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CONTENTS

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ABSTRACTS

ARTICLE

For decades, antitrust enforcers ignored employer power in labor markets, adopting neoclassical assumptions that labor markets are competitive. Despite fanfare regarding recent labor antitrust enforcement, enforcers still deploy neoclassical assumptions and methods, targeting only proven deviations from a presumed competitive baseline, or infracompetitive wages and working conditions. The New Labor Antitrust deduces harms only from reduced competition that workers suffer.

This Article radically challenges that approach as contrary to law and policy. First, as a legal matter, it uncovers the Clayton and Norris–LaGuardia Acts' labor and wage policy as rejecting competitively determined wages in favor of bargained-for wages determined through workers' collective self-determination. It contextualizes those Acts as Progressive and institutional economists' policy victories over neoclassical and formalist views of labor relations. Second, as a policy matter, the New Labor Antitrust's approach contradicts mounting evidence of imperfect competition that should drive new assumptions and methods of detecting and countering employer power. Market-based metrics undercount employer power and its effects, making it needlessly challenging to establish liability. And when liability is established, it may be established for only competition-based—rather than non-competition-based—harms like reducing workers' countervailing power and freedom of association.

The Article explains how the New Labor Antitrust inherited neoclassical doctrine and methods developed outside labor antitrust to usurp Congress's now-forgotten labor and wage policy. It proposes reframing labor antitrust regulation to better detect and target employer power's sources consistent with a policy favoring workers' collective self-determination. It offers preliminary solutions, drawing from broader federal labor policy and the social scientific and philosophical literatures.

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ARTICLE

TOWARD A PROGRESSIVE LABOR ANTITRUST

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For decades, antitrust enforcers ignored employer power in labor markets, adopting neoclassical assumptions that labor markets are competitive. Despite fanfare regarding recent labor antitrust enforcement, enforcers still deploy neoclassical assumptions and methods, targeting only proven deviations from a presumed competitive baseline, or infracompetitive wages and working conditions. The New Labor Antitrust deduces harms only from reduced competition that workers suffer.

This Article radically challenges that approach as contrary to law and policy. First, as a legal matter, it uncovers the Clayton and Norris–LaGuardia Acts' labor and wage policy as rejecting competitively determined wages in favor of bargained-for wages determined through workers' collective self-determination. It contextualizes those Acts as Progressive and institutional economists' policy victories over neoclassical and formalist views of labor relations. Second, as a policy matter, the New Labor Antitrust's approach contradicts mounting evidence of imperfect competition that should drive new assumptions and methods of detecting and countering employer power. Market-based metrics undercount employer power and its effects, making it needlessly challenging to establish liability. And when liability is established, it may

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be established for only competition-based—rather than non-competition-based—harms like reducing workers' countervailing power and freedom of association.

The Article explains how the New Labor Antitrust inherited neoclassical doctrine and methods developed outside labor antitrust to usurp Congress's now-forgotten labor and wage policy. It proposes reframing labor antitrust regulation to better detect and target employer power's sources consistent with a policy favoring workers' collective self-determination. It offers preliminary solutions, drawing from broader federal labor policy and the social scientific and philosophical literatures.

INTRODUCTION

"[T]he labor of a human being is not a commodity or article of commerce."
— Clayton Act.[1]

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
— Norris–LaGuardia Act.[2]

"We have aimed, incidentally, to bring into view the sovereignty of moral law in the economic practice of the world. If competition were supreme, it would be supremely immoral; if it existed otherwise than by sufferance, it would be a demon."
— John Bates Clark.[3]

In 1914, Congress enacted a radically novel federal labor and wage policy, and it did so through antitrust law.[4] Hailed as "the Magna Carta of America's workers" by Samuel Gompers, then-President of the American Federation of Labor (AFL),[5] this law exempted from antitrust enforcement workers' organizing and refusals to deal with their employers.[6] Congress declared the basis of that exemption that "[t]he labor of a human being is not a commodity or article of commerce."[7] The

1. Clayton Act of 1914, Pub. L. No. 63-212, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17 (2018)).

2. Norris–LaGuardia Act, ch. 90, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 102 (2018)).

3. John Bates Clark, Non-Competitive Economics, 5 New Englander 837, 845–46 (1882).

4. Clayton Act of 1914, 38 Stat. 730.

5. See Samuel Gompers, Labor and the War: The Movement for Universal Peace Must Assume the Aggressive, 21 Am. Federationist 849, 860 (1914).

6. See 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . .").

7. Id.

choice of the term "commodity" was no accident. Its selection drew from a rich American intellectual tradition rejecting labor's "commodity" status in the Progressive Era.[8] Excavating this intellectual history reveals how labor advocates, policymakers, and economists converged to reject labor's commodification based on one unifying principle: Arm's-length, market-based wage-setting determined through competition and the forces of supply and demand was deeply socially harmful, and guaranteeing workers' associational freedom, coordination, and collective power against employers through certain forms of strike activity was a better mechanism for achieving fair and reasonable employment terms that properly valued labor.[9] In this regulatory battle, Progressive and emerging institutional economists won a resounding victory over classical and neoclassical economists and theorists.[10]

When courts defied the Clayton Act's labor exemption to enjoin strikes and protect employers' union busting, including by upholding employers' "yellow-dog contracts" conditioning employment on foregoing union affiliation, Congress again intervened to clarify its federal labor policy through antitrust law.[11] In the 1932 Norris–LaGuardia Act, Congress explicitly declared its "public policy" in labor matters, and it did so to restrain what it viewed as misguided and improper judicial overreach in regulating labor disputes and the employment bargain.[12] Specifically, Congress recognized the helplessness of the "individual unorganized worker . . . to obtain acceptable terms and conditions of employment" from employers who, "with the aid of governmental authority," "organize[d] in the corporate and other forms of ownership association."[13] As a remedy to this power imbalance, and to ensure "acceptable" employment terms, Congress deemed it "necessary that [the individual worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, . . . free from the interference, restraint, or coercion of employers of labor" in designating such representatives, organizing, or engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[14] Consistent with that declaration, Congress dramatically restricted court jurisdiction over labor disputes, prohibiting injunctions in antitrust cases against most labor strikes, picketing, and boycotts, outlawing judicial

8. See infra section I.A.

9. See infra section I.A.

10. See infra section I.A.

11. See infra section I.B.

12. See Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)) (imposing "limitations upon[] the jurisdiction and authority of the courts of the United States").

13. Id.

14. Id.

enforcement of yellow-dog contracts, and generally prohibiting imposition of equitable remedies contrary to this stated labor policy.[15]

Federal antitrust law's labor policy has been entirely forgotten by enforcers in their unprecedented shift towards applying antitrust law against employers.[16] The "New Labor Antitrust," for all its novelty and importance, has applied and continues to apply neoclassical industrial organizations (IO) tools to analyze employer power only through employers' ability to deviate profitably from wages set in perfect competition, or below the marginal revenue product (MRP) of labor.[17] The only cognizable harms it recognizes are the adverse effects of the exercise of employer power on compensation that result from reduced labor market competition, or deviations from market-based wages that would have occurred under more fulsome competition absent its exercise.[18] In other words, current antitrust enforcement imposes a neoclassical wage policy favoring labor's valuation within a supply-and-demand equilibrium of cutthroat competition that enforcement seeks to restore in direct contravention of Congress's goals in the Clayton and Norris–LaGuardia Acts.[19] The New Labor Antitrust thus amounts to a methodological usurpation that reverse engineers a radically new regulatory policy supplanting the language and goals of Congress's original policy established in the antitrust laws themselves.[20]

And the ramifications are significant. Proof of employer power and its harms is the central pivot on which enforcement, liability, and damages turn in antitrust actions, so the tools and benchmarks represent fundamental public policy choices.[21] In addition to commodifying labor's value, current methods undercount employer power, make it more challenging to establish antitrust liability, and limit the achievements of antitrust policy to market-based competitive outcomes.[22] Importantly, by centering competitive wage-setting and averting competition-based harms as the driving policy goals of antitrust law, current enforcement displaces measurement of *other* forms of collectivist and institution-based wage-setting that Congress viewed as superior on a number of dimensions: as

15. See 29 U.S.C. §§ 101, 103 (prohibiting courts from issuing restraining orders or injunctions regarding labor disputes and declaring yellow-dog contracts unenforceable as against public policy, respectively).

16. For current enforcement, see, e.g., Eric A. Posner, How Antitrust Failed Workers 5–6, 34–44 (2021) [hereinafter Posner, How Antitrust Failed Workers] (describing recent executive branch and antitrust agency attention to labor antitrust enforcement); Eric A. Posner, The New Labor Antitrust, 86 Antitrust L.J. 503, 511–16 (2024) (summarizing recent developments in labor antitrust enforcement).

17. See infra sections II.A–.B.

18. See infra sections II.A–.B.

19. See infra section II.C.

20. See infra section II.C.

21. See infra section II.C.

22. See infra section II.C.

measures of labor's contributions to production, but also as mechanisms that further broader social policy and enable economic self-determination.[23] Enforcers' current approach also limits remedies for employers' antitrust violations to creating market structures and conduct rules that encourage more labor market competition rather than working to integrate or support worker-led labor institutions to bargain for compensation.[24] Worker-led compensation-setting institutions are viewed as orthogonal to or, at best, third-party beneficiaries of more competitive wage-setting.[25]

This Article is the first to unearth antitrust law *as* federal labor and wage policy and to argue that its public policy goals are not limited to promoting labor market competition. Quite the contrary: It argues that antitrust's labor and wage policy is to ensure labor has countervailing leverage against employers to enable negotiation of "acceptable terms and conditions of employment"[26] free from employer interference, restraint, or coercion.[27] By exclusively prioritizing market- and competition-based metrics and goals, current labor antitrust enforcement betrays Congress's regulatory vision.[28]

Section I.A offers an intellectual history of Progressive Era debates regarding wage theory and labor's valuation to contextualize discussion in section I.B of the legislative histories of the Clayton and Norris–LaGuardia Acts.[29] It describes debates among economists, social scientists, and policymakers as focusing less on whether corporate employers controlled the employment bargain, justifying government intervention—there was general consensus on that as a factual and policy matter before the New Deal.[30] Instead, disagreements primarily turned on whether government intervention should strengthen workers' freedom to contract individually or collectively, through weakening or strengthening worker-led labor market institutions.[31] On one side, classical political economists and a new

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23. See infra section II.C.

24. See infra section II.C.

25. See infra section II.C.

26. Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

27. See infra Part III.

28. See infra Part III.

29. See infra section I.A.

30. See infra section I.A; see also, e.g., Yuval P. Yonay, The Struggle Over the Soul of Economics: Institutionalist and Neoclassical Economists in America Between the Wars 35–40 (1998) (describing the consensus among the American Economic Association's founders in favor of labor in questions of labor legislation and union activities); Daniel Ernst, The Yellow-Dog Contract and Liberal Reform, 1917–1932, 30 Lab. Hist. 251, 273 (1989) [hereinafter Ernst, Yellow-Dog Contract] (arguing that, by 1932, most Americans "believed . . . that 'actual liberty of contract' could no longer exist between an individual employee and a corporate employer").

31. See infra section I.A.

generation of neoclassical economists favored designing interventions to enhance labor compensation based on a conviction that properly functioning markets achieved workers' MRP as their optimal compensation.[32] Progressive social scientists, on the other side, rejected market-based wage-setting as a goal, favoring instead institution-based wage-setting through labor organizations, collective bargaining, and commissions that facilitated just and reasonable wages.[33] The institutionalists won in Congress: Despite the many complex disagreements policymakers had about the scope and source of protected union activity,[34] there was consensus in passing the Clayton and Norris–LaGuardia Acts that collective wage-bargaining was superior public policy to market-based wage-setting through competition.[35]

Part II then provides an overview of the New Labor Antitrust's enforcement infrastructure, inherited from decades-long neoclassical, IO-focused antitrust enforcement. It begins with a history of antitrust regulation and methodologies that led enforcers to the assumption that they must *prove* employer power rather than presume it (in all but the most egregious wage-fixing cases) and that they must do so exclusively through applying a marginalist analysis to ascertain infracompetitive wages compared to a perfectly competitive market.[36] Part II critiques the application of these methods as a matter of law and policy, explaining how they contravene the labor and wage policy of the Clayton and Norris–LaGuardia Acts and are inapt for tackling the scale of harms generated by employers' exercise of buyer power over workers.[37] Specifically, it argues that the extension of prior methods and proof structures to labor markets undercounts the presence and effects of employer power and limits the nature and scope of remedies deemed appropriate for employer harms.[38]

Finally, Part III outlines new methods and enforcement goals that better cohere with the language and policy of the Clayton and Norris–LaGuardia Acts. To achieve the transformative potential of a New Labor Antitrust, it argues for adoption of progressive and pro-worker methodological innovations to match new, noncompetition-based

32. See infra section I.A.

33. See infra section I.A.

34. See James Gray Pope, Labor's Constitution of Freedom, 106 Yale L.J. 941, 962–77 (1997) [hereinafter Pope, Labor's Constitution] (describing the labor movement's resistance to laws restricting workers' freedom of association and right to strike on Thirteenth Amendment grounds); James Gray Pope, The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957, 102 Colum. L. Rev. 1, 12–46 (2002) [hereinafter Pope, Thirteenth Amendment] (describing congressional debates about the scope of the Thirteenth Amendment's protection of workers' concerted activity).

35. See infra section I.B.

36. See infra section II.A.

37. See infra sections II.B–.C.

38. See infra section II.C.

substantive policy goals.[39] Antitrust enforcement could embrace a "new materialism" in both its methods and objectives that integrates contemporary social scientific methods and a deep theoretical awareness of the structural and institutional sources of employer power—including in the law itself—that enable capital's coercion and rent extraction from labor.[40] Rather than modeling labor markets as perfectly competitive, enforcers should presume a model of imperfect competition, placing the burden on employers to prove the contrary in enforcement actions. Further, enforcers should not exclusively measure employer power and its harms through competition-based models but also through violations of public policy stated in the Norris–LaGuardia Act: harms to the full freedom of association, self-organization, and collective representation and negotiation of employment terms and conditions. The New Labor Antitrust should focus on strengthening worker power and workers' bargaining leverage through fortifying labor market institutions, facilitating collective bargaining, and measuring damages based on compensation and labor conditions that would have prevailed had workers been truly free to coordinate and collectively demand improved employment terms and conditions.

The New Labor Antitrust has yet to achieve its full promise beyond the metrics and narrow goals of an economic policy that was never legislated but that has nevertheless usurped its enforcement apparatus. At its roots, antitrust's labor and wage policy recognized both market-based and legal sources of employers' unequal bargaining power with workers. That recognition was backed by social scientific and evidence-based findings that have not only been confirmed but are even more richly demonstrated now.[41] We have the methods, enforcement strategies, and objectives necessary for tackling and preventing the harms of employer power on worker earnings, working conditions, and income inequality—we have only to operationalize them in our current enforcement infrastructure.

I. ANTITRUST'S LABOR AND WAGE POLICY

Standard histories of labor regulation start with the New Deal: Congress passed the 1935 National Labor Relations Act (NLRA) to establish protections for worker organizing, collective bargaining, and strikes.[42] Congress sought to displace courts' attempts to crush union

39. See infra Part III.

40. This "new materialist" approach draws from deeper intellectual traditions of integrating law and social science from historical materialism through the Legal Realist, Critical Legal Studies, and, most recently, the Law and Political Economy movements.

41. See infra Part III.

42. See, e.g., Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. 1527, 1529–40 (2002) (anchoring the origins of labor law in the "New Deal's

militancy through the aggressive exercise of equitable jurisdiction under antitrust and common law.[43] Labor, according to these accounts, won a temporary victory with early labor exemptions to antitrust enforcement, but courts narrowed those exemptions, and the exemptions themselves failed workers by not constitutionally sourcing workers' right to organize and strike in the Thirteenth Amendment.[44] While the labor movement won permanent statutory protections in the NLRA, the rights were grounded in the Commerce Clause and were dramatically eroded by judicial interpretation and legislative amendments, weakening worker power and relegating labor disputes to a hidden realm of depoliticized, private adjudication.[45]

These accounts ignore the origin of federal labor and wage policy in the antitrust laws, a legislative victory that anchored statutes and executive orders establishing a series of regulatory schemes.[46] These regulatory schemes entrenched worker-led institutions, collective bargaining, and collectively negotiated wage-setting in the War Labor Board, National Railroad Adjustment Board, National Mediation Board, National Industrial Recovery Act (NIRA) labor codes, the NLRB, and a number of other wage-administering boards and commissions in the growing administrative state.[47] The foundation of these institutional supports for labor bargaining within government agencies and commissions was the product of Progressive- and New Deal–era lawmaking that sought to displace judicial economic regulation with expert-led administrative regulation of the employment bargain in a vast system that survived into the 1960s and 1970s.[48] As expert agencies were established within the administrative state, the antitrust agencies ceded nearly all labor

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institutionalization of collective bargaining" in the passage of the Wagner Act); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265, 265–70 (1978) (tracing the origins of radical labor protections to the passage and imposition of the Wagner Act on resistant employers); Pope, Thirteenth Amendment, supra note 34, at 46–59 (describing the history of the Wagner Act's passage between 1933 and 1935).

43. See Herbert Hovenkamp, Labor Conspiracies in American Law, 1880–1930, 66 Tex. L. Rev. 919, 953 (1988) (describing federal courts' use of injunctions to subdue labor activities).

44. See Pope, Thirteenth Amendment, supra note 34, at 14–46 (tracing the history of congressional debates about grounding the NLRA in the Commerce Clause rather than the Thirteenth Amendment).

45. See id. (describing the history of constitutional arguments to uphold the NLRA under the Commerce Clause); see also Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 Harv. L. Rev. 1379, 1492–96 (1993) (describing the evolution of labor law through administrative and judicial interpretations and legislative amendments that produced hierarchical labor–management structures and undermined "union strength and involvement").

46. See infra section II.A.2.

47. See infra section II.A.2.

48. See infra section I.A.

regulation elsewhere.[49] In the meantime, they focused their enforcement and expertise development on regulating firm conduct in product markets through increasingly conservative methods grounded in neoclassical modeling that both Congress and labor had explicitly rejected as inapt for economic regulation of the employment relationship.[50]

This Part tells that forgotten story. It identifies the Progressive Era as the crucial turning point for both economic thought and regulatory theory regarding labor, labor's proper valuation, and the role of government institutions in securing that proper valuation.[51] Progressive and institutional economists—in part through their impact on the rise of Legal Realism—directly challenged the precepts of classical political economy, early neoclassical economics, and Classical Legal Thought that viewed the employment relationship as the product of contract between equally free parties.[52] These debates culminated in radically opposed visions of employer power and market-based wage-setting, with clear legislative winners in the Clayton and Norris–LaGuardia Acts and subsequent acts establishing minimum wage, maximum hour, and unionization protections.[53] These statutory and regulatory frameworks evolved into a vast system of direct government intervention and controls over the terms of the employment bargain.[54] This Part contextualizes antitrust law's labor exemptions and their stated labor and wage policies in the economic and legal literature of their time to better understand the exemptions' import for the tools and policy of labor market regulation.

A. *Progressive Era Wage Theory and Labor Valuation*

Between the 1890s and 1930s, Progressive and institutional economists were centrally preoccupied with properly understanding the scope of employer power and labor's value to production.[55] The

49. See infra sections I.A, II.A.

50. See infra sections II.A–.B.

51. See infra section I.A.

52. See infra section I.A.

53. See infra section I.B.

54. See infra section I.B.

55. It is important to note here that Progressivism was not a coherent "movement" with a single, unified aim. See, e.g., James T. Kloppenberg, Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920, at 311 & 487 n.27, 362–63 (1986) (describing Progressivism as "a variety of different constituencies agitating for different and often incompatible reforms"); Peter G. Filene, An Obituary for "The Progressive Movement", 22 Am. Q. 20, 20–24 (1970) ("[S]everal central items in the progressive program divided rather than collected the members of that movement."). There were certainly some individuals within Progressive circles who did not categorically oppose neoclassical thought and marginalism. But this Article focuses on those self-identified "Progressives" who were most involved in the social scientific study of labor and who served as key advisors and policymakers theorizing and drafting the labor and antitrust legislation that is at the core of this Article. While even these Progressive economists had differing views

culmination of their intellectual debates with neoclassical economists—and the reception of those debates in court decisions, legal treatises, and labor-market regulation[56]—informed the language and framing of the Clayton and Norris–LaGuardia Acts' labor exemptions from antitrust enforcement on grounds that labor was not a "commodity or article of commerce."[57] In rejecting labor's commodification, Clayton Act legislators repudiated both neoclassical economics and juridical abstraction of the employment bargain as a negotiated exchange between equals, drawing from Progressive economic thought and early administration of wage regulation.[58] After the federal judiciary narrowed the exemption, Congress returned to state a more expansive "public policy" on labor matters in the Norris–LaGuardia Act.[59] By laying out the intellectual, administrative, and juridical context of these debates, this section illuminates why competing theorizations and methodological approaches to valuing labor were so critical for legislating labor's exemption from antitrust liability. Most importantly, it was novel social scientific approaches to and documentation of poverty wages and hazardous working conditions that diagnosed employer power as a source of labor unrest, justified regulated wage setting, and established unprecedented agencies and tribunals to administer reasonable wages as an alternative to market-based valuation through competition.[60]

1. *Labor Valuation in Economic Thought and Technocratic Administration.* — Over nearly two centuries, from classical political economy's "labor theory of value"[61] to Progressive economists' administration of government wage regulation,[62] intellectual thought on

about how interventionist the state should be in labor–management relations, they took common aim at classical and neoclassical economic thought, which they viewed as outdated and disconnected from labor-market realities. See Laura Phillips-Sawyer, Restructuring American Antitrust Law: Institutionalist Economics and the Antitrust Labor Immunity, 1890–1940s, 90 U. Chi. L. Rev. 659, 662–63 (2023) ("Despite their differences, . . . trade unionists and pragmatic progressivists all remained committed to the overarching progressive liberal project, which may be observed in their generalizable belief in the efficiencies and imperfections of markets, . . . and the necessity of economic regulation to remedy those market imperfections . . . .").

56. See infra section I.A.2.

57. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17 (2018)); see also Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, § 4, 47 Stat. 70, 70 (codified at 29 U.S.C. § 104 (2018)) (eliminating federal court jurisdiction "to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" in certain circumstances).

58. See infra section I.B.

59. See Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

60. See infra section I.A.1.

61. See Adam Smith, The Wealth of Nations 26 (J.M. Dent & Sons 1964) (1776) [hereinafter Smith, Wealth of Nations] ("Labour . . . is the real measure of the exchangeable value of all commodities.").

62. See infra notes 270–275 and accompanying text.

the employment bargain underwent a fundamental shift. A centrally debated question was whether labor's contributions—as a source of individual well-being and social productivity—were best elicited and valued through market exchange and the mechanism of supply and demand or instead through social (including legal) institutions.

On one side of the debate were "free labor" economists who understood labor as liberated and most fairly valued by free market exchange.[63] These included, most prominently, William Graham Sumner, John Bates Clark, Henry Carter Adams, Herbert Joseph Davenport, and Henry Ludwell Moore, among others.[64] As early founders of neoclassical economics in American universities, they drew on classical political economy to support their theorization of social and moral alternatives to enslavement, reconceptualizing American labor production under a contractual—as opposed to property- or status-based—system.[65] The moral valence of labor's freedom to contract lay in the market's ability to properly value labor as a commodity owned by the *laborer*, borrowing from Adam Smith's account in *The Wealth of Nations*: "Labour," Smith explained, "is the real measure of the exchangeable value of all commodities" because "[t]he value of any commodity . . . is equal to the quantity of labour which it enables him to purchase or command."[66] Supply and demand drove the

63. See Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 221–25 (1991) [hereinafter Hovenkamp, Enterprise and American Law] (describing the intellectual origins of "conservative, or bourgeois, free labor ideology" among neoclassical economists and in the rise of American marginalism). For a broader intellectual history of "free labor" debates, see Eric Foner, Reconstruction 156–67 (2d ed. 2014) (describing the evolution of "free labor" thought in the Reconstruction period under the administration of the Freedmen's Bureau); Alex Gourevitch, From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century 38–68 (2015) (describing competing camps of "free labor" thinkers, including laissez faire republicans who treated waged labor as a guarantee of republican liberty); William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 772–814 (describing competing strands of "free labor" ideology among jurists and in working-class culture).

64. See infra note 98 and accompanying text.

65. See Herbert Spencer, Social Statics 397, 414, 436 (Routledge 1996) (1851) (explaining the "law of equal freedom"); William Graham Sumner, What Social Classes Owe to Each Other 24–26 (New York, Harper & Bros. 1884) ("[Middle Age] society was dependent . . . on status . . . . In our modern state . . . the social structure is based on contract, and status is of the least importance. . . . A society based on contract is a society of free and independent men . . . ."); Henry C. Adams, Relation of the State to Industrial Action, 1 Publ'ns Am. Econ. Ass'n, Jan. 1887, at 35, 84 [hereinafter Adams, Relation of the State] ("[T]he labor problem must be worked out on the basis of freedom of contract."); Walter J. Matherly, The Emergence of Factory Labor, 4 Soc. Forces 175, 183 (1925) ("[The present-day workman] is an economic power of great magnitude. . . . No employer can compel him to labor unless he cares to do so. The owners of the agencies of production need him just as badly as he needs them.").

66. Smith, Wealth of Nations, supra note 61, at 26–40.

market price of labor as a commodity.[67] American economists, like Davenport, positioned employers as proxies for "social demand," imagining employers were "engaged in the purchase of the results produced by labor, and compelled by competition . . . to recompense labourers approximately in proportion to the services rendered. No distinction in principle exists . . . between the goods commonly termed services, and those . . . commonly termed commodities."[68]

Nineteenth-century American neoclassical economists also modernized classical political economy with insights from British and European "marginalism."[69] Marginalists theorized production as a series of incremental economic decisions to maximize utility based on costs and earnings accrued by a single additional unit of production.[70] They conceptualized firm pricing, input, and output decisions based on firm

67. Id. at 48–77; see also Edmund Burke, Thoughts and Details on Scarcity 6 (London, T. Gillet 1800) ("Labour is a commodity like every other, and rises or falls according to the demand. . . . [Wages] bear a full proportion to the result of their labour."). Adam Smith recognized the masters' greater bargaining "advantage" due to greater resources and ability to collude but analyzed workers' wage differentials assuming a perfectly competitive labor market. See Smith, Wealth of Nations, supra note 61, at 57–77, 88–129; Bruce E. Kaufman, The Evolution of Thought on the Competitive Nature of Markets, *in* Labor Economics and Industrial Relations 145, 147–50 (Clark Kerr & Paul D. Staudohar eds., 1994) (describing Smith's paradoxical views in *The Wealth of Nations*, which recognizes employers' superior bargaining power in chapter eight while portraying "the workings of a competitive labor market . . . that promote[s] an efficient allocation of labor resources" in chapter ten).

68. Herbert Joseph Davenport, Outlines of Economic Theory 151 (MacMillan Co., 1905) (1896).

69. See Herbert Hovenkamp, The Marginalist Revolution in Legal Thought, 46 Vand. L. Rev. 305, 321–30 (1993) [hereinafter Hovenkamp, Marginalist Revolution] (describing the influence of the "marginalist revolution" on American legal thought relating to social welfare, theories of value, and criminal and civil liability as deterrents). The "marginalist revolution" was led by William Stanley Jevons (1835–1882), Alfred Marshall (1842–1924), Carl Menger (1840–1921), Léon Walras (1834–1910), and Philip Wicksteed (1844–1927). See id. at 306–14 (describing the contributions of Jevons, Marshall, and Menger); see also Erich Roll, A History of Economic Thought 371 (1939) (describing Jevons, Menger, and Walras as the "celebrated trinity" of the "first generation of modern marginal-utility theorists"); Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 409 n.159 (1988) (remarking that Jevons, Marshall, and Wicksteed were "the great revisionists of classical political economy" who contributed to marginal ideas).

