, we observe limited engagement between the parties unless there is already an outright war. As Valeriano, Jensen, and Maness (2018: 18) note, “even when cyber exchanges between rivals escalate, they remain limited in scope outside of ongoing military conflict. That is, rivals may use cyber operations to probe the enemy, test their resolve, and signal the risks of significant escalation.

Data analysis supports these positions and is developed here from established data and taken from ongoing projects to support our background investigation into cyber escalation processes (Maness, Valeriano, and Jensen 2019). Table 12.4 shows the response patterns between the United States and its four major adversaries (Russia, Iran, China, and North Korea) in the cyber domain, as well as how each country responds to a cyber operation with a retaliatory cyber operation. Table 12.4 utilizes the cyber operation severity score from the DCID version 1.5 that measures the impact and national security importance of each state-initiated cyber operation between the years 2000–2016 between rival states (Maness, Valeriano, and Jensen 2019). The scale is interval and ranges from 1 to 10.

Table 12.4 shows that the United States is often on the receiving end of retaliation at a higher rate than expected. However, these responses to US cyber actions do not indicate within-domain escalation. The severity levels with a response score of 2 were retaliatory to US actions that were of a higher severity level. Of the seven actions at the severity level of 4, three represent a decrease in the initial attack severity and four represent an increase by one tick in severity. The only other country that witnesses a statistically significant level of retaliation at a greater rate than expected is Iran, which is wholly due to US or Israeli operations. China’s significant negative relationship with its severity score of 2 shows that it prefers higher levels of severity when it retaliates in the cyber domain. Many of the Chinese incidents involve entanglements with the United States, which is another great power with vast cyber capabilities. This propensity to use more severe attacks does not denote escalation, however. Escalation is rare in digital interactions as measured by rival states from 2000 to 2016.

[Figure omitted]

Table 12.5 shows how responses are related to the overall cyber strategy of the initiating states. In terms of response severity by strategic objective, disruptive efforts by initiating states are usually met with retaliatory disruptions, further indicating that the cyber domain is, for the most part, non-escalatory. Espionage campaigns are also commonly met with cyber operations that either steal or signal capabilities or displeasure for the originating action, but do not lead to a tit-for-tat escalatory ladder, as indicated in Table 12.2. Only occasionally do we see disruptions or espionage operations escalate to the severity level of 5, with this happening only five times over the 2000–2016 period.

Results from war games have demonstrated the complicated empirical picture of the escalation landscape in cyber space (Schneider 2017). After examining war games from 2011 to 2016, Schneider finds that government officials were hesitant to use damaging cyber weapons. Most games only witness the use of cyber capabilities after the onset of conventional warfare, not before. For Jensen and Banks (2018), in the context of cyber options, escalation was the exception, not the norm.

To explore escalation when cyber options are present within the context of integrated options of national power, Jensen and Valeriano (2019) ran a series of war games on 259 participants, including members of the military, students, and policymakers. The simulation situated participants in a typical crisis that was highly likely to escalate given a rivalry situation over an ongoing territorial dispute when the crisis under examination was the third in a series over a five-year period.

The results demonstrated that escalation is not the norm. Based on a general baseline for all international conflict situations, most options fell below the 48 percent threshold. In fact, the only instance where escalation was the dominant option was when a cyber action started the crisis and the target had no cyber response options. This suggests there are implications of attacking a state with cyber options when they do not have the ability to respond within the domain. In most other situations, we witness few demands for escalation when cyber response options are on the table.

Overall, regardless of the situation, cyber escalation is usually not the dominant response. The reality is that even under dangerous conditions cyber response options can actually moderate crisis response patterns. Surveys demonstrate a great amount of fear in the cyber domain, but this does not motivate overreaction (Gross, Canetti, and Vashdi 2017). Figure 12.2 shows the results from a cyber campaign–directed dyads data set. What is measured in what follows is whether the combined cyber operation, which includes diplomatic, economic, and military variables extracted from ICEWS (Boschee et al. 2018), has escalatory responses from the target from all four domains recorded in the campaigns. For a cyber response to be recorded, the target responds within one year from the start date of the original cyber operation from the initiator for disruptions and degradations, and from the date the operation becomes public for espionage operations. For a diplomatic response, the time frame is one month (thirty days) after the cyber operation’s initiation or public reporting, and for economic and military responses, the time frame is three months (ninety days) after the same criteria regarding the cyber operation. For cyber escalation, the severity score must go up at least one point regarding the cyber response. No cyber responses at the same severity score are included. For conventional responses, we use the Conflict and Mediation Event Observation (CAMEO) conflict-cooperation scores to measure escalation (Schrodt 2012). The CAMEO scale ranges from −10 to 10 where the more negative score, the more conflictual and the more positive score, the more cooperative the foreign policy action. If the conflict scores from each domain are lower (more negative) from the target state in retaliation for the cyber incident, escalation in each domain is recorded.

### !D---Marketplace Disinfo

### !D---Bioterror---1NC

#### No bioterror and no impact.

Ackerman et. al 22 – Associate Professor of Homeland Security at the University at Albany

Gary Ackerman, “Why COVID probably hasn’t helped bioterrorists, despite fears,” Bulletin of the Atomic Scientists, 8/11/22, https://thebulletin.org/2022/08/why-covid-probably-hasnt-helped-bioterrorists-despite-fears/

Could COVID have changed the equation? Aum and its ilk aside, terrorists haven’t shown a great deal of interest in bioweapons. But could the pandemic have changed their views? Certainly, many analysts and media organizations have explored this concern. For example, Vox recently ran a lengthy piece on “Why experts are terrified of a human-made pandemic” arguing that COVID is a warning of what’s to come: pathogens enhanced with gain-of-function research and DNA synthesis improving access to pathogenic material. Axios wrote about how the coronavirus reawakened bioweapons fears. An op-ed in the Los Angeles Times argued that COVID shows world leaders the harm bioweapons can cause.

The fears are well-justified in at least one regard: Thanks to scientific advances, the technical barriers to bioterrorism are going down. But COVID isn’t playing a big role there.

As a technical matter, COVID’s bolstering of terrorists’ abilities to acquire biological weapons is likely modest at best. The main potential concern is the proliferation of medical and public health resources aimed at combatting COVID and whether any of these can be reappropriated to serve bioterrorism schemes. In most cases, the answer is no. Nonetheless, new laboratories might create opportunities to steal equipment or pathogens. Terrorists might also be able to more readily acquire skills related to handling pathogenic material through the rapid training that occurred to meet pandemic needs. But these effects are likely minimal.

The pandemic has caused millions of deaths, a lot of illness, and huge economic and societal disruption. It has also shown the limits of vaccinations: 20 percent of Americans still remain hesitant to get their shots. Pandemic-prompted responses may also be less effective for non-contagious agents like Bacillus anthracis. For example, masking is unlikely to be effective response absent an unlikely early warning. Yet, it’s not at all clear that a terrorist group will see new opportunities for bioweapons based on how society has responded to COVID.

Contrary to fears, the way some governments have responded to the pandemic might deter rather than encourage would-be bioterrorists. For example, the experience of the Operation Warp Speed program in the United States showed that governments can rapidly develop, disseminate, and update a novel vaccine. Efforts to bolster early warning systems, like waste-water surveillance programs, may likewise make a bioweapon less effective.

In short, those terrorists who would have pursued bioweapons before COVID will probably still pursue them, while terrorists who would previously have rejected bioweapons are unlikely to see sufficient new benefits in the COVID experience to override their concerns.

Well, what now? Though COVID has not changed the threat of bioterrorism much, there might be some worthwhile policy adjustments to make in light of the pandemic.

Law enforcement and national security agencies concerned with bioterrorism should prioritize groups with apocalyptic ideologies. These groups may have few viable alternatives to bioterrorism. Likewise, analysts should understand how ideological subgroups may differ in their response to COVID: For example, many radical environmentalists probably would be turned off from biological weapons because the groups are generally non-violent. Some sub-groups, however, like RISE, who are more accepting of violence, might be open to seeing a biological weapon as symbolic of nature’s vengeance on humanity. Aum, famously, recruited scientists to manage its weapons efforts. Analysts should be particularly interested in signs such groups are seeking specialized equipment, recruiting people with specialized bioweapons-related knowledge, or developing that knowledge themselves.

To the degree COVID excites policy interest in bioterrorism, those energies should be channeled towards larger public health preparedness. In practice, many aspects of responding to a bioterrorism incident are not terribly different than any naturally-occurring outbreak. Measures like epidemiological early warning, building hospital surge capacity, and exercises on pandemic response are all just as useful in responding to bioterrorism as a natural pandemic. Of course, policymakers need to consider how bioterrorism may affect the details: Bioterrorists may employ rarer, deadlier diseases; strategic targeting may complicate modeling and response to early outbreaks; and, in extreme cases, bioterrorists may alter the properties of known biological agents.

Analysts and policymakers also should ensure that the frustrations of COVID do not overly color threat assessments. They need to think carefully about how the COVID pandemic has actually interacted with the particulars of terrorist ideology and capability. The overall risk of bioterrorism is probably still quite low, but there are ways to push it even lower.

### !D---Disease---1NC

#### Pandemics won’t cause extinction.

Pappas 23 – Science journalist, quoting Amesh Adalja, infectious disease physician at the Johns Hopkins Center for Health Security.

Stephanie Pappas, March 21, 2023, “Will Humans Ever Go Extinct?” Scientific American, https://www.scientificamerican.com/article/will-humans-ever-go-extinct/

The end of humanity is far more likely to be brought about by multiple factors, Kemp says—a pileup of disasters. Though apocalyptic movies often turn to viruses, bacteria and fungi to wipe out huge swathes of population, a pandemic alone is unlikely to drive humanity to extinction simply because the immune system is a broad and effective defense, says Amesh Adalja, an infectious disease physician at the Johns Hopkins Center for Health Security. A pandemic could be devastating and lead to severe upheaval—the Black Death killed 30 to 50 percent of the population of Europe—but it’s unlikely that a pathogen would kill all of humanity, Adalja says. “Yes, an infectious disease could kill a lot of people,” he says, “but then you’re going to have a group [of people] that are resilient to it and survive.”

Humans also have tools to fight back against a pathogen, from medical treatments to vaccines to the social-distancing measures that became familiar worldwide during the COVID pandemic, Adalja says. There is one example of a mammalian species that may have been entirely wiped out by an infectious disease, he says: the Christmas Island rat (Rattus macleari), also called Maclear’s rat, an endemic island species that may have gone extinct because of the introduction of a parasite.

“We are not helpless like the Christmas Island rat who couldn’t get away from that island,” Adalja says. “We have the ability to change our fate.”