70. See, e.g., W. Stanley Jevons, The Theory of Political Economy 199–201, 217–19, 236 (London, MacMillan & Co. 1871) (theorizing that capital enables the expenditure of labor in advance to maximize utility); Alfred Marshall, Principles of Economics 61 (8th ed. 1920) (developing a theory of marginal utility); Carl Menger, Principles of Economics 181–90 (James Dingwall & Bert F. Hoselitz trans. 1976) (1871) (theorizing about the "limits of economic exchange"); Léon Walras, Elements of Pure Economics 217–24 (William Jaffé trans. 1954) (1874) (developing a theory of marginal productivity); Philip H. Wicksteed, An Essay on the Co-ordination of the Laws of Distribution 6 (London, MacMillan & Co. 1894) (describing the relationship between community satisfaction, production, and marginal efficiency); see also Paul J. McNulty, The Origins and Development of Labor Economics: A Chapter in the History of Social Thought 117–26 (1980) (providing an intellectual history of marginalism); Hovenkamp, Marginalist Revolution, supra note 69, at 310–13 (describing the emergence of marginalism as a coherent movement).

estimations of "marginal cost" and "marginal revenue" under both competitive and monopoly conditions, a mounting concern in the era of increasing consolidation.[71]

Among other contributions, these economists used marginalist models and statistical methods to discern a science of wage-setting beneficial to private industry and government regulation.[72] They measured labor's value as one of many inputs about which firms made pricing decisions, generating a technical science of compensation as a standardized commodity in a market exchange.[73] John Bates Clark was critical in conceptualizing labor this way, viewing each worker's value to production in terms of their individualized "marginal" utility, with their proper entitlement to compensation measured as the "marginal product" of their labor.[74] Viewing labor as a commodity "regulated" by supply and demand like any other, economists like Clark were suspicious of unionization as cartelization that would distort free market exchange, "dedicated to the proposition that each laborer deserved to be free, independent, and equal in the eyes of the law, precisely the same as each capitalist and employer."[75] Clark's conviction in the moral economy of wage-setting was based in a "philosophy of value" that understood the market as enabling social measurement of products' and services' "effective utility" beyond any selfishly interested single market participant's valuations.[76] "Free competition" and "free labor" allowed

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71. Marshall's *Principles of Economics*, supra note 70, was the first to incorporate marginalist analysis into price and output theory. See Hovenkamp, Enterprise and American Law, supra note 63, at 216–17.

72. See, e.g., John A. Hobson, The Evolution of Modern Capitalism: A Study of Machine Production 148–53 (London, Walter Scott, Ltd. 1894) ("[T]here is no power to compel [stronger trusts] to [pay high wages], and it would be pure hypocrisy to pretend that the interests of the labourers formed any part of the motive which led a body of keen business men to acquire a monopoly.").

73. See, e.g., Yonay, supra note 30, at 128–33 (describing how the "neoclassical theory of wages" used the idea of the "parity of marginal productivity and wages").

74. See John F. Henry, John Bates Clark and the Marginal Product: An Historical Inquiry Into the Origins of Value-Free Economic Theory, 15 Hist. Pol. Econ. 375, 382–88 (1983) (describing John Bates Clark's writing after 1889 and illustrating his view that "those who argue and press for higher wages than are delivered by the market are actually promoting injustices"); see also John Bates Clark, The Distribution of Wealth: A Theory of Wages, Interest and Profits 77–115 (London, MacMillan & Co., 1899) [hereinafter Clark, Distribution of Wealth] (theorizing about the relationship between wages and labor); John B. Clark, Possibility of a Scientific Law of Wages, 4 Publ'ns Am. Econ. Ass'n, Mar. 1889, at 37, 39–49 [hereinafter Clark, Scientific Law] (developing a general scientific theory of marginal wages based on the principle that "[g]eneral wages tend to equal the actual product created by the last labor that is added to the social working force" (emphasis omitted)).

75. Hovenkamp, Enterprise and American Law, supra note 63, at 222.

76. See J. B. Clark, The Philosophy of Value, 4 New Englander 457, 464–67 (1881) [hereinafter Clark, Philosophy] ("Market value is a measure of utility made by society

everyone to receive what he produced or its equivalent through "free contract": "Each gets an amount gauged by the product of its own final increment."[77] In sum, traditional marginalists conceived labor's contribution to production as any other commodity input, measured workers' MRP as the best approximation of labor's value, and assumed that employers' marginal investment decisions in labor occurred in a competitive market.[78]

By the turn of the century, escalating inequality and economic instability drove economists and social scientists to interrogate the limits of neoclassical, deductive theories about the market's ability to efficiently allocate socially valuable production, particularly when it came to valuing labor's contributions. The Panics of 1873 and 1893 and ensuing depressions, rampant financial speculation, and unprecedented corporate consolidation—along with mass unemployment and escalating worker unrest—generated significant skepticism about the general descriptive and predictive capacity of classical and neoclassical economics from inside and outside the social sciences.[79] Responding to the financial crises of the 1870s, political economists and writers like Henry Demarest Lloyd proposed the expulsion of "political economy" from the British Association of the Advancement of Science "on the ground that it had failed to make good its scientific pretension":

> It is an unfortunate moment for the break-down of the science that claimed to be able to reconcile self-interest with the harmony of interests.
>
> . . . In a recent address[,] . . . [Professor Sumner] said, "Unfortunately the economist can't create facts, and history

considered as one great isolated being; market price is, of course, that measure expressed in terms of a common standard.").

77. Clark, Scientific Law, supra note 74, at 61.

78. See, e.g., Clark, Distribution of Wealth, supra note 74, at 77–115 ("Wages tend to equal the product of marginal labor . . . ." (emphasis omitted)); Hovenkamp, Enterprise and American Law, supra note 63, at 191–92 ("[John Bates] Clark's view that each laborer was entitled to his 'marginal product' was part of the 'free labor' ideology that had dominated American labor policy [in the 1880s and 1890s] since the passage of the fourteenth amendment."); Marshall, supra note 70, at 335–36 (providing a marginalist account of the difference in wages between "skilled and unskilled labour").

79. See, e.g., 3 Joseph Dorfman, The Economic Mind in American Civilization, 1865–1918, at 15, 29–30, 222, 279–83, 458–72 (1949) (describing the Panics of 1873 and 1893 and the economic theories of John R. Commons and Wesley C. Mitchell, who were responding to those crises); Yonay, supra note 30, at 35–46, 50–53 (providing an intellectual history of American economics from the 1880s to World War I); Carl P. Parrini & Martin J. Sklar, New Thinking About the Market, 1896–1904: Some American Economists on Investment and the Theory of Surplus Capital, 43 J. Econ. Hist. 559, 559–63 (1983) (summarizing the work of several theorists who challenged "the classical model of the competitive market" after "the prolonged economic depression of the 1890s," which had led to "a disaffection with the unregulated market . . . among capitalists and enterprisers in all major sectors of the economy").

> furnishes him but few. Consequently, hypotheses have to be used." . . . [W]hile the abstract economists are suffering for facts, the latest parliamentary commission . . . to investigate one of the greatest economic conundrums of modern society—the relations of railroads to other business and the state—have been actually overwhelmed with facts.[80]

Lloyd represented an emerging consensus that, absent government intervention, the "free market" generated devastating social harms, a consensus built in part by the symbiotic relationship developing between government regulation and empirical social science.[81] Locally, nationally, and internationally, the weight of economic depressions and labor unrest wrenching industrial democracies into episodic crises produced a range of regulatory efforts, from support for private trade associations to full government ownership of firms and industries with forms of public–private regulatory commissions in between.[82] These associations, agencies, and commissions were first and foremost data collection bodies at unprecedented scale.[83]

Data collected on contemporary workplace realities was bleak: Starvation wages, grueling hours, and hazardous to deadly working conditions drove escalating labor unrest.[84] This mounting evidence promoted consensus among social scientists and policymakers that leaving regulation of the employment relationship to competitive market forces was untenable and invited support for government intervention through labor legislation.[85] Even a few neoclassical economists, like John Bates

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80. Henry D. Lloyd, The Political Economy of Seventy-Three Million Dollars, Atl. Monthly, July 1882, at 69, 70–71.

81. See Gerald Berk, Louis D. Brandeis and the Making of Regulated Competition, 1900–1932, at 35–111 (2009) (describing Louis Brandeis's theory of expertise-led government "regulated competition" of industry); Thomas C. Leonard, Progressive Era Origins of the Regulatory State and the Economist as Expert, 47 Hist. Pol. Econ. 49, 49–50 (2015) (describing three "acts" in the rise of economics as a discipline in America).

82. See Berk, supra note 81, at 7–11 (discussing industrialization and industrial responses to economic crises in the United States).

83. See Leonard, supra note 81, at 72 (discussing the rise of "scientific management methods" and the use of economic information in industrial practices during World War I); see also infra notes 109–116 and accompanying text.

84. See David Brody, Workers in Industrial America: Essays on the Twentieth Century Struggle 3–119 (1980) (describing dire working conditions in industrial mass production as impelling the rise of "mass-production unionism"); David Montgomery, The Fall of the House of Labor 22–57 (1987) (describing how late nineteenth- and early twentieth-century workplace conditions transformed the role of the state and American labor activism); John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law 22–42 (2004) (describing the "industrial-accident crisis" in the late nineteenth century).

85. See 3 Dorfman, supra note 79, at 351–52 (describing the emerging consensus among academic economists in favor of limited working hours, collective bargaining, workmen's compensation, minimum wage laws, and old-age pensions); Yonay, supra note 30, at 35–40 (discussing the economic theories of the American Economic Association's

Clark, recognized the necessity of unions to ensure just wages when persistent unemployment reduced workers' bargaining power and suppressed wages below workers' MRP.[86] Clark believed certain "forms of non-competitive economies," like "the adjustment of wages by arbitration," could "soften the exceptionally harsh effects of" "the general competitive principle" and wished that an arbitral system "determining the rewards of labor had a more than rudimentary existence in America."[87] A fellow marginalist and political economist, Henry Carter Adams, understood competition as "forc[ing] the moral sentiment . . . to the level of that which characterizes the worst man who can maintain himself in it," proposing countercyclical wage setting through state-supported collective bargaining.[88] Adams was key in devising a science of "reasonable" rate regulation as Director of the Statistical Bureau for the Interstate Commerce Commission (ICC), establishing a model accounting system through nearly three decades of service "[c]ollecting, compiling, and publishing . . . commercial facts . . . essential to safe business calculations [to] remove the chief obstacle to [the] efficient functioning [of competition]."[89]

Aggregated data prompted new lines of inquiry into the unregulated market's role in distorting wages (and prices) in boom-and-bust cycles.[90] A new generation of Progressive Era social scientists, coalescing around a school of "institutional" economists,[91] took on as prominent research

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founders, who "pursued liberal reforms in the fields of labor relations, monopoly regulation, and protective tariffs" during the late nineteenth century).

86. See John Bates Clark, Essentials of Economic Theory as Applied to Modern Problems of Industry and Public Policy 451–502 (1907) ("[T]here would always be in the general market some unemployed men. . . . The presence of even a few men able to do good work and not able to get employment is often sufficient to make individual bargaining work unfairly to the laborer.").

87. See J.B. Clark, Non-Competitive Economics, 5 New Englander 837, 845–46 (1882); see also Clark, Distribution of Wealth, supra note 74, at 77–114 ("If competition works in ideal perfection, wherever . . . marginal workers go, they get their exact products as their pay; though, in fact, as competition works imperfectly, what the men get is merely an approximation to their products.").

88. Adams, Relation of the State, supra note 65, at 38.

89. 3 Dorfman, supra note 79, at 172–73.

90. See Hovenkamp, Enterprise and American Law, supra note 63, at 296–307 (describing the evolution of schools of late nineteenth-century economic thought in response to shifting economic and industrial realities, including the rise of the modern business trust and its ability to distort prices); Naomi R. Lamoreaux, The Great Merger Movement in American Business, 1895–1904, at 159–86 (1985) (describing the evolution of federal antitrust regulation and informational capacity in response to the instability generated by the "great merger movement").

91. "Institutional economics" was first used to describe Thorstein Veblen's work and gradually encompassed a self-identified group of economists that dominated economics and government in the Progressive and interwar periods. See Geoffrey M. Hodgson, The Evolution of Institutional Economics: Agency, Structure and Darwinism in American Institutionalism 255–57 (2004) (describing how institutional economists became

topics the mechanisms by which wages (and prices) were set within the market, how the market enabled concentrations of private power, the proper role and regulation of trusts, theories of combination and natural monopoly, and, importantly, the "labor question."[92] Study of the labor question—and labor's proper "asking price"—was important not only for averting labor unrest but also as part of the expanding rationalization and statistical study of economic production, from calculating lost earnings in workers' compensation schemes to estimating the economy-wide effects of cyclical recessions.

Empirical research made possible by the growing information infrastructure of "government by commission," particularly during and after World War I, propelled institutionalists like Thorstein Veblen,[93]

increasingly influential after World War I, including through the Committee on Cooperation in Economic Research); Yonay, supra note 30, at 50–70 (discussing institutional economists' contributions to New Deal legislation).

92. See Dorothy Ross, The Origins of American Social Science 143–302 (1991) (discussing the various paradigms formulated by Progressive Era social scientists, including "neoclassical economics, liberal economic interpretations of history, a sociology and ideology of social control, and pragmatism"); Malcolm Rutherford, The Institutionalist Movement in American Economics, 1918–1947: Science and Social Control 47–53 (2011) [hereinafter Rutherford, Institutionalist Movement] (detailing institutionalists' theoretical and policy contributions to, among other things, labor market issues, public utilities, social security, and unemployment insurance); Yonay, supra note 30, at 128–30 (describing the institutionalists' attack on neoclassical economic theory, channeled through their examination of the contemporary power imbalance between labor and capital).

93. Veblen (1857–1929) was an economist, sociologist, and author of *The Theory of the Leisure Class* (1899). For more on Veblen, see generally 1 Thorstein Veblen: Critical Assessments (John Cunningham Wood ed., 1993) (providing a wide array of perspectives on Veblen's scholarly and policy contributions); Rick Tilman, Thorstein Veblen and His Critics, 1891–1963: Conservative, Liberal, and Radical Perspectives (1992) (covering Veblen's life and economic theories, as well as prominent criticisms of his work). Veblen famously criticized marginalist economics, including its application to the wage bargain. See Thorstein Veblen, The Limitations of Marginal Utility, 17 J. Pol. Econ. 620, 620–21 (1909) ("[A]s to the causes of change or the unfolding sequence of the phenomena of economic life [economists espousing marginal-utility theory] have had nothing to say hitherto; nor can they, since their theory is not drawn in causal terms but in terms of teleology.").

Wesley Clair Mitchell,[94] Richard T. Ely,[95] John R. Commons,[96] and John Maurice (J.M.) Clark,[97] among others,[98] to reject abstract neoclassical theories of market-based wage-setting and measurement of labor's value under models of perfect competition.[99] Institutional economists worked to dispel neoclassical economists' and "physiocrats'" views that "[t]o buy in

94. Mitchell (1874–1948) was an economist at Columbia known for his leading empirical research and theorization of the business cycle. See 3 Dorfman, supra note 79, at 455–73 (relating Mitchell's academic life and describing his theory of business cycles and its impact). He was the founding President of the National Bureau of Economic Research (NBER) and, between 1920 and 1945, he collected and analyzed data to inform debates about business cycle fluctuations, labor's share of national income, and unemployment. See Yonay, supra note 30, at 51–52 ("[Mitchell's] vision was the quantification of economic studies. He believed that quantification would lead to the discovery of patterns of economic behavior and provide policy makers with the knowledge necessary to navigate economic life.").

95. Ely (1854–1943) was an economist, leader of the Progressive movement, and founder of the American Economic Association (AEA). See Richard T. Ely, Ground Under Our Feet: An Autobiography 132–64 (1938) (describing the founding of the AEA). He led Johns Hopkins' Department of Historical and Political Science and cofounded, with John R. Commons, the American Association for Labor Legislation (AALL) to advocate for labor and social legislation. See id. at 65, 97–174, 148; see also Robert Adcock, Liberalism and the Emergence of American Political Science: A Transatlantic Tale 135–69 (2013) (describing Ely's role in building out the Hopkins Department of Historical and Political Science).

96. Commons (1862–1945) was Richard Ely's student and the well-recognized founder of American labor economics at the University of Wisconsin. John R. Commons, Myself 92, 128–31 (1934). Commons' scholarship was interdisciplinary, pioneering institutional economics and analyzing the legal sources of capitalism, labor history, and the sociology of work. Id. at 127–37. He advocated for a robust administrative state to protect workers, drafted labor legislation, and advised government officials on employment regulations. Id. at 74, 102, 106–11.

97. Clark (1884–1963), son of John Bates Clark, was a prominent economist at Columbia and served as President of the AEA. 5 Dorfman, supra note 79, at 438; In Memoriam: John Maurice Clark, 79 Pol. Sci. Q. (1964). He was best known for his research on dynamic firm costs and economic governance. E.g., John Maurice Clark, Economics of Planning Public Works (1935); John Maurice Clark, Social Control of Business (1926); J. Maurice Clark, Studies in the Economics of Overhead Costs (1923).

98. In addition to those named, other "institutionalists" of this generation include W. Jett Lauck (1879–1949), Walton Hale Hamilton (1881–1958), Leo Wolman (1890–1961), Rexford G. Tugwell (1891–1979), Sumner Slichter (1892–1959), Frederick C. Mills (1892–1964), Paul Douglas (1892–1976), Gardiner Means (1896–1988), Simon Kuznets (1901–1985), Arthur F. Burns (1904–1987), Leon Keyserling (1908–1987), and John Thomas Dunlop (1914–2003). See 3 Dorfman, supra note 79, at 520–44 (providing an overview of institutionalists' contributions to the field of industrial relations); McNulty, supra note 70, at 49–62, 180–97, 203 (describing the roots of institutional analysis as "institutional realism" in classical economics and the evolution of institutional labor economics between the 1930s and 1950s); Rutherford, supra note 91, at 223–28 (chronicling the concentration of institutionalists at Columbia University between 1913 and the early 1930s); Yonay, supra note 30, at 53–54, 57–58 (discussing institutionalism during the interwar period).

99. See Yonay, supra note 30, at 118–20, 128–35 (offering examples of institutionalists' recognition of the divergence between abstract economic models of competition and labor market realities, including the divergence of price and value generated by the power disparity between employers and employees).

the cheapest and to sell in the dearest market was . . . a law of God" and that "[l]abor was a commodity that must obey this 'natural' law."[100] Progressives viewed the "deductive and mathematical" models of "orthodox economics"[101] and marginalism as inapt in the labor context in which market forces are "modified, restricted, and even replaced by social and other non-economic elements"[102] that required "inductive and historical" study.[103] John Kells Ingram, an Irish economist who influenced Progressive economists and leaders like Ely, argued against the "very *narrow, and therefore . . . false*" position of classical economists that treated labor

> *as a commodity*, like corn or cotton . . . . [B]y fixing exclusive . . . attention on these [abstractions], *we miss the deepest and truly characteristic features of the relation of master and workman* . . . . As in science it is the method we pursue on which the value of our investigations will in the long run depend, so in matters of conduct the point of view at which we place ourselves tends to determine the character of our whole procedure . . . . Such a perverted conception arises from the individualistic way of looking at the relation . . . as if it were purely a matter of private concernment. But the entire case receives a different complexion when we place ourselves at the social point of view, from which alone these subjects can be rightly studied.[104]

The narrow "commodity" view that understood labor's value as set by competition ignored the reality that, as economist and sociologist Charles Horton Cooley argued, competition was *itself* not a "natural" development, but could only exist as a "conscious object of public will" with significant public investment in human capital and private industry supports.[105] Commons criticized the "commodity theory of labor" as "not false" but "incomplete," just as were other partial theories that focused exclusively

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100. The New Encyclopedia of Social Reform 14 (William D. P. Bliss & Rudolph M. Binder eds., 1908).

101. See 3 Dorfman, supra note 79, at 162.

102. See Richard A. Lester, Labor and Industrial Relations 48 (1951).

103. See 3 Dorfman, supra note 79, at 162; see also Lloyd G. Reynolds, The Structure of Labor Markets: Wages and Labor Mobility in Theory and Practice 2 (1951); Richard T. Ely, The Past and the Present of Political Economy, *in* 2 Johns Hopkins University Studies in Historical and Political Science 141, 144–47 (Herbert B. Adams ed., Baltimore, John Murphy & Co. 1884); Rexford Guy Tugwell, Experimental Economics, *in* The Trend of Economics 369, 391–92 (Rexford Guy Tugwell ed., 1924); Albert Benedict Wolfe, Functional Economics, *in* The Trend of Economics, supra, at 445–47.

104. John K. Ingram, Work and the Workman: Being an Address to the Trades Union Congress in Dublin, September 1880, at 8 (2d ed. reprt. 1928) (1884) (emphasis added).

105. See Charles Horton Cooley, Political Economy and Social Process, *in* Sociological Theory and Social Research 268, 273–74 (1930); see also 3 Dorfman, supra note 79, at 401–07 (describing Cooley's contributions and intellectual influence on institutionalist economists).

on one dimension of labor's value at the expense of incorporating "theories of democracy, of partnership, of solidarity."[106] More broadly, institutionalists rejected the constricted "commodity" view because it obscured systemic power imbalances between employers and workers that made divergence from perfect labor market competition pervasive and harmful wage outcomes inevitable.[107]

To better understand the "labor question," Commons and other institutionalists proposed a wholly new approach. They advocated for and devised institutional forms of valuation, both public and private, to replace purely market-based forms of valuation. They studied price and wage theory—mechanisms and methods for ascertaining fair and reasonable prices and wages—and "business cycle" theory—ways interconnected pricing and price shocks can systemically impact the economy—to ascertain whether and when government or even private associations should intervene in pricing and wage-setting for improved social welfare.[108]

In developing this new approach, Progressive and institutional economists deployed statistical, sociological, and broader inductive methods developed through scrutiny of increasingly ample administrative data.[109] They sourced data from newly established statistical bureaus in independent and executive agencies, state public utility and railroad

106. See John R. Commons, Industrial Goodwill 5–6, 14–27, 63–64 (1919). For "commodity theory of labor," see id. at 192–97.

107. See Yonay, supra note 30, at 123 (discussing how a lack of information on workers' conditions limited workers' ability to "maximize their utility in the way that neoclassical theory assumed"); Sumner H. Slichter, The Organization and Control of Economic Activity, *in* The Trend of Economics, supra note 103, at 314–17 (criticizing the "theory of free enterprise" in labor markets for its "presuppos[ition] that workmen can accurately compare different occupations and different plants" because "[m]uch of the needed information is not available in any form and little of it is in such shape that workmen can easily use it").

108. See Wesley Clair Mitchell, Business Cycles 570–81 (1913) (summarizing Mitchell's business cycle theory and critiquing alternative theories); John Augustine Ryan, A Living Wage 222–33 (1906) (discussing the determination of wages while arguing for a right to a living wage); 1 Sidney Webb & Beatrice Webb, Industrial Democracy 145–51 (London, Longmans, Green, & Co. 1897) (explaining views on the functions of trade unions); Clark, Scientific Law, supra note 74, at 37–69 (stating Clark's theory of wages); John R. Commons, Political Economy and Business Economy: Comments on Fisher's Capital and Income, 22 Q.J. Econ. 120, 120–25 (1907) (critiquing economists who ignore the distinction between value and cost).

109. See Rutherford, Institutionalist Movement, supra note 92, at 15–56 ("[To a young aspiring economist in the mid-1920s, institutionalism] would have appeared to be something new and modern, promising critical realism, scientific investigation of economic issues, consistency with the latest in related areas of social science, law, and philosophy, and involvement in important issues of social reform."); Yonay, supra note 30, at 55–56, 80–81 ("[Institutionalists] made the argument that proper science, *as it was practiced in all other disciplines*, was based on the laborious collection of facts, the search for recurring patterns, attempts to generalize the data, and, finally, the construction of theories to make sense of the amassed facts and generalizations.").

commissions, and other agencies that provided extensive price and wage indexes for analysis.[110] In 1842, the State Department established the first Bureau of Statistics to collect data on commerce with foreign nations, including pricing data.[111] Between 1866 and 1914, Congress created a Bureau of Statistics in the Treasury and Commerce departments to collect statistics on trade and commerce (including relative wage rates) as well as the Bureau of Labor to collect statistics on labor prices.[112] Congress also established a Bureau of Statistics in the ICC to track railroad rates and wages in the railroad industry.[113]

Evidence from real-world economic data drove Progressive economists' conviction that price and wage valuations were the product of contextual negotiation between parties with differing bargaining leverage, generated and fortified by social institutions, as opposed to abstract equilibration of supply and demand, as predicted under classical pricing theory.[114] As Lionel D. Edie put it, the "standards of industrial behavior . . . persist long after they have outlived their usefulness" because institutions resist quick adaptation to new market conditions.[115] Institutionalists viewed neoclassical analyses as engaging in a "conscious[] endeavor to *prevent* social institutions and usages"—whether they be legal institutions, corporations, trade associations, labor unions, credit networks, or any others—"from intruding themselves in the formulation of economic doctrines" at the expense of understanding basic economic phenomena.[116]

Progressives' conclusions about employers' uneven bargaining power with workers were influenced by the German historical school and English economists and sociologists Sydney and Beatrice Webb, who provided a seminal analysis of employer power in their 1897 book, *Industrial Democracy*.[117] The Webbs attributed employers' stronger leverage to the

110. See, e.g., Mitchell, supra note 108, at 130 (identifying U.S. Bureau of Labor Bulletins as a source of wage data); Henry Moore, The Variability of Wages, 22 Pol. Sci. Q. 61, 64 (1907) (relying on Treasury Census data).

111. See William F. Willoughby, Statistical Publications of the United States Government, 2 Annals Am. Acad. Pol. & Soc. Sci. 236, 237–38 (1891).

112. Id. at 93, 97.

113. Id.

114. See John R. Commons, Institutional Economics: Its Place in Political Economy 789–805 (1934) (providing an institutionalist critique of "banker stabilization" of prices); John R. Commons, Legal Foundations of Capitalism 65–134, 283–312 (1924) (describing the importance of institutions in transactions and the wage bargain); Yonay, supra note 30, at 110–12 (describing the institutionalist critique of neoclassical economics).

115. See Lionel D. Edie, Some Positive Contributions of the Institutional Concept, 41 Q.J. Econ. 405, 407 (1927).

116. Slichter, supra note 107, at 304 (emphasis added).

117. See 1 Webb & Webb, supra note 108; see also Kaufman, supra note 67, at 153 ("[Institutionalism] drew its early inspiration from two foreign sources: the economists of the German historical school and the English economists/sociologists Sydney and Beatrice Webb . . . .").

"reserve army," or excess supply in the labor market, as well as to labor's perishability, workers' relative lack of financial resources, mobility costs and restraints, information asymmetries, employers' superior bargaining skill, and employer collusion.[118] But institutionalists built on their theoretical contributions to empirically document workers' "willing[ness] to endure long hours, extremely heavy work, or extraordinarily great risks for little or no extra compensation," and employers' greater ability "to wait or to take advantage of alternative opportunities" and "put up with a . . . serious shortage of workers rather than pay more than they consider labor to be worth."[119]

To remedy that imbalance, institutionalists supported unionization, wage floors, and standardized working conditions, in part because they believed workers' weaker bargaining leverage fostered a "competitive menace": The least ethical employers with the lowest wages and worst labor standards would force others to compete down to their level, with negative externalities industry-wide, to labor's share of national income, and for macroeconomic stability.[120] Because competition drove firms to settle "wages and conditions of work . . . in each plant separately," it gave each firm "a powerful incentive to obtain an advantage by paying less . . . than its rivals," generating inefficiencies while polarizing labor and management, increasing labor strife, and depriving management of "suggestions and criticisms from those . . . in the best position to observe points of waste and suggest changes, namely, the workmen and the minor officials."[121] As Edwin Walter Kemmerer put it, "[c]ompetition works very

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118. See 1 Webb & Webb, supra note 108, at 603–702 (describing the sources of employers' stronger bargaining leverage in the wage bargain).

119. Slichter, supra note 107, at 322–25; see also A.L. Bowley & A.R. Burnettt-Hurst, Livelihood and Poverty 32–45 (1915) (identifying the causes of inadequate wages "below the minimum standard necessary to physical health" in four English towns); Arthur L. Bowley, The Change in the Distribution of the National Income: 1880–1913, at 16–27 (1920) (describing the decline of real wages relative to prices in the pre-war period and the transfer of wealth "from wage-earners to classes with higher incomes"); A.L. Bowley, Wages and Income in the United Kingdom Since 1860, at 27–99 (1937) (documenting changes in real wage rates relative to prices between 1880 and 1937 and the distribution of income between wage earners and property owners); Paul H. Douglas, The Reality of Non-Commercial Incentives in Economic Life, *in* The Trend of Economics, supra note 103, at 151–88 (describing noncommercial incentives that impact employer wage-setting); Edie, supra note 115, at 423–27 (exploring wage determinants and determinants of the "shares of distribution" through institutions like collective bargaining, immigration restrictions, minimum wage legislation, and other mechanisms).

120. See John R. Commons, American Shoemakers, 1648–1895: A Sketch of Industrial Evolution, 24 Q.J. Econ. 39, 68–69 (1909) (describing the effect of "marginal producers" on others as "depend[ing] on the extent to which he can be used as a club to intimidate others," enabling the "capitalist who can reach out for these low-level producers" to "use them . . . to break down the spirit of resistance").

121. Slichter, supra note 107, at 332–33, 340, 350; see also Edie, supra note 115, at 425 ("Each recipient of income seems to adopt . . . the rule that what each can get for himself

imperfectly, and . . . inadequately, in providing a fair wage" because "less scrupulous competitors" would constrain employers "glad to pay a fair compensation" from offering them, forcing society to "meet the 'depreciation charges' in the form of charities and institutions for [workers'] care."[122] Allowing the unregulated market to set the marginal worker's pay thus "exercise[s] an influence upon the wages of others often entirely out of proportion to their numbers," compelling some to propose "that the minimum wage principle . . . be extended to *all* classes of labor" as a living wage administered through wage boards.[123] Institutionalists thus viewed the neoclassical model of perfect competition as not only descriptively inaccurate but normatively misguided, understanding the goals of competition and "free markets" as wasteful and socially harmful.[124]

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depends less on his efficiency in producing goods for the use of others than on his efficiency in encroaching upon the gains of others by driving shrewd price bargains.").

122. 1 N.Y. State Factory Investigating Comm'n, Fourth Report, S. 138–43, 1st Sess., at 614, 615–16 (1915) [hereinafter Fourth Report] (statement of E.W. Kemmerer); see also Morris A. Copeland, Economic Theory and the Natural Science Point of View, *in* Fact and Theory in Economics: The Testament of an Institutionalist 37, 52 (Chandler Morse ed., 1958) ("The law of supply and demand describes . . . some markets fairly well; . . . in yet others like the labor market . . . it offers little more than a convenient classification of factors and policies affecting price into supply and demand factors."); 2 Webb & Webb, supra note 108, at 658 ("Thus, in the making of the labor contract the isolated individual workman, unprotected by any combination with his fellows, stands in all respects at a disadvantage compared with the capitalist employer."); Morris A. Copeland, Communities of Economic Interest and the Price System, *in* The Trend of Economics, supra note 103, at 103–50 [hereinafter Copeland, Communities of Economic Interest] (discussing the mechanisms of "cut-throat competition"); Daniel R. Ernst, The Labor Exemption, 1908–1914, 74 Iowa L. Rev. 1151, 1161 (1989) (discussing economic debates about exempting labor from antitrust scrutiny as "necessary to offset the power of combined capital"); Henry R. Seager, Trade Unions and the Law, 31 Survey 448, 448–49 (1914) [hereinafter Seager, Trade Unions] (arguing in favor of exempting labor unions from antitrust law because wage-earners "should be allowed to combine with equal freedom" as employers); Henry Rogers Seager, The Theory of the Minimum Wage, 3 Am. Lab. Legis. Rev. 81, 81 (1913) ("[T]he competition for employment may be so intense as to force wages below the living level, and the conditions which control the number of competitors may be so inflexible that [employees] continue at starvation rates year after year with no tendency toward improvement."); Slichter, supra note 107, at 314–17 (describing information asymmetries between workers and employers as a source of wage suppression). Kemmerer was a Princeton economist and helped design the Federal Reserve. Rebeca Gomez Betancourt, Edwin Walter Kemmerer and the Origins of the Fed, 32 J. Hist. Econ. Thought 445, 447–66 (2010).

123. Fourth Report, supra note 122, at 617–18 (statement of E.W. Kimmerer) (emphasis added); see also 2 Webb & Webb, supra note 108, at 774–84 ("[I]f the employers paid more, the labor would quickly be worth more. In so far as this proved to be the case, the National Minimum would have raised the Standard of Life without loss of work, without cost to the employer, and without disadvantage to the community.").

124. See Copeland, Communities of Economic Interest, supra note 122, at 110–14 (stating that a "profitivity theory" as opposed to a "productivity theory" allows individuals to pursue their "own greatest gain" but often at the cost of the "common good"); Slichter, supra note 107, at 309, 341–46 (noting that "[u]nemployment, industrial accidents,

Institutionalists extended their influence on the labor question and government regulation in academia and government commissions. At the University of Wisconsin, John Commons pioneered the study of labor economics and is widely viewed as "the intellectual origin of the New Deal, of labor legislation, of social security, of . . . a welfare state."[125] With the help of Wisconsin Governor Robert La Follette and University President Charles Van Hise, the Wisconsin School became the center of a new institutional approach to understanding labor markets,[126] drawing prominent figures like Selig Perlman, Edwin Witte, and Martin Glaeser, among others.[127] The Wisconsin School sought to incorporate into economic theory and analysis the impact of social institutions on labor market formation and the terms of market exchange.[128] But it also sought to create and utilize government institutions to regulate and study labor market wage-setting dynamics, including state- and federal-level government institutions that drafted and enforced experimental labor regulation and public utility rate- and labor standard-setting in state-level public utility, railroad, and other commissions.[129]

Progressive and institutional economists' experiences administering labor legislation increased their expertise with and documentation of the market's limitations in setting socially optimal wages, fortifying their

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industrial disease, [and] pollution" are among the social costs caused by private businesses engaging in cost shifting in the free market).

125. See Kenneth E. Boulding, A New Look at Institutionalism, 47 Am. Econ. Rev. 1, 7 (1957); see also Robert Ekelund & Robert Hébert, A History of Economic Theory 418 (2d ed. 1983) (noting Commons's lasting influence on federal regulations relating to economic reforms); Yonay, supra note 30, at 62–63 (describing Commons as "[t]he main contributor to economic policy" among institutionalists).

126. See Robert S. Maxwell, La Follette and the Progressive Machine in Wisconsin, 48 Ind. Mag. Hist. 55, 58 (1952) (discussing the role of La Follette and Van Hise in making the University of Wisconsin "closely identified with the Progressive Republican administration").

127. See Malcolm Rutherford, Wisconsin Institutionalism: John R. Commons and His Students, 47 Lab. Hist. 161, 165 (2006) (noting that Commons and his students, including Glaesar, Perlman, and Witte, "transformed" economics at the University of Wisconsin).

128. See id. at 163–71 (discussing the influence of institutionalist scholars as evidenced by the economics course offerings during that period, which were "empirical, focused on institutions, and concerned with social control").

129. See David A. Moss, Socializing Security: Progressive-Era Economists and the Origins of American Social Policy 4–5 (1996) (explaining how Ely and Commons along with their staff at the University of Wisconsin, studied "all types of protective labor legislation, focusing in particular on factory inspection and child labor laws"). For Commons' involvement in institutional reforms, see John R. Commons, The La Follette Railroad Law in Wisconsin, 32 Am. Monthly Rev. Revs. 76, 76–79 (1905) (exploring in detail a newly enacted state law that created a commission to regulate railroad rates); Grover Huebner, Five Years of Railroad Regulation by the States, 32 Annals Am. Acad. Pol. & Soc. Sci. 138, 151 (1908) (describing state-level wage regulation through commissions, including in Wisconsin). Commons and Ely cofounded the AALL to promote labor and social legislation. See Daniel T. Rodgers, Atlantic Crossings: Social Politics in a Progressive Age 236–54 (1998).

resistance to viewing labor as a commodity.[130] Their excavation of these limitations went deep. Institutionalists "regard[ed] as the fundamental data for analysis such underlying institutions as ownership, inheritance, the standards of consumption, and the development of technology,"[131] but also any "method of action arrived at by habituation and convention,"[132] like corporate structures, worker-led institutions, and, more broadly, the law and state institutions.[133] On this analysis, the statement "labor gets exactly what it produces" "under the hypothesis of perfect competition"[134] is better understood as, to cite Columbia economist Henry Moore, "labor gets what the assumed property rights and assumed organization of industry make possible, and the important question is not so much whether labor gets what it produces under those conditions, but rather why actual conditions make possible so small a product."[135]

Taking this more expansive view, institutionalists "pioneered industry-specific studies" to assess, as legal historian Laura Phillips-Sawyer put it, "how embedded social customs dictated employee–employer working rules and increasingly limited labor cohesion, which redounded to the benefit of employers, allowing them to collect more than their fair share of returns."[136] They also collected and analyzed variations in prices and wages to better understand the logic of the price and wage system writ large. Wesley Claire Mitchell was the first to elaborate a data-based analysis and theory of business cycles to explain how and why prices changed for different goods and services in the same market and for the same goods and services in different markets.[137] His analyses demonstrated gender pay gaps and deduced workers' divergent shares of firm earnings based on variations in wholesale and retail prices or prices of raw materials and

130. See William J. Novak, New Democracy: The Creation of the Modern American State 1–24 (2022) (describing the centralization of labor market regulation and the emergence of institutional economics in the context of the federal government's growing administrative capacity between 1866 and 1932); Yonay, supra note 30, at 58–61 (describing institutional economists' contributions to economics and influence on government labor regulation).

131. Walter W. Stewart, Lewis H. Haney, B. M. Anderson, Jr. & J. M. Clark, Economic Theory—Discussion, 9 Am. Econ. Rev. 319, 319–20 (Supp. 1919).

132. 3 Dorfman, supra note 79, at 439.

133. See McNulty, supra note 70, at 153–76 (describing institutional economists' theories and methods); Walton H. Hamilton, The Institutional Approach to Economic Theory, 9 Am. Econ. Rev. 309, 311–13 (Supp. 1919) (same); Malcolm Rutherford, Institutional Economics: Then and Now, 15 J. Econ. Persps. 173, 174–78 (2001) (same).

134. Henry Moore, Paradoxes of Competition, 20 Q.J. Econ. 211, 216 (1906).

135. Id. at 216 n.1.

136. See Phillips-Sawyer, supra note 55, at 672; see also Commons, Institutional Economics, supra note 114, at 52–92 (reasoning from industry-specific studies to assess social customs).

137. See 3 Dorfman, supra note 79, at 458–72 (describing Mitchell's research trajectory).

manufactured goods.[138] These differentiations illustrated how contingent wages were as a measure of labor's productivity and supported institutional economists' view that prices were "social conventions" that "varied [to] reflect the different types of commodity, institution, mode of calculation, and pricing process."[139]

Early administrative investigations, wage board, and wage commission reports confirmed this. Following increased labor unrest after the 1902 Pennsylvania anthracite coal strike, President Theodore Roosevelt turned to a commission to resolve the labor dispute through arbitration, but the arbitration board struggled to ascertain a "scientific" method for investigating a "reasonable" or "just wage."[140] University of Wisconsin President Van Hise sat on the Board and drafted its report, an experience that informed his widely read *Concentration and Control*[141] and the underlying philosophy of the NIRA.[142] The Board's report challenged the limited capacity of neoclassical wage theory to ascertain "reasonable" wages:

> Possibly there should be some theoretical relation . . . between the amount of the income that should go to labor and the amount that should go to capital; and if this question were decided, a scale of wages might be devised . . . which would determine the amount rightly absorbed by labor. It may be that . . . some such solution will be worked out . . . and if so, the income of the railroads could be so apportioned. Thus far, however, political economy is *unable to furnish such a principle as that suggested*. There is no generally accepted theory of the division of income between capital and labor . . . . What, then, is

138. Mitchell, supra note 108, at 132–36, 468–81; see also 3 Dorfman, supra note 79, at 458–59 (summarizing Mitchell's research).

139. Geoffrey Hodgson, The Approach of Institutional Economics, 36 J. Econ. Lit. 166, 169–70 (1998); see also Copeland, Communities of Economic Interest, supra note 122, at 114–15 (discussing the concept of "differential advantage" (emphasis omitted)); Edie, supra note 115, at 425 (explaining the "make-work fallacy" (internal quotation marks omitted)).

140. See 3 Dorfman, supra note 79, at 324–25 (describing the history and challenges of the Anthracite Coal Strike Commission).

141. See Charles R. Van Hise, Concentration and Control: A Solution of the Trust Problem in the United States 248 (1912) ("[C]ommissions should be created to control industrial corporations affected with a public interest just as they now control the public service corporations, as they control quality in industry.").

142. See Ellis Wayne Hawley, The New Deal and the Problem of Monopoly 43–46 (1966) (describing how NIRA was supported by the notion "of a collectivist democracy," which incorporated Van Hise's policy priorities of "[c]oncentration, cooperation, and control"); Phillips-Sawyer, supra note 55, at 673–74 (describing the importance of Van Hise's *Concentration and Control* in its time, including Van Hise's view of the efficiency of production at scale for consumers).

> the basis upon which a judgment may be passed as to whether the existing wage scale of the engineers . . . is fair and reasonable?[143]

The 1912 Massachusetts Commission on Minimum Wage Boards was equally suspicious, proposing a voluntary minimum wage for women and minors but recognizing that no "economic law . . . by some mysterious but certain process[] correlates earnings and wages. Wages among the unorganized and lower grades of labor [were] mainly the result of tradition and of slight competition."[144]

The disruptive scale of labor unrest over wages and working conditions, including horrific instances of workplace deaths, drew national attention and calls for reform. Reform demands utilized social scientific data to press standardization of compensation and labor conditions, taking wages out of market competition for at least some portion of workers. Testifying before the New York Factory Investigating Commission after the 1911 Triangle Shirtwaist Fire, Edwin Kemmerer advised the government, in addition to establishing minimum wage schedules for all workers, to "level up and standardize" industry rules of conduct, including by passing laws requiring that facts about workplaces be "collected, scientifically classified, and made accessible to the public."[145] Louis Brandeis and Josephine Goldmark's famous "Brandeis Briefs," defending state maximum hour and minimum wage laws, deployed the products of this new social science—they assembled hundreds of pages of "*facts*, published by anyone with expert knowledge of industry in its relation to women's hours of labor."[146] Brandeis's "sociological jurisprudence" sought to justify state intervention in markets to a judiciary invalidating legislative reform efforts.[147] As Professor Phillips-Sawyer put it, "Brandeis insisted that contextualizing real-world economic data revealed the true imbalances in market power faced by laborers and thus justified protective legislation."[148]

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143. Charles R. Van Hise, Oscar Straus, Frederick N. Judson, Albert Shaw, Otto M. Eidlitz, Daniel Willard & P. H. Morrissey, Report of the Board of Arbitration in the Matter of the Controversy Between Eastern Railroads and the Brotherhood of Locomotive Engineers 47 (1912) (emphasis added).

144. Henry Lefavour, Richard Olney, John Golden, Elizabeth G. Evans & George W. Anderson, Report of the Massachusetts Commission on Minimum Wage Boards 18 (1912).

145. Fourth Report, supra note 122, at 617, 620.

146. Josephine Goldmark, Impatient Crusader 155 (1953). For an example of a Brandeis Brief, see Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

147. See Berk, supra note 81, at 46 (describing Brandeis as the "founder of the 'sociological jurisprudence' movement"); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 188–89, 209 (1992) (describing the role of the "Brandeis brief" in introducing social scientific research to the judiciary and "providing a necessary demystifying first step toward the goal of social reform").

148. See Phillips-Sawyer, supra note 55, at 677.

Institutionalists' analyses thus challenged the neoclassical theory that free market competition would naturally regulate and accurately value labor based on its contributions. Commons and his Wisconsin colleague John Andrews described the mechanism of market-based competition as "cutthroat," "highly oppressive to the worker and injurious to society in general," noting that "[a]mong the unskilled, unorganized workers, the wage that the cheapest laborer . . . is willing to take, very largely fixes the wage level for the whole group."[149] Commentators echoed their skepticism that market-based wage-setting accurately measured a worker's value as opposed to the value powerful employers could unilaterally set:

> All the machinery of the abstract political economist is driven by the force of competition . . . . The critic of this method wants a political economy that will disclose the actual, not the hypothetical, regulators of prices, wages, rents, and profits. By excluding all forces but those of competition, these economists shut themselves out from the consideration of the gravest problems of the day, which are questions of combination, and not of competition.[150]

More generally, as economists were exposed to data made available by the government's regulation of railroads and public utilities, they began to directly challenge, as Moore put it, "the critical limitations of the current method of investigating economic questions" and the "extremely hypothetical character" of "the theory that, as wages, the laborer gets what he produces."[151] Economists could point to concrete instances where the theory was "fallacious" and not backed by "statistics," particularly in cases of monopoly and oligopoly.[152] Progressive economists favored unionization to increase wages above financially devastating, competitively set wages in boom-and-bust business cycles to achieve countercyclical stabilization.[153]

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149. See John R. Commons & John B. Andrews, Principles of Labor Legislation 48, 373 (4th rev. ed. 1936).

150. Lloyd, supra note 80, at 72; see also Raymond Bye, Some Recent Developments of Economic Theory, *in* The Trend of Economics, supra note 103, at 280–81 (1924) (arguing that, to the extent workers were "paid according to [their] marginal productivity," their compensation would at best be set "*according to its value to employers* who are bidding for it in a competitive market").

151. Moore, supra note 135, at 229–30.

152. Id.

153. See Arthur T. Hadley, Railroad Transportation: Its History and Its Laws 78–79 (1885) (describing the effects of the business cycle on workers supporting families with the result that "[t]he workman seeks relief in combination"); Henry Carter Adams, Professor, Cornell Univ., The Labor Problem, *in* 22 Sci. Am. Supp. 8861, 8861 (1886) ("[C]ompetition applied to the distribution of what is produced[,] . . . while capital . . . is concentrated in the hands of a comparatively few, will give to the employer such an advantage as to exclude the laborer from a just share in . . . an advancing material civilization."); id. at 8863 (describing a system in which workers "are given tenure of employment," "promoted from the ranks," and "consulted whether hours of work or the numbers employed shall be reduced" so they

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In sum, the Progressive Era witnessed deep divisions between neoclassical and Progressive social scientists regarding the mechanisms that set labor's value in the employment bargain. Marginal neoclassical economics calculated labor's value under assumptions of perfect competition and viewed labor like any other input about which employers made incremental, profit-maximizing decisions. In their view, market competition would properly set the value of labor's contributions just like any other commodity. But the realities of highly complex variation in wage-setting, and workers' unequal bargaining leverage, increasingly favored the institutional economists' view that market-based wage regulation was highly contingent and determined more by employers' institution-backed dominance than by "efficient" market forces.

2. *Labor's Commodity Status in Legal Thought.* — While the Progressive Era witnessed deep transformations in social scientific study, especially on the "labor question," legal doctrine primarily ignored them. Judicial opinions and treatises instead applied a thicket of common law frameworks to labor within the tradition of Classical Legal Thought.[154] Courts—and judicial treatises—increasingly viewed workers' strikes as unlawful antitrust conspiracies subject to injunction, classifying labor as a "commodity" which made "the 'labor and skill of the workman' and the 'plant of the manufacturer' . . . all equally 'property,' to which the same set of legal rules should apply."[155] This position diverged from earlier nineteenth-century opinions and a minority of Progressive Era courts that refused to subject labor coordination to antitrust scrutiny on grounds that labor was *not* a commodity.[156]

The commodity distinction mattered as a *legal* distinction for two key reasons. First, labor's "commodity" status determined whether it was laborers' *property* interest protected under federal and state constitutions.[157] If workers had a property interest in their labor, government

"secure[] a right to live in hard times from the fund of capital created by them in flush times").

154. See Daniel R. Ernst, Lawyers Against Labor: From Individual Rights to Corporate Liberalism 69–164 (1995) (describing the evolution of common law conspiracy and tort doctrines to labor combinations alongside the development of social scientific thought); Hovenkamp, Enterprise and American Law, supra note 63, at 207–38 (describing doctrinal and treatise treatment of labor combinations under common law and Classical Legal Thought). For more on Classical Legal Thought, see generally William Wiecek, The Lost World of Classical Legal Thought (1998) (describing the evolution of Classical Legal Thought between 1886 and 1937 in the context of labor unrest).

155. Hovenkamp, Enterprise and American Law, supra note 63, at 211 (quoting Hopkins v. Oxley Stave Co., 83 F. 912, 919 (8th Cir. 1897)).

156. See infra notes 170–182 and accompanying text.

157. See, e.g., Coppage v. Kansas, 236 U.S. 1, 14 (1915) (holding Kansas's ban on yellow-dog contracts unconstitutional as violative of both employers' and employees' rights to liberty and property).

restraints on its "sale"—including through protective state and federal labor legislation—could be constitutionally challenged as due process violations.[158] But second, if labor were *not* a "commodity," Congress could not regulate its sale in interstate commerce—or, more importantly, its withdrawal from sale as strikes that impacted the flow of commerce—under the Constitution's Commerce Clause.[159] Threading this needle was challenging for judicial labor regulation and divided the judiciary on labor's status.[160]

The "commodity" debate became supercharged with the Supreme Court's 1897 *United States v. Trans-Missouri Freight Ass'n*[161] and 1905 *Lochner v. New York*[162] decisions. In *Trans-Missouri*, the Court held that joint rate-setting by competing railroads could violate the Sherman Act, distinguishing its earlier decision, *United States v. E.C. Knight*,[163] which held that in-state price collusion was beyond the Sherman Act's reach.[164] These cases generated significant debate about the quantum of "interstate" impact required for Sherman Act enforceability, particularly when it came to labor strikes.[165] Whether labor was regulable as a "commodity" or "article of commerce" thus became all the more important as employers deployed the Sherman Act to enjoin strikes and hold unions liable for the strikes' effects.[166] *Lochner*, for its part, struck down a New York state maximum-hour law under the Fourteenth Amendment, which prohibits

158. See, e.g., id. ("Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property.").

159. See Phillips-Sawyer, supra note 55, at 683–85 (discussing restrictions placed on antitrust laws by the Commerce Clause).

160. See id. at 700 ("[E]ven after the settlement in *Hutcheson*, labor disputes continued to spill over into the courts on antitrust grounds, and, as we saw in *Jewel Tea*, progressive jurists continued to disagree over the proper boundaries of antitrust law as applied to labor disputes.").

161. 166 U.S. 290 (1897).

162. 198 U.S. 45 (1905).

163. 156 U.S. 1 (1895).

164. See *Trans-Missouri*, 166 U.S. at 313 (distinguishing *E.C. Knight*, which involved "a company engaged in one state in the refining of sugar," whereas the case before the Court concerned "agreements as to rates by competing railroads for the transportation of articles of commerce between the states"); *E.C. Knight*, 156 U.S. at 16–17 (holding the Sherman Act inapplicable because "the contracts and acts of the defendants related exclusively to the acquisition of . . . Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states").

165. See Phillips-Sawyer, supra note 55, at 669, 684, 686–87.

166. See Ernst, supra note 154, at 112–23 (describing employers' legal campaign to challenge worker strikes under the Sherman Act); Phillips-Sawyer, supra note 55, at 668–84 (describing the Supreme Court's jurisprudence in applying the Sherman Act to strike activity).

state deprivation of "liberty" and "property" without due process.[167] The *Lochner* opinion followed Justice Field's reasoning in his 1873 *Slaughter-House Cases* dissent, which quoted Adam Smith:

> "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this . . . is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him."[168]

After *Lochner*, both federal and state courts used its rationale to strike down Progressive labor legislation, with many emphasizing the "commodity" status of labor. A classic example is the Supreme Court's decision in *Adkins v. Children's Hospital*, which cited *Lochner* in striking down a District of Columbia minimum wage law for female employees as interfering with their liberty of contract.[169] At the state level, the Louisiana Supreme Court cited *Lochner* in its 1913 decision, *State v. Barba*, which struck down Louisiana's eight-hour work law as unconstitutional.[170] The court affirmed the lower court, which had held it a "self-evident and undeniable proposition of law that labor is a commodity, and that the right to labor and to employ labor, and make, in respect thereto, contracts upon such terms as may be agreed upon by the parties . . . cannot be interfered with by the Legislature except on some reasonable ground."[171]

But other courts disagreed, tethering their rulings to abolitionism. The trajectory of the judicial "anti-commodity" tradition mirrors the rise and fall of radical Republican thought between the Civil War, Reconstruction, and Redemption.[172] A foundational ruling in this

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167. See 198 U.S. at 53–54; see also U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

168. 83 U.S. (16 Wall.) 36, 110 n.39 (1873) (Field, J., dissenting) (quoting Smith, supra note 66, at 110).

169. See 261 U.S. 525, 548, 553–59, 562 (1923).

170. See 61 So. 784, 785 (La. 1913).

171. Id. (quoting opinion of Louisiana District Judge F. D. Chretien) (citing Ritchie v. People, 40 N.E. 454 (Ill. 1895); Godcharles v. Wigeman, 6 A. 354 (Pa. 1886); State v. Goodwill, 10 S.E. 285 (W. Va. 1889)).

172. For more on radical Republicanism, see, e.g., Foner, Reconstruction, supra note 63, at 228–586 (describing the rise of Radical Reconstruction, the First Redemption, the retreat from Reconstruction, and the Redeemer's New South); Gourevitch, supra note 63, at 47–66 (describing the "[l]aissez-[f]aire Republican [t]urn"). For representative court opinions, see, e.g., Hopkins v. Oxley Stave Co., 83 F. 912, 937, 939 (8th Cir. 1897) (Caldwell, J., dissenting) (analogizing judicial injunctions of workers' strikes and boycotts to "the revival of despotism for laborers . . . mean[ing] their practical enslavement to great aggregations of capital, whose greed takes no note of human destitution and suffering"); Arthur v. Oakes, 63 F. 310, 318–29, 327 (7th Cir. 1894) (discussing judicial regulation constraining workers as akin to involuntary servitude, "a condition which the supreme law

tradition is the 1842 decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Hunt*, which held that state conspiracy law did not apply to indicted workers who struck employers that hired nonunion labor.[173] The court protected the workers' conduct on grounds that their association was used for "fair or honorable and lawful means,"[174] and while some subsequent courts followed its reasoning to exempt labor from antitrust scrutiny,[175] others cited *Hunt* as precedent for limiting antitrust law's reach on the basis that labor was not a commodity regulable by those laws.

A 1908 Iowa Supreme Court decision, *Rohlf v. Kasemeier*, is exemplary but not singular.[176] In *Rohlf*, physicians were criminally prosecuted for combining to fix their medical service fees in violation of Iowa's antitrust law.[177] That law prohibited price-fixing "of any article of merchandise or commodity," and the question was whether physicians' labor services came within its terms.[178] Justice Horace Deemer, a Progressive Republican, drafted the opinion finding they did not.[179] His opinion interpreted the statute's terms "according to the context and . . . approved usage of language," including in social scientific debates:

> Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply and demand, there is another class, which . . . sees in it something more than a commodity, and refuses to subscribe to the doctrine that supply and demand alone regulate the price . . . . It is not . . . within the province of courts of justice to adopt or promulgate any particular system of political science; but in the interpretation of statutes they must take notice of current political theory and conviction. If we were to adopt

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of the land declares shall not exist within the United States, or in any place subject to their jurisdiction"); Kemp v. Div. No. 241, Amalgamated Ass'n of St. & Elec. Ry. Emps. of Am., 99 N.E. 389, 392 (Ill. 1912) ("[Workers' right to withdraw their labor] cannot be abridged or taken away by any act of the Legislature, nor is it subject to any control by the courts, it being guaranteed . . . by the thirteenth amendment[,] . . . which declares that involuntary servitude . . . shall not exist within the United States . . . .").

173. See 45 Mass. (4 Met.) 111, 129–30 (1842).

174. Id. at 134.

175. See, e.g., Queen v. State, 24 S.W. 397, 404 (Tex. 1893). Some courts exempted labor coordination under statutory labor exemptions to state antitrust law after attempts to explicitly exempt labor in the Sherman Act failed. See, e.g., Hunt v. Riverside Club, 104 N.W. 40, 44 (Mich. 1905); State ex rel. Star Pub. v. Associated Press, 60 S.W. 91, 107–08 (Mo. 1900); Cleland v. Anderson, 92 N.W. 306, 310 (Neb. 1902).

176. See 118 N.W. 276, 278–79 (Iowa 1908) (concluding that fixing labor prices did not violate antitrust law); see also supra note 175.

177. See *Rohlf*, 118 N.W. at 277.

178. Id.

179. Id. at 277, 279; see also 11 Benjamin F. Shambaugh, Biographies and Portraits of the Progressive Men of Iowa 471–73 (Des Moines, Conaway & Shaw 1899) (describing Horace Deemer).

> [appellant's] view . . . , it would be on the assumption that the associated words "merchandise" and "commodity" include the wages to be paid for labor . . . . This is a strained and unnatural construction, and gives to the word "commodity" a meaning which is . . . not the commonly accepted one. . . . . With this in mind, we are constrained to hold that labor is not a commodity within the meaning of the act now in question.[180]

The Minnesota Supreme Court followed *Rohlf*'s reasoning in 1909, holding in *State v. Duluth Board of Trade* that a defendant trade board did not violate antitrust law by requiring its members to charge uniform service commissions in their grain sales.[181] The court understood the service commissions as outside the state law's definition of "commodity" because, as it noted had also been the case in *Rohlf*, labor "is not by any fair rule of construction . . . an 'article, commodity, or utility' which 'enters into the manufacture of any article of utility,' within the meaning of those words as used in the statute."[182]

These "anti-commodity" decisions challenged Congress's power to regulate labor under the Commerce Clause, including through passing *protective* labor legislation. Legislative inaction allowed judges to enjoin strikes under the Sherman Act, facilitating a judicial consensus that labor *was* regulable as a "commodity" or "article of commerce" subject to state and federal antitrust law.[183] In their reasoning, judges "imbibed the dominant economic thinking of the nineteenth-century American tradition."[184] The Supreme Court's 1908 *Loewe v. Lawlor* ("*Danbury Hatters*") decision left no remaining ambiguity that the Sherman Act could reach and prohibit "combinations of labor as well as of capital" that restrain trade.[185] Despite the Sherman Act's equivocal legislative history regarding its exemption of labor,[186] the Supreme Court declared that the

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180. *Rohlf*, 118 N.W. at 278. To support its decision, the court cited a Missouri Supreme Court decision, State v. Henke, 19 Mo. 225 (1853). *Rohlf*, 118 N.W. at 278. *Henke* concerned whether hiring an enslaved person away from their master contravened a pre-Civil War state law prohibiting enslaved people from dealing in any commodity without their master's consent. See id. at 226–27. The antebellum decision found the indictment of railroad contractors for hiring an enslaved person to maul rails defective with the explanation that "'[t]he mauling of rails' . . . is not the commodity contemplated by the legislature" because "any commodity" "does not include the manual labor of the slave." See id.

181. See 121 N.W. 395, 414–15 (Minn. 1909).

182. Id. at 412.

183. See Hovenkamp, Labor Conspiracies, supra note 43, at 919, 924–26, 932 n.79 (summarizing case law). For the evolution of judicial thought in issuing labor injunctions, see Felix Frankfurter & Nathan Greene, The Labor Injunction 82–133 (1930) [hereinafter Frankfurter & Greene, The Labor Injunction] (documenting judicial injunctions of labor strikes).

184. Hovenkamp, Enterprise and American Law, supra note 63, at 192.

185. See 208 U.S. 274, 292, 302 (1908).

186. See Sherman Act of 1890, *in* Legislative History of the Federal Antitrust Laws and Related Statutes 3, 7–9 (Earl W. Kintner, ed., 1978). For arguments that the Sherman Act

Sherman Act's meaning "is manifest, and . . . it includes combinations which are composed of laborers acting in the interest of laborers."[187]

Leading up to and following *Danbury Hatters*, treatise writers on conspiracy and antitrust law held them equally applicable to labor and capital, equating labor services and goods as objects of market exchange. Arthur Eddy's 1901 treatise *The Law of Combinations* concluded that the law prohibits capital *and* labor combinations because prices are based on costs, and costs consist of "[l]abor, represented by wages" and "[c]apital, represented by the material consumed and depreciation of plant, machinery, tools, etc."[188] The law should be "directed impartially against combinations of both labor and capital."[189] In Frederick Cooke's 1909 book *The Law of Combinations, Monopolies, and Labor Unions*, he stated that, "[o]n principle, it is not apparent why the legality of combinations among employees . . . should be subjected to any different test from that applied to combinations among employers . . . or among tradesmen."[190]

B. *Antitrust Law's Labor Exemptions as Labor Decommodification*

Judicial consensus that labor's "commodity" status subjected worker coordination and strikes to antitrust law instigated policymakers, legal thinkers, social scientists, and labor leaders to mobilize for legislative reform. In his summary of *The Doctrine that Labor Is a Commodity*, institutional economist and administrator Edwin Witte urged a labor exemption from antitrust enforcement based on the realities of the employment bargain: "[T]he law governing controversies between labor and capital is being recast. If a satisfactory law is to evolve, the emphasis must be upon the facts of the present situation, rather than upon abstract reasoning."[191] It was in this spirit that reformers sought to amend the Sherman Act in what would become the Clayton and Norris–LaGuardia Acts' labor exemptions. This section summarizes the legislative history of these exemptions as deeply informed by contemporary social scientific

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exempted labor, see Edward Berman, Labor and the Sherman Act 11–51 (1930); Louis Boudin, The Sherman Act and Labor Disputes: I, 39 Colum. L. Rev. 1283, 1285–93 (1939); Samuel Gompers, The Hatters' Case, 17 Am. Federationist 197, 202 (1910); Sanjukta Paul, The Case for Repealing the Firm Exemption to Antitrust, *in* Cambridge Handbook of U.S. Labor Law 88, 89–90 (2019). For contrary arguments, see Joseph Joyce, A Treatise on Monopolies and Unlawful Combinations or Restraints 175 (1911); Alpheus Mason, Organized Labor and the Law 122–27 (1925); William Thornton, A Treatise on the Sherman Anti-Trust Act 1–31 (1913); Marina Lao, Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption, 51 U.C. Davis L. Rev. 1543, 1560 (2018).

187. See *Danbury Hatters*, 208 U.S. at 302.

188. Arthur J. Eddy, The Law of Combinations 1330 (1901).

189. Id. at 1331.

190. See Frederick H. Cooke, The Law of Combinations, Monopolies and Labor Unions 104 (2d ed. 1909).

191. Edwin E. Witte, The Doctrine that Labor Is a Commodity, 69 Annals Am. Acad. Pol. & Soc. Sci. 133, 139 (1917).

and doctrinal approaches to understanding and measuring labor's value. It argues that their rejection of labor as a "commodity" was a legislative rejection of consigning labor's value to market-based determinations. That rejection became clearer in the Norris–LaGuardia Act's restriction of judicial jurisdiction over labor disputes and formal statement of antitrust law's labor and wage policy favoring workers' exercise of their collective rights to "obtain acceptable terms and conditions of employment."[192]

Progressives and labor leaders opposed judicial intervention in labor organizing well before the *Danbury Hatters* decision. The Democratic Party placed labor's exemption from antitrust law at the center of its 1908 and 1912 national platforms, declaring that

> [t]he expanding organization of industry makes it essential that there should be no abridgement of the right of wage earners and producers to organize for the protection of wages and the improvement of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade.[193]

Democrats inveighed against "[g]overnment by injunction," in which judges rather than legislatures "determine[d] [the] legitimacy of challenged behavior" and "policy of society towards industrial strife."[194]

"Government by injunction" was also rejected for imposing policy by abstraction.[195] Reception of the Supreme Court's jurisprudence on "yellow-dog contracts"—employment contracts forbidding workers to join labor unions—is illustrative. In *Adair v. United States*[196] and *Coppage v. Kansas*,[197] the Court held unconstitutional federal and state law yellow-dog contract bans.[198] Felix Frankfurter and Nathan Greene rejected the Court's reasoning as "pernicious abstractions" "presuppos[ing] a perfectly balanced symmetry of rights: [T]he employer and employee are on an equality, and legislation which disturbs that equality is an arbitrary

192. Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

193. 51 Cong. Rec. 9544 (1914) (statement of Rep. Bartlett) (quoting 1908 Democratic National Convention platform, American Presidency Project, https://www.presidency.ucsb.edu/documents/1908-democratic-party-platform [https://perma.cc/6RDG-8C4D] (last visited Oct. 11, 2024)); see also Joseph Kovner, The Legislative History of Section 6 of the Clayton Act, 47 Colum. L. Rev. 749, 750–51 (1947) (describing the Democratic Party's response to the *Danbury Hatters*' decision in its party platforms).

194. Felix Frankfurter & Nathan Greene, Legislation Affecting Labor Injunctions, 38 Yale L.J. 879, 879–80 (1929) [hereinafter Frankfurter & Greene, Legislation] (internal quotation marks omitted).

195. See William Forbath, The New Deal Constitution in Exile, 51 Duke L.J. 165, 183–89 (2001) [hereinafter Forbath, New Deal Constitution] (summarizing early twentieth-century criticisms of injunctions against labor organizing).

196. 208 U.S. 161 (1908).

197. 236 U.S. 1 (1915).

198. See *Coppage*, 236 U.S. at 13; *Adair*, 208 U.S. at 175.

interference 'with the liberty of contract.'"[199] Labor leaders also protested judicial reasoning presuming an abstract "equality" between workers and employers, pointing to law that enabled employers to combine but not workers.[200] Frank Foster, the 27-year-old secretary of the Knights of Labor who later co-founded the American Federation of Labor (AFL) with Samuel Gompers, testified before Congress against:

> the argument that the law of supply and demand regulates the labor market, that the workingmen must submit to that law, and that it is entirely useless for them to attempt to rebel against its inexorable and inevitable operation. Even accepting the doctrine of the orthodox school of political economy, that labor is in large measure a *commodity*, . . . the supply of any commodity in the market is not a fixed quantity, but is . . . *regulated by combination*. We know that we pay an artificial price for many of the staple commodities of life. The Standard Oil Company . . . fixes for us the price of the light in the workingman's home, . . . not at its real value, but by regulating the supply . . . . We claim, [*if* labor is a commodity,] that the workingmen have . . . the same power and the same privilege and the same right to control the labor market as the stock broker or the oil broker . . . . [A]nd we claim that high wages is one of the main factors in domestic prosperity; that the cause . . . of financial depression . . . is not a glut in the market, not an overproduction, but rather an insufficient power of consumption possessed by the working people.[201]

The push to legislate a labor exemption from antitrust law thus turned as much on advocates' policy positions regarding unions' social value as it did on rejecting abstract methods of analyzing the employment relationship as a market exchange between equals.

Progressives, institutional economists, and critics of "orthodox" political economy informed the policy, drafting, and language of the Clayton Act that exempted labor on grounds it was not a "commodity" or "article of commerce."[202] Presidential candidate Woodrow Wilson—trained by institutional economist Richard Ely—appointed Louis Brandeis to be his 1912 campaign advisor.[203] "Brandeis influenced the drafting of the Clayton Act" to remedy the "imbalance in bargaining power between employers and employees by removing antitrust law as a roadblock to

199. Frankfurter & Greene, Legislation, supra note 194, at 891 (quoting *Adair*, 208 U.S. at 175).

200. See 1 Sen. Comm. Educ. & Labor, 48th Cong., Report of the Committee of the Senate Upon the Relations Between Labor and Capital and Testimony Taken by the Committee 41, 667–68 (1885) (testimony of Frank K. Foster).

201. Id. (emphasis added).

202. See Yonay, supra note 30, at 53–60 (summarizing institutionalists' government influence).

203. 3 Dorfman, supra note 79, at 337.

certain union action."[204] The Wilson Administration was Brandeis's opportunity to "codify the Wisconsin progressives' idea of trade unionism into a prospective law that would recalibrate market power" between workers and employers.[205] But Progressives and labor leaders shaped the framing of the labor exemption most in terms of the "anti-commodity" tradition. Economist Henry Seager debated labor exemption legislation in 1914 with the American Anti-Boycott Association's leading attorney, Walter Merritt, in *The Survey*, a leading social work journal.[206] Seager advocated enacting a principled exclusion of labor unions from Sherman Act scrutiny: "[T]wo distinct sets of economic relations are clearly separable. One concerns the dealings between the . . . sellers and buyers[] of commodities; the other the dealings between employers and employe[e]s."[207] "Wage-earners should be encouraged to combine" to offset the power of combined capital.[208] The broader circulation of John Kells Ingram's 1880 address to the Trades Union Congress in Dublin was also influential in its explicit rejection of the "false" view that labor is "a commodity."[209] In a later 1928 reissue of the speech introduced by Richard Ely, Ely recalled:

> There is a striking correspondence between [Dr. Ingram's ideals] and the ideals that have found expression in the struggles of the [AFL]. . . . Samuel Gompers always fought the idea that labour is a commodity, and, as a result of his struggles and the struggles of those associated with him, Congress enacted legislation setting forth that labour must not be regarded as a commodity.[210]

Prior to the Clayton Act's passage, Gompers argued that it was "an outrage upon our language" to treat worker and property owner combinations as equivalent since workers "own nothing but themselves and undertake to control nothing but themselves and their power to work."[211] Gompers's *Labor Not a Commodity* stated his position clearly, as Congressman Buchanan highlighted in debate: "[Anti]trust laws[] may rightfully apply to the products of labor, but they do not rightfully apply to the labor power of a free man."[212]

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204. Phillips-Sawyer, supra note 55, at 677; see also Berk, supra note 82, at 40 (describing the enlistment of Brandeis' counsel in drafting the legislation).

205. Phillips-Sawyer, supra note 55, at 678.

206. See Seager, Trade Unions, supra note 122, at 448–49; see also Ernst, Labor Exemption, supra note 122, at 1161.

207. Seager, Trade Unions, supra note 122, at 448–49.

208. Id.

209. See Ingram, supra note 104, at 8; see also supra note 100 and accompanying text.

210. Richard T. Ely, Introduction to Ingram, supra note 104, at 3.

211. Sen. Charles Culberson, Unlawful Restraints and Monopolies, S. Rep. No. 63-698, at 11 (1914).

212. Samuel Gompers, Labor Not a Commodity, 21 Am. Federationist 849, 866 (1914).

In their treatise *The Labor Injunction*, Frankfurter and Greene identify "the plea of Samuel Gompers" as the reason Congress introduced the Clayton Act's labor exemption.[213] Another scholar identifies Gompers as the source of its anti-commodity language based on Gompers's relationship with Ingram and the British Trade Union Congress and later drafting of the International Labor Organization's Charter, setting as the organization's "guiding principle . . . that labour should not be regarded merely as a commodity or article of commerce."[214]

Congressional debates of the Clayton Act's "commodity" language mirrored this literature. The House first put forward section 6 of the Clayton Act without any reference to labor as a "commodity or article of commerce."[215] In House debates, Congressman Robert Henry (D-TX), the Rules Committee Chair, framed his view of the bill in anti-commodity terms, arguing that Congress "never intended that the [antitrust] law should apply to labor organizations" because "it was never intended that the man who sells his labor . . . should be classed as conspiring against trade or in unlawful combinations."[216] Congressman David Lewis (D-MD), a former coal miner and expert on social insurance legislation, echoed these sentiments, contending that "there is this distinction between labor and a barrel of oil, a commodity: Labor is never in truth a commodity."[217]

Progressive leader Senator Albert Cummins (R-IA) amended the House bill that introduced section 6's opening language declaring that the "labor of a human being is not a commodity or article of commerce."[218] Cummins represented Iowa Grange Movement farmers in antitrust

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213. See Frankfurter & Greene, The Labor Injunction, supra note 183, at 142.

214. See Paul O'Higgins, "Labor Is Not a Commodity"—An Irish Contribution to International Labour Law, 26 Indus. L.J. 225, 229 (1997) (alteration in original) (quoting Peace Treaty of Versailles, June 28, 1919, art. 427, https://wwi.lib.byu.edu/index.php/Articles_400_-_427_and_Annex [https://perma.cc/N6LK-YSKT] (last visited Oct. 11, 2024) (internal quotation marks omitted)).

215. 51 Cong. Rec. 9538 (1914) ("That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of . . . labor . . . organizations, orders, or associations instituted for the purposes of mutual help . . . ; or to forbid or restrain individual members of such organizations . . . from carrying out the legitimate objects thereof . . . .").

216. 51 Cong. Rec. 9540–67 (statement of Rep. Henry).

217. Id. at 9565 (statement of Rep. Lewis). These sentiments were echoed by many. See, e.g., id. at 9672 (statement of Rep. Buchanan) (noting the "difference between commodities and living human beings"); id. at 9559 (statement of Rep. Casey) (arguing that "[l]abor power [cannot] be property"); id. at 9173 (statement of Rep. Sherwood) ("Labor power is not property, because it [cannot] be separated from the laborer."); 48 Cong. Rec. 6446 (1912) (statement of Rep. Wilson) ("[T]he assumption . . . that man is property[] [is] an assumption repugnant to . . . all civilized communities . . . ."); id. at 6457 (statement of Rep. Graham) ("Property rights are getting too much recognition at the expense of human rights, and this bill is simply an attempt to get back to where Abraham Lincoln would have us . . . .").

218. See 51 Cong. Rec. 14,546 (statement of Sen. Cummins) (amending what was at the time section 7).

litigation against a barbed wire trust before serving as a reform governor and seeking the 1912 Republican Presidential nomination as a Progressive "insurgent."[219] He served on both the Judiciary Committee that prepared the Clayton bill and the Commerce Committee, where he was a chief sponsor of the Federal Trade Commission (FTC) Act.[220] As early as 1911, Cummins testified that antitrust should address both economic *and* "sociological" "object[s] of danger," noting "the desirability of having as many men as possible who are their own masters, rather than having a few masters and a good many employees."[221] Cummins's statement introducing the introductory language sounded in Republican "free labor" ideology:

> Society has the right to regulate the sale and the transportation of the thing produced, but society has no right . . . to say that a man who has the capacity to work shall work. He is free to either work or to abstain from working. He is free to persuade others to abstain from working. The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, . . . shall not be reckoned to be within a statute which is intended to prevent restraints of trade . . . . [M]y [amendment] recognizes the high quality of labor, distinguishes the power . . . of the human being to render service to his fellow men from the commodity which may be produced through that service.[222]

Senator Hamilton Lewis quoted Senator Sherman's 1890 Senate address calling to "allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which . . . their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side."[223] Progressive Senator and

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219. See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 81–84 (2003) (describing Cummins's rise to fame and political trajectory); see also Benjamin Gue, History of Iowa 64–65 (1903) (same).

220. See Winerman, supra note 219, at 69, 81–88 (discussing Cummins's views on the FTC Act).

221. See 2 Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearing on S. Res. 98 Before the S. Comm. on Interstate Com., 62d Cong. 1584 (1913) (statement of Sen. Cummins, Member, S. Comm. on Interstate Com.).

222. 51 Cong. Rec. 14,585–86 (statement of Sen. Cummins).

223. See id. at 14,587 (statement of Sen. Lewis (quoting 21 Cong. Rec. 2728 (1890) (statement of Sen. Sherman))).

Wilson ally John Kern (D-IN) explicitly connected the "commodity" view of labor to slavery and derided related strains of economic thought, placing into the record a "very well-considered and able" 1914 editorial from *The Outlook* "on the subject of 'Trust laws and labor'":

> The whole question whether labor unions should come under the operations of the antitrust law rests upon the question whether labor is merchandise or not. From the point of the slave holder, . . . labor is merchandise . . . . From the point of view of some economists, labor is regarded as a commodity which, like potatoes, or steel . . . is offered by the owner in the highest market and sought by the buyer in the lowest market . . . . This view of labor as a commodity is rightly becoming obsolete. Slavery is no longer countenanced among civilized people. . . . With the abandonment of that idea must be abandoned the idea of labor as a commodity, for labor consists of human beings . . . . Since the antitrust law does not recognize the difference, Congress ought to amend the law.[224]

While Senator William Borah (R-ID) raised concerns that the language could preclude Congress from enacting protective labor legislation under the Commerce Clause, it was ultimately amended to the House bill and passed.[225] It was a milestone that marked the first and only time Congress exempted conduct from antitrust enforcement on grounds that it was not properly viewed as "an article of commerce" subject to market forces as a "commodity."[226]

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224. Id. at 14608–09 (statement of Sen. Kern). *The Outlook* (1867–1935) was an influential Progressive weekly that included Theodore Roosevelt as a Contributing Editor. See Hazel Dicken-Garcia, Journalistic Standards in Nineteenth-Century America 253 (1989) (providing a general overview of the journal's history); Roosevelt Begins Work as an Editor, N.Y. Times, Mar. 5, 1909, at 5 (discussing Theodore Roosevelt's "new post as associate editor of The Outlook"). The editorial was likely drafted by Lyman Abbott, then-Editor-in-Chief, an advocate of industrial democracy who gave the funeral address at economist Henry George's funeral. See Lyman Abbott, Address of the Rev. Lyman Abbott, D.D., *in* Addresses at the Funeral of Henry George 25–30 (Edmund Yardley ed., 1905); Lyman Abbott, Industrial Democracy, *in* 9 Forum 658–69 (Lorettus S. Metcalf ed., New York, The Forum Publishing Co. 1889) ("[A]s slavery gave place to serfdom and serfdom to the wages system, so in time the wages system will give place to industrial democracy.").

225. See 51 Cong. Rec. 14,591, 14,610. This concern echoed broader worries about sourcing labor protections in Congress's Commerce Clause as opposed to Thirteenth Amendment authority. See generally Pope, Thirteenth Amendment, supra note 34 (discussing constitutional sourcing debates for labor legislation in the Commerce Clause and Thirteenth Amendment, respectively); Pope, Labor's Constitution, supra note 34 (same).

226. See 51 Cong. Rec. 14,591 (statement of Sen. Borah) ("[The House bill] is a declaration upon the part of Congress that labor is not a commodity *or* an article of commerce." (emphasis added)).

The Clayton Act's passage inaugurated broader federal efforts to protect workers and worker organizing, from the first War Labor Board,[227] National Railroad Adjustment and Mediation Boards,[228] NIRA labor codes and unionization protections,[229] to the NLRA[230] and the Fair Labor Standards Act (FLSA),[231] all of which established boards and commissions that either directly regulated wages and labor standards or facilitated and supervised workers' collective bargaining with employers over the same.[232]

Expanding workers' collective rights in a growing administrative state was meant to displace judicial jurisdiction over labor disputes to correct two equally important errors: (1) *substantive*—judicial deviation from an emerging consensus favoring wage determination through collective bargaining rather than market competition and (2) *methodological*—judicial reliance on abstract rather than evidence-based, social scientific reasoning in adjudicating labor disputes. Reformers' battle against the courts escalated soon after the Clayton Act's passage. In *Duplex Printing Press Co. v. Deering*, the Supreme Court narrowly interpreted the Clayton Act's labor exemption to uphold an injunction of a union's secondary boycotts of their employer's distributors and customers.[233] The decision mobilized more support for Congress to restrain the courts. Labor movement leaders resisted judicial injunctions on constitutional grounds, arguing that the Thirteenth Amendment limited courts' equitable jurisdiction "to protect property when there is no remedy at law" because labor could not be "property"[234]—the AFL's proposed anti-injunction bill

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227. See Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 14, 1942).

228. See Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (codified at 45 U.S.C. §§ 153–154 (2018)).

229. See National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

230. See National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169 (2018)).

231. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219).

232. See Hiba Hafiz, Structural Labor Rights, 119 Mich. L. Rev. 651, 664–73 (2021) [hereinafter Hafiz, Structural Labor Rights] (relating the NLRA's equal bargaining power purpose); see also Kate Andrias, An American Approach to Social Democracy, 128 Yale L.J. 616, 650–93 (2019) (same). For a summary of these federal efforts, see Hiba Hafiz, Why a "Whole-of-Government" Approach is the Solution to Antitrust's Current Labor Problem, ProMarket (Nov. 18, 2021), https://www.promarket.org/2021/11/18/antitrust-monopsony-government-labor/ [https://perma.cc/2KV9-V4DA] [hereinafter Hafiz, Whole-of-Government Approach] (describing the history of government commissions to regulate wages and labor standards).

233. See 254 U.S. 443, 471 (1921) (reading the labor exemption narrowly because it "imposes an exceptional and extraordinary restriction upon the equity powers of the courts" and because a broader reading "would violate rules of statutory construction"), superseded by statute, National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, as recognized in Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

234. See, e.g., Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 112–20, 202–12 (2022) (describing the constitutional stakes of labor resistance between Reconstruction and the

stated: "[N]othing shall be held to be property unless it is tangible and transferable."[235] The labor movement demanded policy recognition of workers' freedom of association and rights to withdraw their labor, and they deployed social scientific justifications to protect their collective action based on employers' unequal bargaining power.[236] The Supreme Court was not far from conceding this position—after *Duplex Printing*, the Court partially overturned state labor strike bans and labor injunctions on grounds that workers' concerted activity was deemed "essential to give laborers opportunity to deal on equality with their employer."[237]

But for reformers, those decisions did not go far enough. Progressive lawyers and social scientists—including Felix Frankfurter, Edwin Witte, Francis Sayre, Donald Richberg, and Herman Oliphant—sought new legislation to strip courts of equitable jurisdiction over labor disputes, prohibit certain employer conduct, and state a clear labor policy to guide and constrain judicial labor market regulation.[238] In what became the Norris–LaGuardia Act, Frankfurter, Witte, Sayre, Richberg, and Oliphant drafted a new federal labor policy in the antitrust laws, centered on an

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New Deal); Forbath, New Deal Constitution, supra note 195, at 186–202 (describing the history of workers' constitutional resistance against legal and jurisprudential characterization of their labor as employers' "property"); Pope, Thirteenth Amendment, supra note 34, at 12–46 (describing Thirteenth Amendment arguments against labor injunctions in the period before the New Deal); Pope, Labor's Constitution, supra note 34, at 962–77 (explaining "[l]abor's claim to a constitutional right to strike" and telling the story of Alexander McWhirter Howat, a union leader who was jailed in 1921 for defying a labor injunction).

235. See Frankfurter & Greene, Labor Injunction, supra note 183, at 279 (reprinting text of S. 1482).

236. See, e.g., Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York, May 28, 1920, at 15 (1920) (recording Gompers arguing that workers' ability to counter employer power merely through quitting rather than collective action was "subterfuge," and asking "just imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel Corporation"); J.W. Walker, Only Worker Suffers, Workers Chron. Apr. 29, 1921, at 3 (denouncing the asymmetry in bargaining position between workers and employers and arguing that organizing and striking are the only ways to put workers and employers "on a parity").

237. See Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921); see also Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 540 (1923) ("[The worker] is forbidden [by the Industrial Court Act] to strike . . . and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.").

238. See Frankfurter & Greene, The Labor Injunction, supra note 183, at 280–81 (reprinting S. 1482, Frankfurter and others' proposed anti-injunction bill whose labor policy language was adopted in the Norris–LaGuardia Act); Edwin Witte, The Government in Labor Disputes 274–75 (1932) (recounting the Norris–LaGuardia Act's legislative history); see also Phillips-Sawyer, supra note 55, at 687–88 (stating that Senator George Norris invited Frankfurter, Oliphant, and others "to draft a new federal anti-injunction bill," which resulted in a bill "codifying a procedural approach to the problem of industrial disputes"); Pope, Thirteenth Amendment, supra note 34, at 36–46 (describing the political maneuvering of Senator Norris and his committee of social scientists, which led to the passage of the Norris–LaGuardia Act).

institutionalist understanding of employer power and justifying jurisdiction-stripping as a means of protecting the rise of labor market institutions that were better equipped to set the terms of the employment bargain:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.[239]

The Act prohibited coercive yellow-dog contracts and the exercise of court jurisdiction over labor matters that would contravene its stated public policy.[240] Progressive and institutional economists and lawyers drafted this language with the conviction that labor deserved "more than the rhetoric of abstractions" courts used to justify labor injunctions.[241] In lieu of those abstractions, the Norris–LaGuardia Act's policy statement reflected "a belief widely entertained by economists as well as by workers, and frequently acted upon by employers themselves, that the workmen engaged in every division of a single industry are bound by a common

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239. 29 U.S.C. § 102 (2018). For more on Frankfurter's, Oliphant's, Richberg's, Sayre's, and Witte's roles in drafting the Norris–LaGuardia Act, see Irving Bernstein, The Lean Years: A History of the American Worker, 1920–1933, at 397–403 (1960) [hereinafter Bernstein, Lean Years] (describing the drafting of the Norris–LaGuardia Act by Frankfurter, Richberg, Oliphant, Sayre, and Witte in 1928); William E. Forbath, Law and the Shaping of the American Labor Movement 163–64 (1991) (describing the legislative history of the Norris–LaGuardia Act); Ernst, Yellow-Dog Contract, supra note 30, at 271–72 (detailing Richberg's role in drafting the Norris–LaGuardia Act along with Frankfurter, Oliphant, Sayre, and Witte); Robert Gorman & Matthew Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 333–35, 337–38 (1981) (detailing the drafting of the Norris–LaGuardia Act and internal policy debates between Frankfurter, Oliphant, Richberg, Sayre, and Witte).

240. See 29 U.S.C. §§ 101, 103.

241. See Felix Frankfurter & Nathan Greene, Congressional Power Over the Labor Injunction, 31 Colum. L. Rev. 385, 405–06 (1931).

economic bond."[242] That common bond extended from workers' unequal bargaining power based in part on legal and governmental sanctioning of the corporate form which precluded unorganized workers' actual liberty to contract in an arm's-length market exchange.[243] Given that reality, the Act's policy centered uncoerced collective assertions of worker demands as the best means of establishing "acceptable terms and conditions of employment."[244]

* * *

Progressive Era legal debates fundamentally shifted the parameters of labor market regulation. And they did so not merely by centering the documentation and empirical assessment of economic workplace realities in legislative discussions but also by "institutionalizing" policy mechanisms Progressives believed could temper the existence and adverse effects of employer power relative to individual unorganized workers. The culmination of these new foundations of legal and regulatory thought were the Clayton and Norris–LaGuardia Acts. While these statutes restrained judicial injunctions against workers' strikes against their direct employers—conduct that received more protection with the NLRA's enactment—they failed to prevent persistent judicial narrowing of workers' entitled protections to organize and strike under the judicial "'non-statutory' labor exemption."[245] Perhaps even more surprising is the extent to which Congress's recognition of employer power in those Acts had no impact on antitrust enforcement or policy with regard to *employers*. In their century-long enforcement record, antitrust enforcers, with very limited exceptions, never targeted enforcement to challenge employer power that harmed workers.[246]

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242. See id.

243. See 29 U.S.C. § 102 (noting that under "prevailing economic conditions," the individual worker is "commonly helpless to exercise actual liberty of contract and to protect his freedom of labor").

244. Id.

245. See, e.g., Hiba Hafiz, Labor Antitrust's Paradox, 86 U. Chi. L. Rev. 381, 385–88 [hereinafter Hafiz, Labor's Antitrust Paradox] (2018) (describing judicial interpretations of the Clayton and Norris–LaGuardia Acts through a nonstatutory exemption); Phillips-Sawyer, supra note 55, at 697–99 (same); Pope, Labor's Constitution, supra note 34, at 987 (describing the judicial nullification of the Clayton Act's labor exemption); Theodore St. Antoine, *Connell*: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603, 606, 617–18, 618 n.64 (1976) (describing the nonstatutory exemption's doctrinal evolution).

246. See Posner, How Antitrust Failed Workers, supra note 16, at 13 ("While antitrust law . . . nominally applied to *all* markets—labor markets as well as product markets—antitrust enforcement would focus almost exclusively on product markets."); Hafiz, Labor Antitrust's Paradox, supra note 245, at 388–91 ("The recent focus of attention on the anticompetitive effects of employer buyer power has prompted calls for aggressive labor-antitrust enforcement and even incorporation of work-law violations into antitrust liability analysis against employers."); Ioana Marinescu & Eric A. Posner, Why Has Antitrust Law

Until now.[247] Enforcers' new attention to employers' anticompetitive conduct has transformed the antitrust landscape, raising a range of doctrinal and policy questions regarding how to adapt antitrust law to the new labor market context. But little attention has yet been paid to the question of whether entirely new methods and goals should be applied in this setting in light of Congress's labor and wage policy enacted in the labor exemptions. In expanding antitrust enforcement to labor markets, enforcers have applied the same methods used to target the harms of anticompetitive conduct in markets for commodities—product markets—rather than methods uniquely amenable to labor markets. And the tools applied to assess employers' conduct, and employers' market power more generally, have been precisely the tools Progressives and institutional economists inveighed against: marginalist analysis to detect employer power over wages that deviates from a presumption of perfect competition. Part II describes the history and rise of these methods, their recent deployment in labor markets, and the extent to which enforcers have returned to a presumption of labor as a commodity in estimating and targeting employer power and conduct in violation of the law.[248]

II. THE NEW LABOR ANTITRUST AS LABOR COMMODIFICATION

Recent antitrust enforcement and policy challenging employers' anticompetitive conduct in labor markets has launched a new regulatory arena for worker protection. But it did not emerge on a clean slate. In applying antitrust law to employers, enforcers must contend with over a century of antitrust doctrine and precedent shaped nearly exclusively by enforcement in *product* markets, where courts have primarily focused on price and output effects in commodity sales to consumers.[249] Enforcers are also tethered to methods they developed to prove liability and harm in those markets by evidentiary doctrine and institutionalized economic expertise.[250] Expert testimony used to prove market power and its adverse effects has drawn exclusively from neoclassical industrial organizations

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Failed Workers?, 105 Cornell L. Rev. 1343, 1375–82 (2020) [hereinafter Marinescu & Posner, Has Antitrust Failed Workers?] (exploring why "labor monopsony cases are rare").

247. See infra section II.B (describing recent enforcement in labor antitrust cases).

248. By "enforcers," this Article refers to both public and private enforcers, including public and private litigators as well as the courts.

249. See Posner, How Antitrust Failed Workers, supra note 16, at 34–45 ("Because there is more product-side litigation than labor-side litigation, there is more product-side case law, and thus product-side outcomes are easier to predict."); Hafiz, Labor Antitrust's Paradox, supra note 245, at 391–404 (presenting "the range of employers' procompetitive justifications of, and defenses to, labor market restraints and the resulting challenges labor antitrust faces under the consumer welfare standard").

250. See, e.g., Elizabeth Popp Berman, Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy 72–95, 129–41 (2022) ("[A] feedback loop between enforcement actions and court decisions institutionalized economic reasoning as the only legitimate lens through which policy could be pursued.").

(IO) economics (with a recent incorporation of game theory and behavioral theory), focusing on models that seek to discern whether a seller of goods marginally raised (or lowered, in the case of a buyer) prices or reduced output above or below a competitive market equilibrium. The admissibility and weight of economic expert testimony have survived judicial review countless times, and judicial admission of and factfinder reliance on that testimony has established decades of precedent that both eases and complicates subsequent enforcement. Enforcement is easier for those trained in and able to bear the costs of these methods as well as for courts that have developed expertise in and relied on them to make their decisions appeal-proof. But that precedent burdens those seeking to establish economic power and its resulting harms—workers who are often unfamiliar with or cannot afford costly economic experts or seek to establish coercive power through alternative methods and theories.[251] Neoclassical IO methods are not just persuasive in antitrust administration. They are institutionalized through agency and interagency practice, personnel hiring, and contracting arrangements with experts in the Department of Justice (DOJ) Antitrust Division's Chief Economist and Expert Analysis Group, the Bureau of Economics at the FTC, and leading expert shops hired to prove that complex economic transactions amount to antitrust violations.[252]

This Part lays out the methodological and procedural infrastructure that the New Labor Antitrust inherited from a legacy of IO-based antitrust enforcement in product markets. It explains how the application of these methods to labor markets contravenes the labor policy of the Clayton and Norris–LaGuardia Acts and is inapt for adequately tackling the harms of employers' exercise of buyer power over workers. Specifically, it argues that extending prior methods and proof structures to labor markets mistakenly dismisses the nature and extent of employer power and erroneously establishes competitive wage-setting as a benchmark and goal of enforcement. First, current approaches do not assume, as the statutes require, that corporate employers presumptively have buyer power and harms to workers' countervailing leverage are of primary policy concern. Instead, they assume a default of perfect competition in labor markets that requires enforcers, in all cases beyond naked price-fixing and market allocation agreements, to *prove* employer power resulting in competition-

251. See, e.g., Jesse Eisinger & Justin Elliott, These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers, ProPublica (Nov. 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers [https://perma.cc/D2ZW-EDH8] (explaining the costs of economic expertise).

252. See Popp Berman, supra note 250, at 24 (explaining how macroeconomic theories of reasoning were incorporated into institutions); Hiba Hafiz, Economic Analysis of Labor Regulation, 2017 Wis. L. Rev. 1115, 1140–48 [hereinafter Hafiz, Economic Analysis] (outlining agencies' "strategies and approaches to conducting and integrating economic analysis" into their "regulatory functions").

based harms for liability to attach. Second, in detecting employer power, current methods benchmark the "market price" of labor to detect wage deviations rather than assume that wage-setting through institutions—like institutions of collective bargaining—offers the best benchmark of labor's contributions and value to production against which to evaluate employers' ability to suppress compensation or slow compensation growth. Enforcers measure harms and orient remedies towards correcting deviations from competitive wage-setting rather than measuring and remedying employer chilling of worker organizing, institution-building, and exercise of countervailing power to achieve collectively bargained employment conditions. The Part concludes by critiquing the application of current methods as a matter of law and policy, arguing that they undercount the presence and effects of employer power and limit the nature and scope of appropriate remedies for employer violations.

A. *Antitrust's Economic Turn and Proving Employer Power*

Congress's ban on regulating labor as a "commodity"—and its deeper understanding of the harms of competitive wage-setting that informed that ban—stands in stark contrast to labor antitrust's current, exclusive focus on promoting labor market competition.[253] But deviation from Congress's labor policy in the Clayton and Norris–LaGuardia Acts is longstanding, beginning with antitrust enforcers' selective enforcement against labor but not employers.[254] After Congress enacted the labor exemption, antitrust enforcers continued targeting strikes and established a special labor office in the DOJ's Antitrust Division to centralize its anti-union enforcement.[255] Meanwhile, the agencies never targeted employer monopsony, coordination, or other anticompetitive conduct.[256] This occurred despite economists' concerns, during and after the labor exemptions' enactment, about workers' unequal bargaining power with employers, employers' use

253. See, e.g., Exec. Order No. 14,036, 86 Fed. Reg. 36,987 §§ 1–2 (July 9, 2021) [hereinafter, E.O. 14,036] ("Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions.").

254. See supra note 183 and accompanying text.

255. See Corwin D. Edwards, Thurman Arnold and the Antitrust Laws, 58 Pol. Sci. Q. 338, 346–48 (1943) (providing a history of the DOJ's Antitrust Division's labor program); see also supra note 183 and accompanying text.

256. The record of antitrust enforcement between 1890 and 1930 reveals no enforcement action against employers, and on the contrary, while antitrust enforcement was generally weak, it was predominantly deployed against workers' combinations; three-quarters of antitrust prison terms were imposed against labor. See Walton Hamilton & Irene Till, Antitrust in Action, U.S. Temp. Nat'l Econ. Comm. Monograph No. 16, at 25–101, apps. A, B, G (1940) (listing antitrust enforcement actions between 1890 and 1930); Marc Allen Eisner, Antitrust and the Triumph of Economics 52 (1991) (discussing early antitrust enforcement against labor unions); Frankfurter & Greene, The Labor Injunction, supra note 183, at 47–53, 231–49 (collecting and analyzing federal court injunctions against worker combinations between 1890 and 1930).

of harmful restraints in employment contracts, and employers' rampant coordination on "common policies with reference to employe[e]s."[257]

Professor Eric Posner hypothesizes that the reason antitrust agencies neglected enforcement against employers was their reliance on the "traditional assumption of economists that labor markets are competitive," but "had [economists] been consulted," they "would have been of little help" because they "have until recently given this topic little attention."[258] While this is partly true with regard to neoclassical economists' assumptions in the post-war period,[259] it is an incomplete account of the history of economic thought on imperfect labor market competition.[260] It also ignores a robust tradition since the Progressive Era of economists and lawyers directly regulating employer power through administrative policymaking and enforcement in recognition of imperfect labor market competition.[261] Economists—particularly Progressive and labor economists—advocated for and designed commissions and agencies to administer labor and wage regulations to protect against employers' unilateral wage-setting and dangerous working conditions that contributed to disruptive strikes from the 1890s onward.[262] Their views of employer power informed their active involvement in wage regulation and efforts to equalize bargaining power through federal wage boards from World War I through the Nixon Administration, and they informed the 1935 founding of the NLRB's Division of Economic Research through its General Counsel's aggressive briefing on workers' relative bargaining power in the 1980s.[263]

So there is a more complex story here. This section recounts the deeper enforcement history that led to the operative assumption in the

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257. See, e.g., Seager, Trade Unions, supra note 122, at 449.

258. See Posner, How Antitrust Failed Workers, supra note 16, at 37–40.

259. See, e.g., id. at 36 ("Postwar economists assumed that labor markets were reasonably competitive, and accordingly that labor market power was not an important social problem."); Paul A. Samuelson & William D. Nordhaus, Economics 41–44, 771–73 (13th ed. 1989) (highlighting that only "[a]fter two centuries of experience and thought" do "we now recognize the scope and realistic limitations of [the 'invisible hand'] doctrine"); David Card, Who Set Your Wage?, 112 Am. Econ. Rev. 1075, 1076–77 (2022) ("[B]y the 1970s the standard graduate-level textbooks in microeconomics theory . . . chose to give only a brief discussion of market power in output markets, and to complete[ly] ignore monopsony.").

260. See supra notes 67, 108 and accompanying text.

261. See supra section I.A.1.

262. See supra section I.A.1.

263. See Hafiz, Economic Analysis, supra note 252, at 1119–29 (discussing the creation of the NLRB Division of Economic Research and explaining that the Division was "stripped of its funding and, in a little noticed Congressional measure, banned from resurfacing by the Taft-Hartley Amendments to the NLRA"); Hafiz, Structural Labor Rights, supra note 232, at 671–72 (describing studies of unequal bargaining power in labor markets produced by the NLRB Division of Economic Research and the impact of those studies on "Board enforcement and adjudication").

New Labor Antitrust that: (1) Employer power is something enforcers cannot presume but must *prove* in all cases (except wage-fixing); (2) proof of such power can only be demonstrated through a neoclassical marginalist analysis of infracompetitive wages relative to an ideal competitive market; and (3) antitrust can only be utilized to remedy competition-based harms and infracompetitive employment outcomes.

1. *Regulation of Employer Power Before the New Deal.* — Following Congress's enactment of the Clayton and Norris–LaGuardia Acts, the antitrust agencies neither quantified nor analyzed employer power.[264] The contemporary judicial and regulatory context made their regulation of employer power less likely.[265] The antitrust agencies were weak, courts were generally hostile to analyzing employer-worker bargaining power, and *other* administrative agencies whose core mandates were expert-led regulation of employer power were gaining ground.[266]

Before the 1950s, the DOJ's Antitrust Division and the FTC had limited resources and primarily relegated economic expertise to nonenforcement data collection and analysis.[267] When the FTC's Economic Division opened its doors in 1914, it inherited economists from the Roosevelt Administration's Bureau of Corporations with a decade of expertise devising industrial policy and investigating the organization, conduct, and management of business associations.[268] But those economists were isolated from the FTC's litigation division.[269] The lack of internal personnel expertise in labor markets meant that litigators lacked robust social scientific analysis of how labor market competition worked,

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264. See, e.g., Posner, How Antitrust Failed Workers, supra note 16, at 37–38 (discussing the absence of antitrust agency enforcement against employers).

265. See supra sections I.A.2–I.B.

266. For examples and discussion of judicial hostility, see, e.g., Nat'l Lab. Rels. Bd. v. Ins. Agents' Int'l Union, 361 U.S. 477, 490 (1960) ("[Our labor policy] does [not] contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union."); Hafiz, Structural Labor Rights, supra note 232, at 684–86 ("[C]umulative [NLRB] and court rulings . . . create[d] an unbalanced bargaining process favoring employers' bargaining leverage relative to unions and organizing workers.").

267. See Eisner, supra note 256, at 47–89 (summarizing the early history of the DOJ Antitrust Division and the FTC).

268. See id. at 59 ("In large part, the FTC was an extension of the Bureau of Corporations, created under Roosevelt's direction as part of the Department of Commerce and Labor in 1903."); William Letwin, Law and Economic Policy in America 240–54 (1965) (describing the development of antitrust law and policy through Roosevelt's Bureau of Corporations).

269. See Eisner, supra note 256, at 59 (discussing the organization of the FTC at its creation); see also Berk, supra note 81, at 122–48 (discussing the development of institutional expertise at the FTC in cost accounting and the supervision of trade agreements); W. Stull Holt, The Federal Trade Commission: Its History, Activities and Organization 25–31 (1922) (describing "the economic activities of the commission" and characterizing them as "for the most part . . . entirely distinct from the other work of the commission").

let alone with regard to employer power.[270] Further, the agencies lacked the political will and capacity to make coherent antitrust policy and select cases based on established criteria, not least as against employers, so attorneys primarily focused on narrow, easy cases, relegating substantive policy to the courts.[271] As the nation hurtled from recessions to depression, the agencies' labor priority became stabilizing industry from strikes to ensure continued production, using administrative enforcement power to, on the one hand, protect employer collusion with regard to a continued labor supply, and on the other, enjoin strikes in relatively straightforward per se cases against workers' coordination.[272] Courts were generally hostile to labor, continued to uphold antitrust challenges to worker coordination, and primarily adopted a formalist approach that viewed the employment relationship as a transaction between equals best regulated by the market.[273] When the DOJ challenged a glass manufacturers' labor market allocation agreement, the Supreme Court held it did not violate the antitrust laws.[274]

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270. See Eisner, supra note 256, at 71–75 ("The Budget Bureau identified the isolation and the insufficient strength of the economics staff as one of the critical problems.").

271. Id. at 47 (describing the antitrust agencies' limited capacities and "lack[] [of] mechanisms for planning and selecting cases," resulting in "a preoccupation with trivial cases that could be won with relative ease").

272. For the agencies' persistent use of the labor injunction, see supra note 245 and accompanying text. Antitrust law analyzes conduct under one of two review standards: the per se rule and the rule of reason. Conduct that is per se unlawful—price-fixing, bid-rigging, market allocation agreements, and horizontal boycotts—is easier to establish because it does not require enforcers to define a market or prove market power, violative intent, or anticompetitive effects. Conduct analyzed under the rule of reason—unlawful monopolization, mergers, vertical restraints, and other anticompetitive conduct—requires establishing a relevant market, market power, anticompetitive effects, and either a balancing or less restrictive alternative to the conduct's procompetitive benefits. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007) (summarizing the legal standard established for evaluating conduct that violates the Sherman Act under the "rule of reason"); C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law, 116 Colum. L. Rev. 927, 938 (2015) (same); Herbert Hovenkamp, The Rule of Reason, 70 U. Fla. L. Rev. 81, 91–92 (2018) (same).

273. See Bernstein, Lean Years, supra note 239, at 190–243 (describing judicial hostility toward labor in the 1920s); Frankfurter & Greene, The Labor Injunction, supra note 183, at 79–80 (stating that labor unions often did not fight injunctions they felt were issued by judges who were "hostile to [sic] organized labor" (internal quotation marks omitted) (quoting Report of Seventh Vice President Ames, 21 Machinists' Monthly J. 816, 816 (1909)) (misquotation)); Hafiz, Structural Labor Rights, supra note 232, at 673–88 ("Through narrow interpretation of the non-statutory exemption, the Supreme Court significantly restructured workers' bargaining leverage, limiting their lawful coordinated action outside of single-firm bargaining."); Klare, supra note 42, at 304 (discussing *NLRB v. Sands Manufacturing Co.*, which was an example of Supreme Court jurisprudence that "relied on a highly formalistic and contractualist reading of the [NLRA] to legitimize the inequalities of bargaining power arising from the unequal social distribution of property ownership").

274. Nat'l Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 413 (1923) ("[W]e see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men.").

While the antitrust agencies neglected enforcement against employers, an increasing array of administrative agencies and commissions were created to regulate terms and conditions of work, from labor commissions enforcing state maximum-hour, minimum-wage, and other protections (1837–1887), to the ICC (1887–1996), and with the start of World War I, the Commission on Industrial Relations (1915), the War Industries Board (1917–1919), National Mediation Commission (1917), U.S. Railroad Administration (1917–1920), War Labor Policies Board (1918), the Federal Wage Commission (1918), National War Labor Board (1918–1919), National Industrial Conference (1919), and the Railway Labor Act's National Mediation and National Railroad Adjustment Boards (authorized in 1926).[275] These agencies directly intervened in (or mediated) the employment bargain between workers and employers in the most prominent industries nationwide, promoting and facilitating collective bargaining, establishing shop committees to collectively bargain in non-unionized workplaces, arbitrating labor disputes, and establishing industry-wide "labor codes" providing for an eight-hour day, minimum wage, overtime pay, and wage differentials.[276] Between 1917 and 1920, the federal government nationalized the railroad industry—the industry that employed by far the most workers of all the industries in the country—creating the U.S. Railroad Administration that set labor and wage standards for over 1.5 million workers.[277] The Administration established an eight-hour workday, provided raises that gave the lowest-paid workers the highest-percentage increases, required equal pay for equal work, and mandated overtime and holidays.[278] When railroad workers were asked in

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275. See 3 Dorfman, supra note 79, at 49–65 (describing institutionalists' impact in government from 1890 to the interwar period, including through devising labor legislation and serving in agencies and on commissions); Lewis L. Lorwin & Arthur Wubnig, Labor Relations Boards: The Regulation of Collective Bargaining Under the National Industrial Recovery Act 3–49 (1935) (discussing the development of the National War Labor Board and the War Labor Policies Board); Hafiz, Whole-of-Government Approach, supra note 232 (discussing several agencies that Congress created to regulate labor in the first half of the twentieth century); see also supra notes 227–231.

276. See Lorwin & Wubnig, supra note 275, at 8–25, 45–46, 291–324, 332–35 (describing administration of NIRA's labor codes, the National Labor Board, and the first National Labor Relations Board by industry).

277. See Robert B. Matchette, Anne B. Eales, Lance J. Fischer, Brenda B. Kepley & Judith A. Koucky, Records of the U.S. Railroad Administration, *in* 1 Guide to Federal Records in the National Archives of the United States 14.1–.10 (1995) (collecting the records of the U.S. Railroad Administration, including its promulgated labor and wage standards).

278. See Marver H. Bernstein, Regulating Business by Independent Commission 16–52 (1955) (providing an overview of public regulation of business between 1887 and 1920); Douglas B. Craig, "Don't You Hear all the Railroad Men Squeak?": William G. McAdoo, the United States Railroad Administration, and the Democratic Presidential Nomination of 1924, 48 J. Am. Stud. 777, 782–84 (2014) (detailing wage increases enacted by the USSRA in 1918); Mary Van Kleeck, Federal Policies for Women in Industry, 81 Annals Am. Acad. of Pol. & Soc. Sci. 87, 87–89 (1919) (describing federal regulatory standards for contractors,

1918 whether to keep the industry nationalized, over 300,000, or 99.5% of those voting, voted in favor.[279]

While the government's support of workers varied by industry and conflict, government administrators gained significant experience documenting, analyzing, and negotiating over the "science" of wage-setting and labor standards compliance, all while learning about the extent and risks of employer power and the proportion of labor costs to profits in leading industries.[280] While this extensive regulatory apparatus likely did not reach employer monopsony and conduct outside major industrial production sites, it brought firms that drove the majority of production within the reach of direct government regulation of wages and standardized working conditions, fundamentally transforming the labor movement and fortifying labor's ranks to double its union membership—reaching 5 million unionized workers—by the end of the war.[281]

2. *Regulating Employer Power Between the New Deal and Post-War Period.* — Between the New Deal and World War II, regulation of employer power came under the purview of new regulatory regimes and administrative agencies, including, most importantly, the 1933 NIRA's industry and labor code boards, the 1935 NLRA's NLRB, and the 1938 FLSA's wage-regulating industry committees, or wage boards.[282] The NIRA established the first federal labor protections for collective bargaining and

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including "the eight-hour day, prohibition of night work, one day of rest in seven, a minimum wage based on the cost of living, and equal pay for women doing the same work as men").

279. See Colin J. Davis, Power at Odds: The 1922 National Railroad Shopmen's Strike 44 (1997) (describing the outcome of a shopmen vote on "the advisability of government control or ownership of the railroads"); Demands of Railway Labor Unions, 10 Current Hist. 445, 445–46 (1919) (describing "a scheme of railway nationalization" known as the Plumb Plan).

280. The sheer amount of work performed in commissions, committees, administrations, and agencies during this period on the economics of wage-setting is too vast to cite here. For useful sources documenting the history of government investigation and regulation of wage-setting, see generally Irving Bernstein, The New Deal Collective Bargaining Policy (1950) (describing the evolution of federal collective bargaining policy from the NIRA and Railway Labor Act to the NLRA); Elma B. Carr, The Use of Cost-of-Living Figures in Wage Adjustments (1925) (summarizing the workings of federal, state, and municipal agencies and commissions in regulating wages and labor standards before 1925); Gerald G. Eggert, Railroad Labor Disputes: The Beginnings of Federal Strike Policy (1967) (describing the administration of wage and labor standard regulation by government commissions and agencies in the railroad industry); Joseph P. Goldberg & William T. Moye, DOL, The First Hundred Years of the Bureau of Labor Statistics (1985) (describing the history and use of Bureau of Labor Statistics data in government wage regulation); Lorwin & Wubnig, supra note 276 (describing the history of twentieth-century labor boards before the passage of the NLRA); see also supra notes 130–131.

281. See Brody, supra note 84, at 12–46 ("[U]nion membership, doubling in four years, stood at five million in 1920.").

282. See 29 U.S.C. §§ 151–169 (2018) (creating the NLRB); 29 U.S.C §§ 201–218 (2019) (creating the "Wage and Hour Division in the Department of Labor"); Andrias, supra note 232, at 650–93 (describing the rise, fall, and aftermath of NIRA).

codes for determining labor standards absent collective bargaining agreements, and government-supervised boards mediated labor disputes in the private sector to check employer power.[283] The NLRA and FLSA were intended to restore equal bargaining power between workers and employers and set wage floors to limit the impact of corrosive competition on wages.[284] Employer power was also tempered by an unprecedented expansion in federal jobs programs in the Works Progress and Public Works Administrations, forcing private sector employers to compete with the government on wages and labor standards and conditioning federal contracting on meeting wage and labor standards, respectively.[285] Employers' labor policies and wage-setting was also regulated by the National War Labor Board (1942–1945), the Korean War Economic Stabilization Agency (1950–1953), and the Defense Manpower Administration (1950–1953), which administered wage controls and arbitrated labor disputes in a number of industries, while executive orders established labor standards with federal contractors and ordered investigations into labor strikes.[286] This extensive background of government institutions regulating the employment bargain contributed to the highest union density ever in the U.S., almost thirty-five percent of wage and salary employment by 1954, with the total number of union members peaking at around twenty-one million in 1979.[287]

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283. See Lorwin & Wubnig, supra note 275, at 437–45 (discussing the creation of several labor boards, such as the Newspaper Industrial Board and the National Construction Planning and Adjustment Board).

284. See 29 U.S.C. § 151 (stating the NLRA's policy of "restoring equality of bargaining power between employers and employees"); Hafiz, Structural Labor Rights, supra note 232, at 664–73 (demonstrating "how antitrust law and social science shaped the NLRA's design and implementation as a means of overcoming employer wage setting"); Michael L. Wachter, Labor Unions: A Corporatist Institution in a Competitive World, 155 U. Pa. L. Rev. 581, 593–97 (2007) ("It is now received wisdom that the [Robinson–Patman] Act was a product of the pessimistic view that unregulated competition meant destructive competition . . . ."). The wage boards "recommended . . . the highest minimum wage rates for the industry which . . . will not substantially curtail employment." Fair Labor Standards Act of 1938, ch. 676, § 8(b), 52 Stat. 1060, 1064.

285. See Steven Attewell, People Must Live by Work: Direct Job Creation in America, From FDR to Reagan 144 (2018) (describing the impact of the Works Progress Administration and Public Works Administration on private sector competition); Margaret Weir, Politics and Jobs: The Boundaries of Employment Policy in the United States 28–50 (1992) (describing business organizations' opposition to New Deal policies and an increasingly powerful federal government).

286. See, e.g., Exec. Order No. 10,161, 15 Fed. Reg. 6105, 6106 (Sept. 9, 1950) (establishing the Economic Stabilization Agency); Exec. Order No. 10,140, 15 Fed. Reg. 4333 (July 6, 1950) (investigating the Pullman strike); Exec. Order No. 10,135, 15 Fed. Reg. 4239 (June 30, 1950) (establishing the eight-hour day and extending Exec. Order 9898, as amended by Exec. Order 9926); Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 12, 1942) (establishing the National War Labor Board).

287. See Gerald Mayer, Cong. Rsch. Serv., RL32553, Union Membership Trends in the United States 10, 12 (2004), https://sgp.fas.org/crs/misc/RL32553.pdf [https://perma.cc/XWY9-Z96T] (summarizing union membership statistics).

Given the extensive government involvement in industry-based wage regulation in this period, it is not surprising that the antitrust agencies did not expend their limited resources on intervening in labor markets. The recovery programs of the 1930s reversed the Depression's downward spiral, but when the economy entered the 1937 recession, the President's advisors pointed to high levels of industry concentration and collusion as a source.[288] Drawing from IO, they developed an "economic structuralist" analysis—the Structure-Conduct-Performance (S-C-P) paradigm—predicting that market structure, or market concentration, incentivized and facilitated collusion, reducing economic performance.[289] Concentration insulated firms from market forces, resulting in inefficiencies, higher prices, barriers to entry, reduced technological innovation, and harmful wealth transfers.[290]

In 1938, Congress established the Temporary National Economic Committee (TNEC) to bring together congressmembers and representatives from the Antitrust Division and other agencies to study "the extent, causes, and effects of concentrated economic power."[291] TNEC hearings conducted between 1938 and 1941 produced "the most detailed analyses of the American economy ever conducted."[292] Their studies included analyses by leading economists at Harvard, MIT, and the Bureau of Labor Statistics (BLS) of "Industrial Wage Rates, Labor Costs and Price Policies," detailing industry- and firm-specific wage data, and analyzing the "processes of wage determination" to find that firms engaged in "follow the leader" wage-setting at an economy-wide scale.[293] The Industrial Wage Rates study revealed that consumer price changes "were not based primarily on wage rate changes, even when [they] were fully reflected in labor costs," but that "labor costs were universally a principal [management] concern . . . because of their effect upon profits

288. See Eisner, supra note 256, at 77 (describing the formation of an economic consensus around the causes of the 1937 recession).

289. See Joe S. Bain, Industrial Organization 19–43 (2d ed. 1968) (laying out the economic and political theories concerning industrial organization); id. at 85–144 (describing market structures and the impacts of business concentration in the economy and individual markets); id. at 406–27 (describing the relation of market structure to market performance); Hawley, supra note 142, at 373–76 (describing the adaptation of the S-C-P paradigm from IO in the antitrust context).

290. See Eisner, supra note 256, at 101–103 (outlining the structure-conduct-performance paradigm and its theories of harm regarding concentrated industrial structures).

291. Id. at 77.

292. Id.

293. Douglass V. Brown, John T. Dunlop, Edwin M. Martin, Charles A. Myers & John A. Brownell, Industrial Wage Rates, Labor Costs and Price Policies, U.S. Temp. Nat'l Econ. Comm. Monograph No. 5, at ix–xi, xvi, 8, 28–30, 107 (1940) (internal quotation marks omitted) (documenting "follow-the-leader" wage-setting in the shoe, paper, and cotton textile industries).

and . . . the [company's] cash position."[294] In other words, firms' labor costs were not being passed on to consumers: Wage-setting was primarily a *distributional* concern rather than an *efficiency* concern about the appropriate pay to maximize output. The TNEC also commissioned a study by Jacob Perlman, Wisconsin-trained institutional economist and Chief of the BLS's Division of Wage and Hour Statistics, on "Hourly Earnings of Employees in Large and Small Enterprises."[295] Perlman found "[w]ide variations" in wage structure "not only throughout industry . . . but also within a single industry, a single plant, and even a single occupation in the same plant," and made clear that no single competitive market rule governed wage determination.[296] Perlman's study was likely the first to document a large-firm premium in oligopolistic industries—a finding consistent with collusion.[297]

The TNEC hearings motivated a newfound support for antitrust enforcement and economic structuralism more generally.[298] Walton Hamilton and Irene Till's internal review of the Antitrust Division criticized the limited role of economists in litigation, stating that enforcement would "be best served by an amphibian who could use with equal ease the idiom of law and of economics."[299] The TNEC studies, and Roosevelt's appointment of Thurman Arnold to lead the Antitrust Division, launched S-C-P as the dominant analytical paradigm for antitrust agency analysis of industries and firm conduct, and the period between the 1950s and 1970s saw more general adoption of economic structuralist thinking in Congress and by the courts in their understanding of antitrust policy and its administration.[300]

But in adopting IO's economic structuralist analysis and neoclassical assumptions that labor markets were competitive, enforcers ignored developments in labor economics and other fields that theorized and documented employer wage-setting power. The IO literature generally produced no S-C-P analysis of employer power, and S-C-P-driven policy resulted in no direct challenges to employer conduct, even in

294. Id. at x–xi.

295. Jacob Perlman, Hourly Earnings of Employees in Large and Small Enterprises, TNEC Monograph No. 14, at i, iii (1940) (describing the author and underlying materials of Perlman's TNEC-commissioned study).

296. See id. at 1.

297. See id. at xi, xiii.

298. Eisner, supra note 256, at 77.

299. See Hamilton & Till, supra note 256, at 33.

300. See Eisner, supra note 256, at 90–183 (describing the adoption of economic thinking, the S-C-P model, and industrial organization economics in broader antitrust policy and within both the DOJ's Antitrust Division and the FTC); Hawley, supra note 142, at 404–72 (describing the importance of the TNEC studies and Arnold's appointment to the integration of economic thought in antitrust policy and enforcement).

concentrated industries.[301] The Antitrust Division continued prosecuting labor unions, including criminally prosecuting striking Anheuser-Busch workers in a case the Supreme Court dismissed on labor exemption grounds.[302] While the S-C-P framework identified market structure and conduct that could harm consumers, small businesses, and even trading partners, its application centered product market definition as the exclusive analytic focus of corporate concentration's effects.[303] That inquiry provided a limited window into labor market concentration levels and labor market effects.[304]

In 1950, Congress passed the Celler–Kefauver Act to expand the agencies' authority to challenge mergers based on economic structuralist

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301. The author conducted a keyword search for "employer" AND "antitrust" in the following dominant IO and economics journals between 1937 and 1980: *American Economic Review* (est. 1911), *Antitrust Bulletin* (est. 1955), *Antitrust Law & Economics Review* (est. 1967), *Antitrust Law Journal* (est. 1952), *Econometrica* (est. 1933), *Journal of Economic Literature* (est. 1969), and the *Quarterly Journal of Economics* (est. 1886). Articles referencing labor markets focused entirely on unions, worker coordination, the labor exemption, and union–employer collusion. Only two articles referenced employer power. The first, Clark Kerr's *Labor Markets: Their Character and Consequences*, 40 Am. Econ. Rev. 278, 279–84 (1950), referenced five labor market models—perfect, neoclassical, institutional, managed, and natural—some assuming imperfect competition and monopsonistic wage-setting. The second, Glen Cain's *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 J. Econ. Literature 1215, 1215–16 (1976), presented labor economists' critiques of neoclassical economics based on research into segmented labor markets.

302. See, e.g., Apex Hosiery v. Leader, 310 U.S. 469, 501–04, 513 (1940) (exemplifying the Court's approach in restraining a workers' strike); Hamilton & Till, supra note 256, at 122–43 (identifying and describing convictions, fines, consent decrees, and the handling of criminal cases under federal antitrust law from July 1890 to July 1940). For an institutionalist's critique, see Edwin Witte, A Critique of Mr. Arnold's Proposed Antilabor Amendments to the Antitrust Laws, 32 Am. Econ. Rev. 449, 449–59 (1942) [hereinafter Witte, Critique of Proposed Amendments] (arguing against antitrust legislation and enforcement against labor unions).

303. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 272–74 (1966) (examining concentration in the grocery store market in Los Angeles); United States v. Phila. Nat'l Bank, 374 U.S. 321, 356 (1963) (discussing identification of a product market as a necessary step in the analysis); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (focusing on determining the outer boundaries of a product market).

304. See Gregor Schubert, Anna Stansbury & Bledi Taska, Employer Concentration and Outside Options 48 & n.70 (Working Paper, 2020), https://scholar.harvard.edu/files/gregorschubert/files/stansbury-jmp-nov17.pdf [https://perma.cc/H34P-BNYL] (noting that "the degree of employer concentration in a given local area is at least to some extent endogenous to local economic conditions," which "is one of the concerns which motivated industrial organization economists to move away from the [S-C-P] paradigm and focus less on market concentration statistics"); see also Steven Berry, Martin Gaynor & Fiona Scott Morton, Do Increasing Markups Matter? Lessons From Empirical Industrial Organization, 33 J. Econ. Persps. 44, 45 (2019) (analyzing "the shortcomings of the [S-C-P] approach" and offering alternatives); Richard Schmalensee, Inter-Industry Studies of Structure and Performance, *in* 2 Handbook of Industrial Organizations 951, 952–53 (1989) (arguing for the value of "inter-industry research" as an alternative to contemporary methods of market analysis).

analysis of corporate concentration and collusion.[305] The antitrust agencies increasingly internalized IO economics into agency functioning and enforcement prioritization due to judicial, internal, and external pressures to professionalize and anchor antitrust policy on neoclassical principles.[306] Political appointees viewed economic analysis as capable of bringing "greater coherence" and uniform metrics to antitrust policy by providing "simple decision rules" to evaluate investigations and cases, facilitate planning, and maximize efficient use of limited resources.[307] At the DOJ, agency reorganization, establishment of the Policy Planning office, and top-down leadership from political appointees—most importantly, Donald Turner (Assistant Attorney General, 1965–68)—centered economic analysis in agency enforcement decisions and substantive prosecution of antitrust violations.[308] The agency issued its first Merger Guidelines, clarifying its policy and analytic methods for merger enforcement and signaling the S-C-P approach as its governing framework.[309] The Guidelines made no mention of employer power.[310] The FTC had been reorganized in 1961 to expand the Chair's power over agency personnel and create an Office of Program Review to help the Chair define the agency's policy goals.[311] FTC economists played a substantial role in merger enforcement and otherwise interpreted financial statistics and provided evidence for enforcement actions.[312] But

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305. Celler–Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (2018)); see also Eleanor Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1150–51 (1981) (describing the Celler–Kefauver Act's legislative history and related case law).

306. See Eisner, supra note 256, at 17, 90–91 (relating the shift in antitrust policy from 1960 to 1980 toward privileging economic theory at the expense of legal analysis); see also Popp Berman, supra note 250, at 132–41 (discussing how by the 1980s "antitrust policy would be based on the value of efficiency rather than a commitment to limiting political power or encouraging small business" on account of "the integration of economic reasoning into the executive branch" and the courts' acceptance of the consumer welfare standard).

307. See Eisner, supra note 256, at 17.

308. See id. at 123–49 (describing the assistant attorneys general who led the DOJ Antitrust Division during the 1960s and 1970s and their impact on the Division's approach to enforcement).

309. See Antitrust Div., DOJ, Merger Guidelines 1 (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf [https://perma.cc/PQ32-ES9Z] [hereinafter 1968 DOJ Merger Guidelines] ("[T]he primary role of [Clayton Act] Section 7 enforcement is to preserve and promote market structures conducive to competition."). The Guidelines also codified judicial decisions that applied economic analysis to merger enforcement. See Eisner, supra note 256, at 128–32 ("[T]he guidelines presented an economic translation of enforcement criteria that had evolved over the course of the [1960s] in a number of important court decisions.").

310. See 1968 DOJ Merger Guidelines, supra note 309, at 2–5 (explaining the DOJ's approach to defining markets with references to sales of products and services but not labor acquisition).

311. Eisner, supra note 256, at 75.

312. Id. at 152.

there is no evidence that IO-trained FTC economists assessed mergers' labor market effects or were concerned with employer power during enforcement.[313]

Relatively high union density may also explain the agencies' neglect of labor market enforcement, particularly given congressmembers' concern that, if anything, workers had too much consolidated power.[314] Higher union density meant that many workers were in a bilateral monopoly with strong employers, mitigating employers' monopsony.[315] Once union density reaches around thirty percent, economists document significant effects on nonunion wages, with no continued increase of impact at the highest densities, so high density in the post-war period may have defused any perceived need for government intervention.[316]

Still, both industrial relations experts and labor economists continued the Progressive and institutionalist traditions of documenting and theorizing employers' monopsonistic wage-setting, including wage-setting as a result of labor market segmentation and labor market frictions.[317]

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313. The Clayton Act's labor exemption does not preclude enforcement in labor markets where, "in any line of commerce or in any *activity affecting commerce*[,] . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." See 15 U.S.C. § 18 (2018) (emphasis added); see also Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536, 569–72 (2018) [hereinafter Naidu et al., Remedies for Labor] (stating that, apart from the Clayton Act section 6 exemption for union organizing, "nothing in the antitrust laws distinguishes labor markets from other types of markets, and the courts have agreed that anticompetitive behavior in labor markets violates the antitrust law").

314. The Taft–Hartley Amendments (1947) to the NLRA, dramatically weakening workers' labor protections, are illustrative. See Sean Farhang & Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal, 19 Stud. Am. Pol. Dev. 1, 2–29 (2005) (explaining that the Taft–Hartley Amendments expanded agricultural exemptions to the NLRA).

315. See, e.g., Alan Manning, Monopsony in Motion: Imperfect Competition in Labor Markets 350–59 (2003) [hereinafter Manning, Monopsony in Motion] ("[W]ages set by very powerful unions will be independent of the extent of monopsony power in the labor market . . . .").

316. For a discussion of union density's effects on nonunion wages, see, e.g., John T. Addison, Pedro Portugal & Hugo de Almeida Vilares, Union Membership Density and Wages: The Role of Worker, Firm, and Job-Title Heterogeneity, 233 J. Econometrics 612, 613 (2023) ("Some critical mass of union density—around 30 percent—is required to have any material influence on wages, while beyond some level (approximating 70 percent) further increases in union density detract from the peak premium.").

317. See, e.g., Robert L. Bunting, Employer Concentration in Local Labor Markets 42–113 (1962) (studying factor-market concentrations and the impacts of employer concentration on local labor markets); Joan Robinson, The Economics of Imperfect Competition 209–32 (2d ed. 1969) (theorizing imperfect competition and monopsony in buy-side markets); Caroline Ware, The Early New England Cotton Manufacture 113–17, 230–82, 325–54 (1966) (studying the rise of cotton manufacturing in New England and the relationship between corporate structure and wages); Robert Zevin, The Growth of Manufacturing in Early Nineteenth-Century New England 1–21 (1975) (studying returns to labor in the rise of manufacturing in nineteenth-century New England); Martin Bronfenbrenner, Potential Monopsony in Labor Markets, 9 Indus. & Lab. Rels. Rev. 577,

These labor economists adapted IO models and S-C-P analysis, viewing "the literature on labor monopsony [as] draw[ing] on the same microeconomic theory as the industrial organization literature on product-market power."[318] But there is no evidence that IO economists or antitrust policymakers either read or recognized the significance of this literature for their regulatory mandates.

3. *Industrial Organizations, the Chicago School, and Deregulation.* — The relatively pro-enforcement S-C-P framework internalized economic analysis in antitrust enforcement and administration but also normalized agencies' reliance on economics to enable a relatively seamless adaptation to new IO approaches under the Chicago School's influence.[319] Shifting to the new Chicago School paradigm meant adopting a broader, deregulatory policy agenda. But it also meant shifting antitrust enforcement, policy, and, later, doctrine to a "price theory," predominantly consumer-welfare-focused approach to measuring actionable harm, making assessment of worker welfare harms and non-market-focused measurement and assessment of employer power effects more elusive.[320]

577–78 (1956) ("[T]he typical employer in an unorganized labor market has some degree of monopsony power . . . ."); Charles R. Link & John H. Landon, Market Structure, Nonpecuniary Factors, and Professional Salaries: Registered Nurses, 28 J. Econ. & Bus. 151, 151 (1976) (examining the effects of monopsony in the labor market for nurses); Gerald W. Scully, Pay and Performance in Major League Baseball, 64 Am. Econ. Rev. 915, 915–30 (1974) (setting out "to crudely measure the economic loss to [baseball] players due to the restrictions of the reserve clause," which "restrict[ed] the player's freedom of negotiation to the owner of the contract").

318. William M. Boal & Michael R. Ransom, Monopsony in the Labor Market, 35 J. Econ. Literature 86, 86 (1997) (citing labor-economic studies that drew from the IO literature from the 1960s onward).

319. See Eisner, supra note 256, at 112–16 (describing the administrative and jurisprudential conditions at the beginning of the shift from the S-C-P framework to the Chicago School); Gary Gerstle, The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era 73–106 (2022) (describing the development of neoliberal thought in the middle of the twentieth century); Herbert Hovenkamp & Fiona Scott Morton, Framing the Chicago School of Antitrust Analysis, 168 U. Pa. L. Rev. 1843, 1871 (2020) (explaining the influence of the Chicago School's brand of economics on federal courts).

320. There is a tremendous literature on the Chicago School's impact on antitrust policy. See, e.g., Robert Pitofsky, Introduction to How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 5 (Robert Pitofsky ed., 2008) ("Specific concerns [shared by many lawyers and scholars] include current preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections, the belief that only efficiency matters, . . . but most of all, lack of support for rigorous enforcement . . . ."); Elliott Ash, Daniel L. Chen & Suresh Naidu, Ideas Have Consequences: The Impact of Law and Economics on American Justice 4 (Nat'l Bureau of Econ. Rsch. Working Paper No. 29788, 2022), https://www.nber.org/papers/w29788 [https://perma.cc/XHN5-QYNU] (finding "some evidence that . . . judges [who have attended the Manne Economics Institute for Federal Judges] are more likely to vote against antitrust protections"); Filippo Lancieri, Eric A. Posner & Luigi Zingales, The Political Economy of the Decline of Antitrust Enforcement in the United States 3 (2023) (unpublished manuscript), https://papers.ssrn.com/

Chicago School economists and antitrust policymakers viewed markets, including labor markets, as self-equilibrating and efficient so long as market actors were left free to operate based on their rational, profit-maximizing self-interest.[321] Price theory enabled them to overcome perceived weaknesses in prior economic approaches' "microscopic examination of the idiosyncrasies of particular markets."[322] The dominance of new economic approaches supercharged measuring all forms of economic power through marginalist analyses of deviations from a competitive market price. [323] Labor markets were presumed to operate on a model of perfect competition with no idiosyncrasies relative to other markets.[324] Further, Chicago School economists believed perfect competition in labor markets would achieve the best results for the economy by allocating employment and productivity in combinations that maximize production and consumption.[325]

Any residual sense that broader economic stakeholders, like workers, were impacted by anticompetitive conduct was displaced by an exclusive focus on consumer welfare in product markets.[326] Leading the FTC's

sol3/papers.cfm?abstract_id=4011335 [https://perma.cc/WAE2-NS6U] (questioning the "enlightened technocrat narrative," which posits that antitrust enforcement declined due to the influence of the Chicago School, and proposing an alternative theory that "US antitrust policy (courts and regulatory agencies) ha[s] been captured by special interests"). For primary sources, see generally Robert Bork, The Antitrust Paradox (1978) (arguing that antitrust law should prioritize consumer welfare and efficiency over protecting individual competitors and small businesses); Richard A. Posner, Antitrust Law: An Economic Perspective (1976) (critiquing existing antitrust doctrine in favor of a law and economics approach to analyzing antitrust policy, collusion, exclusionary practices, and enforcement); Richard A. Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925, 925 (1979) [hereinafter Posner, Chicago School] (disclaiming the notion that the Chicago School was, at time of writing, "a distinctive approach to antitrust policy").

321. See, e.g., Samuelson & Nordhaus, supra note 259, at 541–67, 771–73 (providing a basic theory about market inefficiency with externalities).

322. Posner, Chicago School, supra note 320, at 931.

323. See, e.g., John N. Drobak, Rethinking Market Regulation: Helping Labor by Overcoming Economic Myths 15–23 (2021) ("In the messy real world, the [perfect competition] model works well at some times and poorly at others.").

324. See id. (describing the assumptions of models of perfect competition in labor markets).

325. See, e.g., George J. Stigler, The New Welfare Economics, 33 Am. Econ. Rev. 355, 355–59 (1943) (criticizing "the new welfare economics" which proposes that "income (of all countries together) is maximized by free trade").

326. See, e.g., Zephyr Teachout, Break 'Em Up: Recovering Our Freedom From Big Ag, Big Tech, and Big Money 148, 173, 178 (2020) (critiquing the impact of the Chicago School of Economics on antitrust policy and enforcement); Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 88–91, 135–37 (2018) ("[Judge] Bork contended, implausibly, that the Congress of 1890 exclusively intended the antitrust law to deal with one very narrow type of harm: higher prices to consumers."); Lina Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 J. Eur. Competition L. & Prac. 131, 131–32 (2018) ("[Consumer welfare] has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers.").

Office of Policy Planning and Evaluation (OPPE), Wesley Liebeler unequivocally stated:

> [T]he basic objective of these laws is to maximize consumer welfare. . . . We are not aware of any other operationally viable objective available to the Commission in setting priorities. The choice as to which programs should be undertaken, which given priority and which deferred, should be made on the basis of their expected economic impact on the consumer in dollars-and-cents terms.[327]

Employer power's harms to workers were not conceptualized as a component of the agencies' antitrust enforcement.

Under the guidance of new leadership, the Chicago School era saw significant institutional changes within the antitrust agencies.[328] They trained attorneys in economics, expanded staff economist hiring in new internal offices to independently analyze cases on par with attorneys, and prioritized economic analysis on Chicago School principles in premerger screenings and merger reviews under the 1976 Hart–Scott–Rodino Act and new 1984 Merger Guidelines.[329] This reorientation within the agencies was also driven by the Supreme Court, which, in its *United States v. General Dynamics*, *Continental T.V., Inc. v. GTE Sylvania*, and subsequent decisions, signaled skepticism of the S-C-P paradigm in favor of a Chicago School approach more lenient to mergers, vertical restraints, and other anticompetitive conduct.[330]

The rise and seeming fall of the Chicago School has been heralded for some time, but the New Labor Antitrust has crossed partisan and ideological lines.[331] As the product of political appointments in the

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327. Off. of Pol'y Plan. & Evaluation, FTC, 1976 Budget Overview (1974), reprinted in 692 Antitrust & Trade Reg. Rep. (BNA) No. 692, at E-1 (Dec. 10, 1974).

328. See Eisner, supra note 256, at 135–83 (describing institutional changes to the DOJ and FTC in the Chicago School era); B. Dan Wood & James E. Anderson, The Politics of U.S. Antitrust Regulation, 37 Am. J. Pol. Sci. 1, 30–37 (1993) (examining DOJ Antitrust Division enforcement practices from 1970 to 1989).

329. See Eisner, supra note 256, at 135–227 (describing the integration of law and economics at the DOJ's Antitrust Division and the Bureau of Competition at the FTC between the late 1960s through the 1980s); Wood & Anderson, supra note 328, at 30–37 (same).

330. See Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 37, 41–42, 57–59 (1977) (overruling precedent requiring the Court to find a per se violation and applying the rule of reason to uphold a franchise agreement between a manufacturer and retailer); United States v. Marine Bancorp., Inc., 418 U.S. 602, 605–06 (1974) (rejecting government challenge to a regional bank merger); United States v. Gen. Dynamics Corp., 415 U.S. 486, 504 (1974) (protecting coal industry merger). For judicial skepticism of the S-C-P paradigm, see James Miller, The Economist as Reformer 8 (1989) (reporting that the FTC's success rate on appeal in federal courts fell from eighty-eight percent in cases decided between 1971 and 1976 to forty-three percent in cases decided between 1977 and 1981).

331. See supra note 326; see also Christopher S. Yoo, The Post-Chicago Antitrust Revolution: A Retrospective, 168 U. Pa. L. Rev. 2145, 2166–68 (2020) (describing the

Obama, Trump, and Biden administrations, The New Labor Antitrust has supercharged the agencies' antitrust enforcement against employers.[332] These efforts include executive orders, White House reports, calls to action, policy briefs, and other agency actions ranging from guidance on employers' information-sharing, enforcement against wage-fixing, no-poaching, noncompete, and information-sharing agreements, integration of labor market effects analysis into merger reviews, and rulemaking prohibiting non-competes in employment contracts.[333] Yet, in all their enforcement, the agencies have deployed traditional IO approaches to assessing employer power, applying neoclassical marginalist analysis to ascertain employers' ability to profitably offer infracompetitive wages in a relevant antitrust market.[334] The next section explains how this deployment is consistent with labor commodification, tethering analysis of employer power to market-based determinations of labor's value.

B. *Quantifying Employer Power in Current Labor Antitrust Enforcement*

More aggressively than ever, New Labor Antitrust enforcers have taken on employers' anticompetitive conduct, and in the case of the FTC, perhaps broader worker exploitation and coercion.[335] But these interventions target only deviations from a primarily quantitative, market-based determination of competitive benchmarks and labor's value.[336] Under current law, employers can violate antitrust law in three main ways: unlawfully agreeing with other employers on workers' compensation or no-poach agreements (per se unlawful); reaching other agreements that reduce labor market competition, including agreements to merge or acquire firms if that may substantially lessen competition or tend to create a monopoly (subject to rule of reason analysis); and unlawfully acquiring or maintaining labor market monopsony (subject to rule of reason

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emerging debate over Neo-Brandeisian antitrust beyond the "Post-Chicago Revolution"); Lina M. Khan, The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655, 1677–81 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)) (describing the "Neo-Brandeisian" program in antitrust policy and enforcement).

332. See Hiba Hafiz, Imperfect Competition in Labor Markets, Competition Pol'y Int'l, 3–4 (2021), https://www.competitionpolicyinternational.com/wp-content/uploads/2021/10/5-Imperfect-Competition-in-Labor-Markets-By-Hiba-Hafiz.pdf [https://perma.cc/PQ8Z-V3B7] (explaining why recent antitrust enforcement has targeted employer monopsony).

333. See id.

334. See id.

335. See, e.g., FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (Comm'n File No. P221202, Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/P33A-TBY9] [hereinafter FTC UMC Policy Statement] (listing as unfair methods of competition "conduct [that] may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature").

336. See supra section II.A.3.

analysis).[337] In the first circumstance—where employers engage in wage-fixing, no-poaching, or market allocation agreements—antitrust enforcers benefit from a per se prohibition and are not required to prove employer power, but only if employers cannot successfully claim the agreement was ancillary to a procompetitive venture.[338] In recent enforcement efforts, courts have erred on the side of allowing employer justifications, in part because the Supreme Court has previously ruled that "it is only after considerable experience with certain business relationships that courts classify [restraints] as *per se* violations."[339] Most prominent cases against employers, however, involve conduct judges analyze under the rule of reason, including horizontal agreements between employers alleged to constitute ancillary restraints, information-sharing agreements, vertical no-poaching or other labor market restraints, mergers and acquisitions, and unlawful monopsonization.[340] In these cases, courts require proof that

337. See 15 U.S.C. §§ 1, 2, 18 (2018). For an overview, see Posner, supra note 16, How Antitrust Failed Workers, at 45–113 (explaining the mechanisms with which employers exert market power over labor markets to harm workers).

338. See, e.g., United States v. Addyston Pipe & Steel Co., 85 F. 271, 281–82 (6th Cir. 1898) ("[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract . . . ."); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 157–62 (N.D.N.Y. 2010) (holding that the plaintiffs could withstand summary judgment on their wage-fixing claim through circumstantial evidence tending to show such a conspiracy without a demonstration of market power); Antitrust Div., DOJ & FTC, Antitrust Guidance for Human Resource Professionals 3 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/4ZAW-KYLR] ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."); Hovenkamp, Rule of Reason, supra note 272, at 139–40 (discussing Judge Bork's development of the "ancillary restraints doctrine," which "he attributed largely to then Sixth Circuit Judge Taft's decision in the *Addyston Pipe* case").

339. See Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9 (1979) (internal quotation marks omitted) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972)). For recent labor antitrust cases applying the rule of reason to restraints analyzed as per se unlawful in product markets, see Posner, New Labor Antitrust, supra note 16, at 546–48, 555, 558–60.

340. See, e.g., NCAA v. Alston, 141 S. Ct. 2141, 2154–60 (2021) (rejecting the NCAA's objections to "subjecting [the NCAA's student-athlete] compensation restrictions to a rule of reason analysis"); Todd v. Exxon Corp., 275 F.3d 191, 202–10 (2d Cir. 2001) (applying the rule of reason to a "data exchange" of employee compensation information in the oil industry); Eichorn v. AT&T Corp., 248 F.3d 131, 144–46 (3d Cir. 2001) ("[W]e hold the no-hire agreement here is more appropriately analyzed under the rule of reason."); United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1, 23–35 (D.D.C. 2022) (defining the market for cash advances from publishers to authors while reviewing a government challenge of a publisher merger); Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 794–97 (S.D. Ill. 2018) (discussing a hub-and-spoke conspiracy between a restaurant chain corporation and its franchises to enforce a "no-hire" provision preventing workers from moving from one franchise to another); Le v. Zuffa, LLC, 216 F. Supp. 3d 1154, 1166–69 (D. Nev. 2016) (requiring a showing of market power in the labor market for "Elite Professional MMA Fighters"); In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1120–24 (N.D. Cal. 2012) (refusing to decide whether to apply a per se or rule of reason analysis at the motion to dismiss stage).

employers have buyer power in a relevant antitrust market, which involves proving at least some level of market power in markets for labor services that workers would consider reasonable substitutes to the jobs offered by the targeted employer(s), defined by job classification and a geographic area, usually commuting distance.[341] Market power is shown through a marginalist analysis of employers' ability to profitably suppress wages and working conditions below what would otherwise exist in a more competitive labor market.[342] Courts also require proof that the targeted conduct had "anticompetitive effects" and resulted in harm "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[343]

The internalization of Chicago School IO analysis in antitrust jurisprudence and enforcement has been formative of this market definition analysis and its application to labor markets. After some early confusion, economists, antitrust enforcers, and the courts have converged on a more consistent mirroring of *product* market definition and market power analyses in *labor* markets.[344] In doing so, enforcers first define a "relevant antitrust market," primarily applying a variant of the "hypothetical monopolist" test used in product markets, which asks whether "a hypothetical profit-maximizing firm . . . that was the only present and future seller of a group of products . . . likely would undertake

341. See, e.g., Posner, supra note 16, at 64–68 (collecting cases); DOJ & FTC, Merger Guidelines § 4.3.D.8, at 48 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/P8T4-MMVV] [hereinafter 2023 Merger Guidelines] (providing agency guidance on market definition for labor markets); José A. Azar, Steven T. Berry & Ioana Marinescu, Estimating Labor Market Power 2–19 (Nat'l Bureau of Econ. Rsch. Working Paper No. 30365, 2022), https://www.nber.org/papers/w30365 [https://perma.cc/4DRV-9Z4Z] [hereinafter Azar et al., Estimating Labor Market Power] (describing economic methods for estimating employer power in labor markets).

342. See, e.g., U.S. Dep't of the Treasury, The State of Labor Market Competition 3–4 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/T2AL-69JK] [hereinafter Treasury Report] ("A labor market monopsonist leverages their position to pay their workers less than the competitive rate for a given job.").

343. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–90 (2007) (holding per se analysis inapplicable to vertical restraints setting minimum resale prices because "economics literature is replete with procompetitive justifications for" the practice); Hemphill, supra note 272, at 940–42 (describing the lower federal courts' use of a burden-shifting framework combining the less restrictive alternatives test with an assessment of anticompetitive effects to determine liability).

344. See Posner, How Antitrust Failed Workers, supra note 16, at 30–41 (providing an overview of judicial analysis of labor antitrust cases in relation to doctrine focused on product markets); Hafiz, Labor Antitrust's Paradox, supra note 245, at 391–99 (describing market power analysis in the context of labor-market restraints); Marinescu & Posner, Has Antitrust Failed Workers?, supra note 246, at 1362–82 ("The Supreme Court has confirmed that antitrust law applies to labor markets in the same way that it applies to product markets.").

at least a small but significant and non-transitory increase in price ('SSNIP') or other worsening terms ('SSNIPT') for at least one product in the group."[345] The quantum increase in price has traditionally been set at five percent.[346] In labor markets, the agencies consider "whether the hypothetical monopsonist would undertake at least a SSNIPT, such as a . . . decrease in the wage offered to workers or a worsening of their working conditions or benefits."[347] If a firm could profitably do so, then they have market power relative to a competitive market where workers would switch to other employers if they offered such an infracompetitive employment term.[348] Similar to product market cases,[349] enforcers then ask whether workers would *switch* employers to a new employer substitute in response to such a diminished term under a substitution analysis, estimating or even surveying workers' tendency to switch employers "as a result of an incremental decrease in wages."[350] In other words, economists, enforcers, and the courts use equilibrium models to assess employers' ability to offer employment terms below those that would be offered in a more competitive environment where the supply of labor would meet competitive demand, assuming workers' services are fungible within a job category and geographic area. Enforcers can only target employers able to set employment terms that deviate from market-based terms set under conditions of perfect competition, or failing that, more competitive market conditions (identified through a benchmark or proxy) that would have existed absent the anticompetitive conduct.[351] That competitive wage is understood by economists, antitrust scholars, and enforcers to be the "marginal revenue product" (MRP) of labor.[352]

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345. See 2023 Merger Guidelines, supra note 341, § 4.3, at 41–42.

346. Id. § 4.3.B., at 43.

347. See id. § 4.3.B., at 42.

348. See id. at §§ 4.3.B–D.8 (describing agencies' approach to market definition in labor markets).

349. See id. § 4.3 ("The same market definition tools and principles discussed above [in product markets] can be used for input markets and labor markets, where labor is a particular type of input."); Russell Pittman, Three Economist's Tools for Antitrust and Merger Analysis: Case Applications 7 (Econ. Analysis Grp. Discussion Paper No. 21-2) (economic analysis group discussion paper 21-2) (2021), https://www.justice.gov/atr/page/file/1404436/download [https://perma.cc/R2VW-8H2H] (describing economists' substitution analysis in antitrust and merger enforcement in product markets).

350. See Naidu et al., Remedies for Labor, supra note 313, at 548.

351. For a more detailed discussion, see Brian Callaci, Competition Is Not the Cure, Bos. Rev. (Nov. 23, 2021), https://www.bostonreview.net/articles/competition-is-not-thecure/ [https://perma.cc/8RGF-XY4Y] (reviewing Posner, How Antitrust Failed Workers, supra note 13) (critiquing Posner's proposals for labor antitrust enforcement for focusing too much on comparing workers' wages and "their marginal product, or the amount they would be paid if reality conformed to the economic model of perfect competition," and neglecting dynamic effects and nonwage union benefits).

352. See, e.g., Treasury Report, supra note 342, at 3–4 ("In a perfectly competitive labor market, each worker earns the market value of what they contribute to production—known as the 'marginal revenue product of labor' . . . ."); IIB Phillip E. Areeda, Herbert

The antitrust agencies' new Merger Guidelines recognize that labor markets have unique characteristics—they exhibit "high switching costs and search frictions" and workers have "individual needs" that "may limit the geographical and work scope of the jobs that are competitive substitutes."[353] These characteristics justify "relatively narrow" market definitions with fewer employer substitutes than for consumers in product markets.[354] But the agencies were clear that "[t]he same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of . . . employers as buyers of labor" and "[t]he same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers."[355] In analyzing labor markets, the agencies' focus will be on how a merger's "reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."[356] The quantum of wage reduction or slower wage growth is set based on IO models seeking to detect an employer's ability to deviate from an equilibrium *competitive* wage—workers' MRP.

In addition to defining markets and measuring employer power through market-based metrics, applying the adapted neoclassical IO framework limits labor market enforcement to competition-based harms, or adverse effects that workers suffer due to *reduced labor market competition* as opposed to, say, the opposite: the adverse effects of employer competition to reduce labor costs in a race to the bottom. For example, a non-union employer that outcompetes its unionized rivals by using aggressive anti-union tactics against its workers—even committing unlawful unfair labor practices under the NLRA—may instigate competition with its rivals to reduce labor costs, particularly if it passes on its lower labor costs to consumers in the form of lower prices and increases its market share, pressuring other employers to lower their *own* workers' wages or wage growth. This kind of conduct alone would not violate current understandings of antitrust law because it does not reduce labor market competition.

Courts, policymakers, and scholars have reinforced labor antitrust's exclusive focus on competition-based harms in explicit statements of

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Hovenkamp & John L. Solow, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 503 (5th ed. 2021) (summarizing formal price–cost measure analyses of market power); Boal & Ransom, supra note 318, at 87–88 (using marginal revenue product in a model of a single firm); Naidu et al., Remedies for Labor, supra note 313, at 537 (describing labor market power as the ability of an employer to set wages "below workers' marginal revenue product").

353. See 2023 Merger Guidelines, supra note 341, § 2.10, at 27.

354. See id.

355. See id., § 2.10., at 26.

356. See id., § 2.10., at 27.

doctrine and policy. For example, in *NCAA v. Alston*, the Supreme Court's most recent labor antitrust case, the Court held that the NCAA's restrictions on student athletes' compensation and benefits violated antitrust law.[357] But the Court stated that, "[i]n the Sherman Act, Congress tasked the courts with enforcing an antitrust policy of competition on the theory that market forces 'yield the best allocation' of the Nation's resources," and understood its touchstone as assessing the NCAA's "challenged restraint's 'actual effect on competition.'"[358] The Court emphasized the lower courts' findings that, absent the NCAA's restraints, "competition among schools would increase."[359] Similarly, in executive orders and agency statements defining labor antitrust policy, the President and the antitrust agencies have focused exclusively on the harms of reduced competition from increased labor market concentration and anticompetitive labor market restraints.[360] While the FTC's recent Policy Statement Regarding the Scope of Unfair Methods of Competition under section 5 leaves room for alternative conceptions of cognizable harm resulting from employers' "coercive, exploitative, collusive, abusive, deceptive, predatory," or other conduct that "involve[s] the use of economic power of a similar nature," its Notice of Proposed Rulemaking (NPRM) on Non-Compete Clauses focuses exclusively on such clauses' harm to competition in labor markets, and no FTC guidance, policy statement, or enforcement action has yet indicated what, if any, employer conduct may be actionable under section 5 to the extent it does *not* reduce labor market competition.[361] Further, the FTC made clear that "violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition."[362] In other words, mere violations of labor law, as generally applicable law, would not alone constitute a violation of section 5.

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357. See 141 S. Ct. 2141, 2166 (2021) (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104, n. 27 (1984)).

358. See id. at 2147, 2151 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

359. See id. at 2152 (internal quotation marks omitted) (quoting In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1068 (N.D. Cal. 2019)).

360. See E.O. 14,036, supra note 253, at 36987–89 ("Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions."); 2023 Merger Guidelines, supra note 341, § 2.10, at 26 ("[A] reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume . . . ."); Treasury Report, supra note 342, at i–ii, 1–2 (summarizing the ways in which constraints on labor market competition hurt workers and the "broader macroeconomy").

361. See FTC UMC Policy Statement, supra note 335, at 9; see also Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) [hereinafter "Non-Compete NPRM"].

362. See FTC UMC Policy Statement, supra note 335, at 8.

Further, in seeking to remedy labor antitrust violations, enforcers have focused only on relief directed at eliminating anticompetitive conduct or increasing competition between employers, not relief that, as per the language of the Norris–LaGuardia Act, ensures "[the individual unorganized worker] shall be free from the interference, restraint, or coercion of employers of labor . . . in the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[363] Remedies in the form of treble damages are tethered to workers' losses only from declining competition, and while they impose economic costs on employers, they do nothing to chill employer resistance to worker organizing or compel the act's stated "acceptable terms and conditions of employment" achievable through the collective worker voice backed by a strike threat.[364] Remedies enjoining anticompetitive mergers or the use of anticompetitive agreements are not designed to impact workers' countervailing leverage and may in fact undermine it.[365]

C. *Against Quantitative Commodification and Competition-Based Labor Antitrust Enforcement*

Currently, antitrust law solely recognizes employer power if employers can profitably deviate from paying competitive wages, ideally understood as workers' MRP.[366] Relatedly, the only cognizable harm from that power is harm generated by reduced labor market competition. This section offers a legal and policy critique of deploying exclusively competition-based metrics to discern whether the necessary elements of antitrust violations are met in the labor antitrust enforcement context, including, most importantly, as they apply to quantifying employer power and exclusion of non-competition-based harms.

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363. See 29 U.S.C. § 102 (2018).

364. Id. For treble damages, see 15 U.S.C. § 15(a) (2018).

365. For injunctive relief, see supra note 340. For merger remedies undermining workers' leverage, see Hiba Hafiz, Rethinking Breakups, 71 Duke L.J. 1491, 1572–95 (2022) [hereinafter Hafiz, Rethinking Breakups] (describing the circumstances in which merger remedies like breakups can harm workers).

366. See supra note 352 and accompanying text. For recent decisions on benchmarking competitive wages as workers' MRP, see, e.g., Le v. Zuffa, LLC, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064, at *30 n.42 (D. Nev. Aug. 9, 2023) (accepting MRP as benchmark); Morris v. Tyson Chicken, Inc., No. 4:15-cv-00077-JHM, 2020 WL 6331092 (W.D. Ky. Oct. 28, 2020) (same); Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2013 WL 1721651, at *2–3 (E.D. Mich. Apr. 22, 2013) (same); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 146 (N.D.N.Y. 2010) (admitting expert testimony on harm to nurses' wages because it "is based on the widely accepted economic concept of marginal revenue product"); White v. NCAA, No. CV-06-099-RGK (MANx), 2006 WL 8066803, at *4, *7 (C.D. Cal. Oct. 19, 2006) (accepting plaintiffs' use of MRP in a competitive labor market as the benchmark for compensation).

First, as a threshold matter, the New Labor Antitrust contravenes the language and policy of the antitrust statutes themselves. Enforcers' adoption of neoclassical methods usurped Congress's stated policies in the Clayton and Norris–LaGuardia Acts, which explicitly rejected the goals of competition-focused wage policy. Their text, legislative history, and purpose are also in deep tension with the view that antitrust enforcement in labor markets should be either focused on promoting labor market competition or exclusively directed at employer conduct that reduces labor market competition on compensation.[367] Congress could not have been clearer that it did not view labor's value as properly determined by market exchange, and it explicitly recognized that the public policy of antitrust law was to support *non*-market-based wage bargaining through protecting workers' countervailing leverage in the form of labor organizations, specifically because of the bargaining power imbalance between corporate employers and individual workers negotiating at arm's length in the open market.[368]

In the Clayton Act, Congress debated the Cummins Amendment, and with a record vote, decided to include its language that the "labor of a human being is not a commodity or article of commerce."[369] Senator Cummins, among others, made clear that its language distinguished product and labor markets for antitrust purposes:

> [I]f we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the wages for which they work shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly.[370]

Further, the language and legislative history of the Norris–LaGuardia Act[371] establish a policy preference for relegating wage-setting not to market forces but to labor organizations and the leverage they can exert to set wage rates and terms of conditions of work.[372] In fact, it was courts'

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367. See 15 U.S.C. § 17 (enacting a labor exemption from antitrust laws); 29 U.S.C §§ 101–103 (2018) (enacting a labor exemption and stating the antitrust laws' public policy in labor matters and stripping courts of jurisdiction over "undertakings in conflict with" its "public policy"); supra Part I.

368. 15 U.S.C. § 17; 29 U.S.C §§ 101–103; supra Part I.

369. See 51 Cong. Rec. 14,590–91 (1914).

370. Id. at 14585 (statement of Sen. Cummins).

371. See supra text accompanying notes 9–11.

372. For legislative history, see supra Part I.B.

narrow interpretation of the Clayton Act's labor exemption that led to the adoption of the Norris–LaGuardia Act's public policy language.[373]

That Congress went so far as to declare unenforceable agreements that conflicted with its "public policy" in labor matters supports a claim that judicial interpretations—and antitrust enforcement more generally—that tether antitrust measurement of labor's value, employer power, or its harms to worker's MRP defy Congress's purposes and stated antitrust policy.[374] Further, setting the parameters of antitrust enforcement to capture *only* conduct that deviates from a model of perfect competition sets labor's value in a way Congress recognized could only misvalue labor below "acceptable terms and conditions of employment" and institutionally entrenches public policy contrary to the language of the exemptions on their face.[375] Congressional rejection of market-based valuations of labor challenges the very IO methods enforcers and the courts have deployed that only evaluate employer power and its effects in a relevant "labor market" defined by its own supply and demand equilibrium negotiated through arm's-length "external" labor market wage-setting.[376] In other words, while Congress sought to remove labor from competitive market-based valuation, current enforcement limits cognizable liability to enforcers' proper market definition for labor's commodified exchange and places competitive valuation within that market as its only goal.

Focusing labor antitrust enforcement only on competition-based harms limits the achievement of Congress's "public policy" in labor matters to ensure workers' freedom to "obtain acceptable terms and conditions of employment" through union organizing, collective bargaining, and workplace democracy—in other words, a kind of "internal" labor market wage set through administrative rules and procedures established in recognition of workers' collective voice. Antitrust laws' stated labor policy suggests that Congress sought to vindicate *non*-competition-based harms through antitrust regulation—specifically, conduct that reduced workers' countervailing leverage through disrupting their ability to organize, collectively bargain, and seek mutual aid or protection, and, more generally, harms from employers' increased bargaining power that took advantage of or reinforced workers' helplessness in the employment bargain. These types of harms are much broader than competition-based

373. See Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70 (1932) (as amended by Pub. L. 98-620); supra notes 238–244 and accompanying text.

374. See Norris–LaGuardia Act.

375. See id.

376. For "internal" and "external" labor markets, see generally Peter B. Doeringer & Michael J. Piore, Internal Labor Markets and Manpower Analysis (1970) (developing the theory of internal labor markets governed by administrative rules within the firm as distinct from external labor markets in which prices are controlled by economic factors).

harms or harms resulting from a reduction in labor market competition between employers.

Second, as a matter of policy, modeling labor markets on assumptions of perfect competition contravenes current social scientific consensus regarding the labor market realities most workers face in relation to their corporate employers.[377] That a model of *imperfect* competition better approximates those realities is not a new argument.[378] But while antitrust enforcers have ignored those arguments while focusing exclusively on neoclassical models, social scientists with labor market expertise, including Nobel Prize winners, have produced a rich, decades-long literature documenting the extent of market frictions, social institutions, and customs that fortify employer power and structurally limit workers' ability to switch employers, even when underpaid or working in inferior conditions.[379] And while labor economists have empirically studied and published their findings on imperfect competition since the Progressive Era,[380] the current empirical turn in economics, fueled by reliance on larger, increasingly complex data sets, has produced considerable research to support an assumption of imperfect competition. This more recent turn has produced evidence of pervasive labor market concentration, employer collusion, and agreements restraining worker mobility as well as of market frictions like matching costs, search and mobility costs, information asymmetries, and heterogeneous preferences.[381] Even the U.S. Treasury

377. Following the language of the Clayton and Norris–LaGuardia Acts, this Article's discussion and proposals focus exclusively on employers organized in corporate or other forms of business organization.

378. See supra notes 66, 317 and accompanying text.

379. See, e.g., Manning, Monopsony in Motion, supra note 315, at 360–61 (describing sources of imperfect competition in labor markets); Robert M. Solow, The Labor Market as a Social Institution 1–27 (1990) (identifying how the character of the labor market as a social institution distinguishes its operation from other markets); Hiba Hafiz & Ioana Marinescu, Labor Market Regulation and Worker Power, 90 U. Chi. L. Rev. 469, 474–77 (2023) (collecting literature); Alan Manning, Monopsony in Labor Markets: A Review, 74 ILR Rev. 3, 3–26 (2021) (same).

380. See supra section I.A.1; supra notes 317–318.

381. See, e.g., Ioana Marinescu & Jake Rosenfeld, WorkRise, Worker Power and Economic Mobility: A Landscape Report 8 (2022), https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf [https://perma.cc/C7S9-JDFU] ("[T]he evidence on labor market concentration and labor supply elasticity clearly demonstrates that employers have *monopsony power*."); Treasury Report, supra note 342, at 3–22 (collecting literature); José Azar, Ioana Marinescu & Marshall Steinbaum, Labor Market Concentration, 57 J. Hum. Res. S167, S197 (2022) (demonstrating market concentration in local labor markets); Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, 57 J. Hum. Res. S200, S201 (2022) ("[W]ages may be set in imperfectly competitive markets, with a relatively small number of employers bargaining with workers, ultimately setting wages below perfectly competitive rates." (citation omitted)); David Berger, Kyle Herkenhoff & Simon Mongey, Labor Market Power, 112 Am. Econ. Rev. 1147, 1148 (2022) (developing a model to measure oligopsony power in labor markets); Boal & Ransom, supra note 318, at 97–99 (collecting evidence of qualitative labor

Department and neoclassical economists have joined the emerging consensus that labor markets are imperfectly competitive.[382]

Additionally, as a policy matter, limiting labor antitrust enforcement to employer conduct that suppresses wages below workers' MRP undercounts employer power and limits redress for its harms. Union premium wages better reflect the antitrust statutes' wage policy as determined by workers' collective voice and workplace institutions.[383] But even more conservatively, union premium wages may be better proxies for workers' value to production as compared to "competitive" wage rates, whether because they reduce the wage markdown of pervasive monopsony power or because "efficiency" wages better reflect workers' overall value-add. Administrative rules and procedures—internal labor market wage-setting—reflect pay equity norms, life-cycle productivity, and incentive structures that are better approximations of workers' contributions.[384] But more importantly, measuring employer power based on the employer's ability to deviate from a "market wage" as opposed to, say, a union premium wage, leaves out the full range of market power that employers can exercise to intimidate or coerce their employees into not joining unions, powers which many more employers possess relative to those that can merely suppress wages or working conditions, or slow wage growth,

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market features that monopsony models can explain); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, Monopsony in Online Labor Markets, 2 Am. Econ. Rev.: Insights 33, 43–44 (2020) ("The findings in this paper provide strong evidence that even in a thick labor market where search frictions may appear to be low, there is considerable monopsony power."); Kevin Rinz, Labor Market Concentration, Earnings, and Inequality, 57 J. Hum. Res. S251, S278 (2022) ("[I]ncreased local labor market concentration reduces earnings . . . ."); Azar et al., Estimating Labor Market Power, supra note 341, at 2 ("[J]ob differentiation is one possible source of imperfect competition in the labor market."); Alan B. Krueger & Orley Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector 2–3 (Nat'l Bureau of Econ. Rsch. Working Paper No. 24831, 2018), https://www.nber.org/papers/w24831.pdf [https://perma.cc/4Q8W-AWDH] ("[W]e seek to shed light on the extent of employer collusive action to restrict competition in the labor market by examining the prevalence of covenants in franchise contracts that restrict the recruitment and hiring of employees from other units within the same franchise chain.").

382. See Treasury Report, supra note 342, at 1 ("[T]he American labor market is characterized by high levels of employer power. . . . Employers exploit this market power by holding wages and certain non-wage benefits beneath their competitive level.").

383. See supra Part I.

384. See, e.g., David Weil, The Fissured Workplace 76–92 (2014) (discussing the processes that impact wage setting); Emily Breza, Supreet Kaur & Yogita Shamdasani, The Morale Effects of Pay Inequality, 133 Q.J. Econ. 611, 612–13 (2018) (summarizing the behavioral economics literature on the relationship between pay equity, morale, and worker behavior); Samuel Dodini, Kjell Salvanes & Alexander Willén, The Dynamics of Power in Labor Markets: Monopolistic Unions Versus Monopsonistic Employers 33–34 (IZA Discussion Paper No. 15635, 2022), https://docs.iza.org/dp15635.pdf [https://perma.cc/6V72-CCYA] (analyzing the effect of unions on earnings, employment, and inequality).

below what a "competitive" market would achieve.[385] And in addition to failing to countervail existing employer power, the harms from chilling collective worker voice register in failures to innovate, uncorrected production inefficiencies and disruptions, higher turnover, reduced morale and productivity, increased wage divergence and income inequality, wealth transfers, macroeconomic instability, and more.[386]

Coherent federal labor policy requires reading the Clayton and Norris–LaGuardia Acts consistently with the NLRA, which grants employees the right to organize, unionize, collectively bargain, and strike "for the purpose of collective bargaining or other mutual aid or protection," and prohibits employers' "interfere[nce] with, restrain[t], or coerc[ion]" of "employees in the exercise of th[os]e rights."[387] In other words, the New Labor Antitrust's approach limits enforcers' ability to further overall federal labor policy and, specifically, Congress's consistent public policy vision that wages either be set by workers through collective

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385. For the broader literature on employer intimidation and coercion in union-busting campaigns, see infra notes 390–392 and accompanying text.

386. See, e.g., John W. Budd, The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation, *in* What Do Unions Do? A Twenty-Year Perspective 160–92 (James T. Bennett & Bruce E. Kaufman eds., 2007) (describing how labor unions can lead to a higher rate of participation in employee benefit plans); Richard B. Freeman & James L. Medoff, What Do Unions Do? 78–180 (1984) (providing an overview of the labor economics literature on the benefits of unions); Kate Bahn & Joe Peck, How Unions Can Increase Firm Productivity and Strengthen Economic Growth, WorkRise (Sept. 6, 2023), https://www.workrisenetwork.org/working-knowledge/how-unions-can-increase-firm-productivity-and-strengthen-economic-growth [https://perma.cc/N32Q-SFCB] (collecting studies); Laura Feiveson, Labor Unions and the U.S. Economy, U.S. Dep't of the Treasury (Aug. 28, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy [https://perma.cc/JM45-Z55K] (same).

387. See 29 U.S.C. §§ 157–158 (2018). Importantly, the Supreme Court and lower courts have not understood the NLRA as superseding the Clayton and Norris–LaGuardia Acts. See, e.g., Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–47 (1942) (interpreting the term "labor dispute" within the meaning of the Norris–LaGuardia Act); New Negro All. v. Sanitary Grocery Store Co., 303 U.S. 552, 560–61 (1938) (same); Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 312–14 (1st Cir. 2022) (same). This is in part because the Clayton and Norris–LaGuardia Acts' provisions are broader than the NLRA's, as they apply to labor disputes "regardless of whether or not the disputants stand in the proximate relation of employer and employee," 29 U.S.C. § 113(c), and because the Norris–LaGuardia Act was "intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers," *New Negro All.*, 303 U.S. at 560–61; see also *Columbia River Packers Ass'n*, 315 U.S. at 146 ("[B]y the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee."). But more generally, this Article focuses on policy statements and injunctions intended to guide *antitrust* law and enforcement as they are applied to employers' violations of antitrust law in labor markets, not the regulation or scope of workers' rights to organize, collectively bargain, or strike, or any associated unfair labor practices that worker activity may elicit.

bargaining *or* through negotiations free from the interference, restraint or coercion of employers in the exercise of their labor rights.[388]

Additionally, because labor antitrust enforcers have focused only on competitive wage reduction measures, they have ignored potential remedies that could more effectively counter harmful employer power and further federal labor policy in the NLRA. While remedies for labor antitrust violations are robust—treble damages of workers' losses from employers' anticompetitive conduct—they are retroactive and at best deter infracompetitive wage bargaining ex ante.[389] But because the New Labor Antitrust's enforcement approach benchmarks the competitive wage, employers' incentives ex ante are to negotiate only a market-based wage rather than, say, a union premium wage, and if the union premium wage were the benchmark, employers might instead be more incentivized to negotiate wages with worker representatives in labor organizations or through collective bargaining. So the competitive wage baseline has precluded remedies that mandate establishing or strengthening labor organizations' role in the employment bargain in ways that both contravene Congress's stated labor policy in the antitrust laws and undermine NLRA policy. Additionally, limiting labor antitrust enforcement to only competition-based harms has unnecessarily restrained enforcement that could prevent employers' rampant interference with, restraint of, or coercion of employees in exercising their right to organize, collectively bargain, and strike in violation of labor law. Employer noncompliance with labor law is pervasive, dramatically disrupting and chilling worker unionization, in part due to the NLRB's limited resources and lengthy remedial processes.[390] Economist Anna

388. Cf. 29 U.S.C. § 158(a)(1) (establishing as an unfair labor practice in violation of the National Labor Relations Act employers' "interfere[nce] with, restrain[t], or coerc[ion] [of] employees in the exercise of the rights guaranteed" in the statute).

389. See 15 U.S.C. § 15 (2018).

390. See In Solidarity: Removing Barriers to Organizing: Hearing Before the H. Comm'n on Educ. & Lab., 117th Cong. 8 (2022) (statement of Kate Bronfenbrenner, Dir. of Lab. Educ. Rsch., Cornell Sch. of Indus. & Lab. Rel.), https://edworkforce.house.gov/uploadedfiles/9.14.22__bronfenbrenner_testimony.pdf [https://perma.cc/L7SS-ZK3N] ("A majority of firms continue to mount aggressive anti-union campaigns, while a smaller number do little or no campaigning against the union."); The Right to Organize: Empowering American Workers in a 21st Century Economy: Hearing Before the S. Comm'n on Health, Educ., Lab. & Pensions, 117th Cong. 9 (2021) (statement of Mark Gaston Pearce, Former Chairman, NLRB), https://www.help.senate.gov/imo/media/doc/Pearce2.pdf [https://perma.cc/SPR3-WNWP] ("Without a credible deterrent, employers weighing the consequences of violating the law face a choice that all but incentivizes such serious interferences with employees' rights."); Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, Econ. Pol'y Inst., Unlawful: U.S. Employers Are Charged With Violating Federal Law in 41.5% of All Union Election Campaigns 6 (2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/FFP6-PJ8P] (highlighting that "many union organizing efforts are thwarted by employers before making it to the filing stage" and "many anti-union violations go unreported"); Kate Bronfenbrenner, No Holds

Stansbury has found that the NLRA's sanctions for violations are so weak that employers have no economic incentive to comply.[391] Further, the dramatic decline in union density from nearly thirty-five percent in 1954 to six percent in 2019 is at least partially the result of employer coercion and retaliation.[392] Declining worker power not only harms worker earnings but also has broader macroeconomic, social, and political effects.[393]

III. TOWARD A PROGRESSIVE LABOR ANTITRUST

Antitrust policy and enforcement are at a crossroads. The Biden Administration's Executive Order on Promoting Competition in the American Economy and selection of progressives like Tim Wu, Jonathan Kanter, and Lina Khan to advise the President on competition policy and lead the DOJ's Antitrust Division and FTC, respectively, have heralded a shift from Chicago and Post-Chicago School thinking in favor of more

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Barred: The Intensification of Employer Opposition to Organizing 4 (Econ. Pol'y Inst., Briefing Paper No. 235, 2009), https://core.ac.uk/download/pdf/5133179.pdf [https://perma.cc/SC4K-HXME] ("As companies have globalized and restructured, corporate anti-union strategies have become more sophisticated, through resorting to implied or real threats of ownership change, outsourcing, or contracting out in response to nearly every organizing campaign." (citations omitted)).

391. See Anna Stansbury, Do US Firms Have an Incentive to Comply With the FLSA and the NLRA? 31 (Peterson Inst. for Int'l Econs. Working Paper No. 21-9, 2021), https://www.piie.com/sites/default/files/documents/wp21-9.pdf [https://perma.cc/CJC7-CPKD] ("[C]urrent penalties for typical firms mean that most firms need to expect a 78–88 percent chance of detection to have an incentive to comply with the FLSA.").

392. See Lawrence Mishel, Lynn Rhinehart & Lane Windham, Explaining the Erosion of Private-Sector Unions, Econ. Pol'y Inst., 9 fig.A, 45 (2020), https://files.epi.org/pdf/215908.pdf [https://perma.cc/RAA5-9WWL] ("The sharp decline of union representation and new union members in the 1970s—a decline from which workers and the labor movement have never recovered—was due not to worker disinterest but rather to a combination of employer tactics and weaknesses in the law that undermined worker organizing."); Mayer, supra note 287, at 22–23 (summarizing union statistics).

393. See Anna Stansbury & Lawrence H. Summers, The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy, Brookings Papers on Econ. Activity, Spring 2020, at 2 (arguing "that the decline in worker power has been the major structural change responsible for [] economic phenomena" occurring between the 1980s and 2020, including a decline in income to labor, a rise in average profitability, and a substantial fall in average unemployment); Tova Wang, Ash Ctr. for Democratic Governance & Innovation, Union Impact on Voter Participation—And How to Expand It 1 (2020), https://ash.harvard.edu/files/ash/files/300871_hvd_ash_union_impact_v2.pdf [https://perma.cc/A2VZ-JA8B] (examining the relationship between union participation and voter participation and finding that unions "increase voter participation among union members as well as the people around them"); Jasmine Kerrissey & Evan Schofer, Union Membership and Political Participation in the United States, 91 Soc. Forces 895, 919–21 (2013) (observing that from 1955 to 2008, as a result of union decline "[f]ewer individuals are exposed to the mobilizing effects of union membership, which, in aggregate, implies lower levels of voting, protesting and so on").

interventionist, Neo-Brandeisian antitrust policy.[394] The agencies' unprecedented commitment to labor antitrust enforcement has established a new regulatory environment to challenge employer power.

But the transformative potential of the New Labor Antitrust will turn on the details. Using Chicago School tools to tackle progressive and pro-worker antitrust goals has and will hamper achievement of those goals.[395] Antitrust enforcers can and should promote substantive policy advances that match the labor and wage policy of the antitrust laws, integrating contemporary social scientific methods that can more expansively target the sources and manifestations of employer power. This Part argues that the Clayton and Norris–LaGuardia Acts' stated policies displace traditional antitrust goals as applied to labor markets and, while not inconsistent with traditional goals of reducing employer power through promoting competition, establish independent antitrust goals of targeting corporate employer conduct that "interfere[s], restrain[s], or coerc[es]" collective worker organizing to establish representative workplace institutions for collective bargaining and mutual aid.[396] In other words, it argues that a Progressive Labor Antitrust should be equally concerned with harms to workers' countervailing leverage and voice that impact their ability to achieve "acceptable terms and conditions of employment" as with employer conduct that suppresses wages, wage growth, and workplace quality.[397] More broadly, antitrust enforcement should embrace a "new materialism" in both its methods and objectives that embraces the wealth of social scientific tools that are bottom up, but with a deep theoretical awareness of the structural sources of power, including through the ways that law and other institutions that support capital enable the coercion of labor and extraction of labor rents. This Part is a preliminary effort to outline alternative approaches antitrust enforcers could deploy to estimate employer power and its harms and offers recommendations for how to adapt those approaches in labor antitrust enforcement.

A. *Alternative Approaches to Evaluating Employer Power and Its Harms*

This section provides two preliminary suggestions of complementary alternatives to the current, competition-based wage-setting approach to assessing employer power and its harms. First, it argues that enforcers should flip their presumptions: Rather than assuming labor markets operate on a model of perfect competition, they should assume, consistent

394. See E.O. 14,036, supra note 253, at 36,987–90; Jim Tankersley & Cecilia Kang, Biden's Antitrust Team Signals a Big Swing at Corporate Titans, N.Y. Times (July 24, 2021), https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html (on file with the *Columbia Law Review*) (summarizing the Biden Administration's antitrust efforts).

395. See supra sections II.B–.C.

396. See 29 U.S.C. § 102 (2018).

397. See id.

with a growing empirical consensus, that labor markets operate on a model of imperfect competition. Second, enforcers should draw on broader social scientific methods and analytic tools from labor economics, behavioral economics, macroeconomics, sociology, political science, geography, and philosophy to assess employer power and its competition and *non*competition harms, consistent with the Clayton and Norris–LaGuardia Acts. These proposals are the start of a conversation, but the hope is to invite enforcers to benefit from the wealth of scholarly and empirical approaches to employer power as a first step.

Presumption of Imperfect Competition. Instead of assuming labor markets are competitive, a better approximation of the economic consensus is that most workers fall in the monopsony compensation range of a highly inelastic labor supply curve.[398] The new canon of economics textbooks starts with a fresh premise: "[I]t is monopsony, not perfect competition, that is the best simple model to describe the decision problem facing an individual employer," and "if one wants to model the market as a whole, models of oligopsony or monopsonistic competition are what is needed."[399] Assuming that labor markets are imperfectly competitive is also consistent with the language and purpose of the Clayton and Norris–LaGuardia Act exemptions.[400] Given this statutory and economic support, enforcers should preserve scarce enforcement resources and adopt a position—in policy documents, agency guidance, and litigation filings—that employer power should be rebuttably presumed in labor antitrust cases.Taking such a position is not unprecedented in antitrust enforcement history and doctrine. Canonical case law on mergers has established a structural presumption on the basis of economic understandings of market realities and the impacts of market structure, and agency guidance in Merger Guidelines has done the same.[401] Presumptions and burden of proof allocations exist throughout antitrust doctrine based on evolving empirical understandings of the likelihood of

398. See supra notes 367–379 and accompanying text.

399. Manning, Monopsony in Motion, supra note 315, at 3.

400. See 15 U.S.C. § 17 (2018) (exempting the application of the antitrust laws to "forbid the existence and operation of labor . . . organizations" and declaring the "labor of a human being is not a commodity or article of commerce"); 29 U.S.C. §§ 101–103 (declaring the wage and labor policy of the Norris–LaGuardia Act); supra Part I.

401. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (citing IO economists' analyses to establish a structural presumption in merger enforcement); 2023 Merger Guidelines, supra note 341, at § 2.1 (declaring in Guideline 1 that "[m]ergers [r]aise a [p]resumption of [i]llegality [w]hen [t]hey [s]ignificantly [i]ncrease [c]oncentration in a [h]ighly [c]oncentrated [m]arket"); 1968 DOJ Merger Guidelines, supra note 309, at 1–2 (outlining presumptions about market structure and its effects on competition); Steven C. Salop, The Evolution and Vitality of Merger Presumptions, 80 Antitrust L.J. 269, 269 (2015) ("[*Philadelphia National Bank*] formulated what we would now call a 'quick look' type of decision process of using a preliminary screen to create a rebuttable presumption that certain mergers are anticompetitive.").

market realities and practices resulting in antitrust harms.[402] The Supreme Court recently offered an iteration of this longstanding principle: "From the beginning the Court has treated the Sherman Act as a common-law statute . . . . Just as the common law adapts to modern understanding and greater experience, so too do[] the Sherman Act's prohibition[s] . . . evolve to meet the dynamics of present economic conditions."[403] Burdens of proof and burden-shifting frameworks have changed over time with regard to nearly every form of firm conduct aside from price-fixing, including mergers, vertical restraints, unilateral conduct, and ancillary restraints, and these burdens have also changed based on specific industry realities, whether of declining industries and failing firms, industry-specific barriers to entry, or conditions that make it easier for firms to maintain cartels.[404] Where the Chicago School drove agency policy and judicial

402. See Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 433 (1990) (explaining that "[judicial] experience" guides whether restraints are entitled to "a conclusive presumption" of unreasonableness (internal quotation marks omitted) (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982))); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) (refusing to apply a per se rule against horizontal restraints on competition because of the nature of the relevant market); Andrew I. Gavil, Burden of Proof in U.S. Antitrust Law, *in* 1 Issues in Competition Law and Policy 125, 132–52 (Wayne Dale Collins et al., ABA Section of Antitrust L., ed., 2008) (providing case studies of burden allocation and burden shifting in antitrust cases over time); Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 Yale L.J. 1996, 2001 (2017) ("The structural presumption is rooted in empirical evidence indicating that more concentrated markets tend to have higher prices and higher price-cost margins, all else equal.").

403. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 899 (2007). But see Daniel Crane, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205, 1211–12 (2021) (arguing that "antitrust statutes often have readily discernable meanings that the courts simply ignore"). Again, that Congress recognized in the Clayton and Norris–LaGuardia Acts labor market conditions that mirror economists' current recognition of pervasive imperfect competition in those markets further fortifies the evolution of the law in this direction, as they supersede common law assumptions of "free labor" contracting in labor markets. See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401 (1950) (describing the longstanding canon of construction that a statute supersedes the common law when the statute is not consistent with the common law "and when a statute is designed as a revision of a whole body of law applicable to a given subject").

404. See State Oil Co. v. Khan, 522 U.S. 3, 21–22 (1997) (shifting scrutiny of maximum resale price maintenance agreements from per se to rule of reason); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) (same with vertical non-price restraints); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977) (applying industry-specific analysis for merger liability in declining bowling industry); Nat'l Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 413 (1923) (using similar reasoning to assess the declining hand-blown glass industry); United States v. Microsoft Corp., 253 F.3d 34, 89–95 (D.C. Cir. 2001) (applying industry-specific rule of reason analysis for tying); United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) (applying new burden-shifting framework for merger analysis); E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136 (2d Cir. 1984) (applying lenient analysis to price coordination in declining industry); supra notes 402–403; see also Harry First & Spencer Weber Waller, Bespoke Antitrust, 68 S.D. L. Rev. 468, 470 (2023) (noting a trend toward custom-tailoring analysis); Thomas

decisions based on theories of low entry barriers and firms' limited capacity for monopoly or cartel maintenance, enforcers today can drive agency policy and rules of decision by drawing on evidence-based analyses of market frictions, mobility costs, high entry barriers, and workers' limited capacity to switch employers.Finally, in addition to deploying a presumption of imperfect competition in labor markets, the FTC has a unique "unfair methods of competition" authority under section 5 of the FTC Act to establish prima facie liability for conduct that tends negatively to affect competitive conditions without requiring additional evidence or allowing cognizable justifications.[405] Given that authority, the agency could certainly argue for a presumption that certain labor market practices constitute unfair methods of competition due to pervasive employer power.[406] Such arguments could be supported by the FTC's own expert assessment of labor market conditions, further studies of labor market conditions under its section 6(b) authority,[407] case law holding that the FTC Act encompasses violations of the Sherman and Clayton Acts,[408] and case law holding that the FTC's authority to regulate unfair methods of competition is particularly broad when those methods conflict with "the basic policies of the Sherman and Clayton Acts."[409]

Broader Methods of Measuring Employer Power and Its Harms. A presumption of employer power would obviate enforcers having to prove employer power through metrics that center market-based valuations of worker's labor. But to the extent employers can rebut the presumption, and the question of employer power is live in any enforcement action, antitrust enforcers can rely on methods of determining employer power—and labor's underlying value—that extend beyond market-based metrics.

Nachbar, Qualitative Market Definition, 109 Va. L. Rev. 373, 409–16 (2023) (discussing the different sources of market power).

405. See 15 U.S.C. § 45(a)(1); FTC UMC Policy Statement, supra note 335, at 10 (discussing the FTC's broad discretion to establish liability).

406. While the agency did not make this argument in its Non-Compete NPRM, this Article argues it could have. See Non-Compete NPRM, supra note 361.

407. See FTC Act § 6(b), Pub. L. 63-203, 38 Stat. 717, 721 (codified at 15 U.S.C. § 46(b)); 15 U.S.C. § 46(a); FTC UMC Policy Statement, supra note 335, at 1 n.3, 12 (collecting cases that confirm the FTC's section 5 authority to regulate "various types of unfair conduct that tend to negatively affect competitive conditions" and summarizing examples).

408. See Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 395 (1953) (affirming that conduct "falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of § 5(a)").

409. Fed. Trade Comm'n v. Brown Shoe, 384 U.S. 316, 321 (1966); see also Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair" (internal quotation marks omitted) (quoting *Brown Shoe Co.*, 384 U.S. at 320–21)); Fed. Trade Comm'n v. Nat'l Lead Co., 352 U.S. 419, 428–29 (1957) (affirming rulings holding that the FTC has "wide discretion in . . . end[ing] . . . unfair practices" and is "the expert body to determine what remedy is necessary to eliminate [] unfair or deceptive trade practices" (internal quotation marks omitted) (quoting Jacob Siegel Co. v. Fed. Trade Comm'n, 327 U.S. 608, 612–13 (1946))).

Specifically, they can draw from broader methods of discerning power and coercive control from labor economics, behavioral economics, macroeconomics, sociology, political science, geography, and philosophy.

Labor Economics and Industrial Relations. First, current IO models applied to measure employer power assume external labor market wage-setting based on marginal decisions with static labor needs, ignoring a rich literature on compensation in labor economics, industrial relations, organizational studies, and human resource management. This literature documents and analyzes how firm policies and rules, productivity incentives, fairness, and other considerations impact employers' ability to unilaterally set wages and the range and design of compensation structures offered in employment contracts.[410] It also analyzes broader indicators of workers' relative bargaining power to employers, including its sources in workers' and employers' relative voice and exit options.[411] As this author argues in prior work, enforcers can rely on this literature to assess indicators of workers' and employers' relative bargaining power to get a clearer picture of employers' ability to undercompensate workers.[412] These indicators specify what types of evidence support findings of employer or worker power, respectively, and the policies and institutions that impact voice and exit options.[413] In other words, they incorporate into the analysis the ways in which law fortifies the bargaining leverage of the relevant parties, evidence crucial for building a "new materialism" of private power.

Current substitution analysis is limited, both statically and dynamically, with regard to identifying adequate substitutes based on existing industry practice and competitive wage rates and in discerning proper substitutes over time. This is equally true with, say, AI technologists in the tech sector as with delivery drivers choosing between independent contractor positions (e.g., FedEx or Amazon) and union jobs (e.g., UPS): Workers have heterogeneous preferences for the kinds of jobs, long-term investments, skills development, and personal control or voice they aspire to on the job and in their careers.[414] A more textured view of

410. See, e.g., Weil, supra note 384, at 76–92 (collecting literature); Hafiz, Economic Analysis, supra note 252, at 1148–52, 1163–64 (same).

411. See Albert Hirschman, Exit, Voice, and Loyalty 21–43 (1970) (describing workers' ability to use exit and voice); Hafiz & Marinescu, supra note 379, at 472 (examining the roles of voice and exit in bargaining dynamics between employers and workers); Marinescu & Rosenfeld, supra note 381, at 5 (same).

412. See Hafiz & Marinescu, supra note 379, at 494–96 ("These worker power indicators can help gauge how much power workers have in specific geographic locations, occupations, or industries.").

413. See id. at 477–92 (identifying indicators of workers' and employers' relative bargaining power based on their respective voice and exit options).

414. For the literature on workers' heterogeneous preferences and the relationship between heterogeneous preferences and employer monopsony, see, e.g., José Azar & Ioana Marinescu, Monopsony Power in the Labor Market 6–7, 13–19, 38, 52 (Inst. for the Econ. &

compensation-setting would starkly transform analysis of employer power because such a view introduces more nuanced questions about what counts as "adequate substitutes" for workers, including consideration of pay equity impacts, knowledge economies and information asymmetries, and amenities that more accurately capture quality-adjusted wages.[415] Further, more complex wage-setting models—including "efficiency wage" models—more accurately assess processes employers deploy to incentivize effort in light of the employment relationship operating as an incomplete contract.[416] The models' purpose is to set compensation levels for higher productivity outcomes.[417] They also incorporate fairness and morale considerations, which enable better assessment of workers' understanding of a fair division of their gains from trade.[418]

Labor economists have also tried to study workers' willingness to pay for dignity at work through qualitative survey data.[419] This data is critical for evaluating how workers view their outside options and the level of employer power in a given labor market. For example, workers may accept lower pay for non-wage amenities if they have more control over their schedules or more voice at work.[420] Non-IO economic approaches to understanding dynamic and dignitary wage-setting can improve enforcers' analysis of how workers value their contributions. Capturing these qualitative aspects of labor markets—and the social and normative logics that inform the employment bargain—more closely approximates the realities of bargaining leverage in that bargain.[421]

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the Future of Work, Discussion Paper No. 31/24, 2024), https://www.rfberlin.com/wp-content/uploads/2024/12/24031.pdf [https://perma.cc/8W6G-A5MS].

415. See Samuel Bowles & Herbert Gintis, Power 6 (U. Mass. Dep't of Econ., Working Paper No. 2007-03, 2007), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1039&context=econ_workingpaper [https://perma.cc/9XND-FJJY] (discussing the employer's power to dictate the quality of the workplace).

416. See Suresh Naidu, Labor Market Power in American Political Economy, *in* The American Political Economy: Politics, Markets, and Power 295, 309–11 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021) [hereinafter Naidu, Labor Market Power] (discussing the correlations between wages and outputs under the efficiency wage model).

417. Id.

418. There is a vast labor and behavioral economics literature on the relationship between fairness and morale considerations in the labor bargain. For a brief summary of labor economics models incorporating fairness and morale considerations in wage-setting, see Arindrajit Dube, Suresh Naidu & Adam D. Reich, Power and Dignity in the Low-Wage Labor Market 2–5, 30–31 (Nat'l Bureau Econ. Rsch., Working Paper No. 30441, 2022), https://www.nber.org/papers/w30441 [https://perma.cc/866D-GTB5] (exploring dignity at work through a study of Walmart employees).

419. See id. at 5 (describing the study's survey methodology).

420. See id. at 2–17, 26–31 (describing the non-wage amenities that employees value).

421. For more on qualitative market definition, see Nachbar, supra note 404, at 419–25 (examining the advantages of qualitative market definition over quantitative market definition, particularly in "the consideration of barriers to entry").

Behavioral Science and Information Economics. Enforcers can also better understand the realities of monopsonistic wage-setting by incorporating behavioral evidence of information asymmetries that accrue to employer power. Information asymmetries in labor markets generally favor employers because employers have more information about market wages than workers, hire more often than workers switch jobs, and have more negotiating expertise.[422] Power can also accrue to employers because workers lack accurate knowledge of legal rights that strengthen their bargaining leverage, thus lowering their compensation.[423]

Macroeconomics. Analyzing industry- or even economy-wide data can give enforcers a sharper understanding of employer power.[424] Big data grants economists more sophisticated tools to investigate the macroeconomic effects of corporate concentration.[425] Macroeconomic analysis measures labor's share of income, a useful indicator of workers'

422. See Marinescu & Rosenfeld, supra note 381, at 14 ("Firms are likely to have a lot more information about the market wage than workers, because firms hire more often than workers switch jobs."); Zoe Cullen & Bobak Pakzad-Hurson, Equilibrium Effects of Pay Transparency, 91 Econometrica 765, 766–68 (2023) (discussing the effects of pay transparency laws on two-sided incomplete-information bargaining by increasing individual workers' bargaining power relative to employers); Jason Sockin & Aaron Sojoruner, What's the Inside Scoop? Challenges in the Supply and Demand for Information on Employers, 41 J. Lab. Econ. 1041, 1075 (2023) ("Volunteers are reluctant to supply negative information and aspects of their own identity together."); Manudeep Bhuller, Domenico Ferraro, Andreas R. Kostøl & Trond C. Vigtel, The Internet, Search Frictions and Aggregate Unemployment 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30911, 2023), https://www.nber.org/system/files/working_papers/w30911/w30911.pdf [https://perma.cc/DB9V-GXBA] (explaining the effects of the internet on job searches and hiring).

423. See Weil, supra note 384, at 245–46, 291 n.2 (summarizing literature); Jack Fiorito & Paul Jarley, Union Organizing and Membership Growth, 33 J. Lab. Res. 461, 482 (2012) (discussing the lack of choice for workers in union organizing); Pauline Kim, Bargaining With Imperfect Information, 83 Cornell L. Rev. 105, 105–11 (1997) (explaining employees' lack of knowledge about at-will employment); Pauline Kim, Norms, Learning, and Law, 1999 U. Ill. L. Rev. 447, 451 (1999) (summarizing arguments against at-will employment); J.J. Prescott & Evan Starr, Subjective Beliefs About Contract Enforceability, 53 J. Legal Stud. 435, 438 (2024) ("[Seventy] percent of employees with an unenforceable noncompete mistakenly believe that their noncompete is enforceable."); Stewart J. Schwab, Law-and-Economics Approaches to Labour and Employment Law, 33 Int'l J. Compar. Lab. L. & Indus. Rels. 115, 137–38 (2017) (explaining that the internal promotion system causes employees to get stuck with one employer); Evan Starr, J.J. Prescott & Norman Bishara, The Behavioral Effects of (Unenforceable) Contracts, 36 J.L., Econ., & Org. 633, 665 (2020) (investigating the effects of unenforceable noncompete contracts and finding that they affect employee tenure despite being unenforceable under state law).

424. See Hafiz, Economic Analysis, supra note 252, at 1176–83 (discussing ways to integrate "macroeconomic analysis into labor regulation").

425. See, e.g., Jan Eeckhout, The Profit Paradox 216–33 (2021) (discussing the importance of data in regulating market power); Jan De Loecker, Jan Eeckhout & Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, 135 Q.J. Econ. 561, 567–74 (2020) (describing the study's use of data to measure market power over time).

relative bargaining power.[426] That analysis has shown that competition law enforcement is associated with changes in labor's share in over twenty industries in twelve Organization for Economic Cooperation and Development (OECD) economies between 1995 and 2005.[427] These tools have not yet been integrated into antitrust enforcement to assess employer power but offer methods to aggregate industry-wide microeconomic data to estimate labor's share of the gains from trade across firms. At least one court has found that wage suppression from a dominant employer's anticompetitive conduct can be calculated through revenue share.[428]

Macroeconomic tools are particularly useful for proving employer power in highly concentrated labor markets and for setting agency enforcement priorities in industries where labor's share is low.[429] Macroeconomic analysis is additionally valuable for achieving antitrust's distributive goals and ensuring the shared benefits of economic development in ways that strengthen broad purchasing power and countercyclical planning.[430]*Sociology and Political Science.* Antitrust enforcers could revive the methodological pluralism of Progressive and New Deal labor regulation by turning to broader social scientific research in sociology and political science on employer power.[431] Since the New

426. See, e.g., David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, Concentrating on the Fall of the Labor Share, 107 Am. Econ. Rev. 180, 185 (2017) (presenting the "superstar firm explanation" for the decline in labor share (emphasis omitted)); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, The Fall of the Labor Share and the Rise of Superstar Firms, 135 Q.J. Econ. 645, 702 (2020) (discussing the connection between the fall in labor share and the rise of "superstar firms"); Simcha Barkai, Declining Labor and Capital Shares, 75 J. Fin. 2421, 2460 (2020) ("[I]ncreases in industry concentration are associated with declines in the labor share.").

427. See Amit Zac, Carola Casti, Christopher Decker & Ariel Ezrachi, Competition Policy and the Labor Share, 40 J.L., Econ., & Org. 786, 787–88 (2023).

428. See Le v. Zuffa, LLC, No. 2:15-CV-01045-RFB-BNW, 2023 WL 5085064, at *29 (D. Nev. Aug. 9, 2023) (finding a model based on revenue share to be a "reliable source[] of proof as to antitrust impact").

429. See supra note 426 and accompanying text.

430. For antitrust's distributive goals, see Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation, 34 Hastings L.J. 65, 93–96, 112–15, 127–30, 135–37 (1982) (describing the distributive goals of the Celler–Kefauver, Clayton, FTC, and Sherman Acts); Eric A. Posner & Cass R. Sunstein, Antitrust and Inequality, 2 Am. J.L. & Equal. 190, 191 (2022) (arguing that, "in some cases, it may be appropriate to consider sacrificing economic efficiency for distributional goals by introducing distributional weights into antitrust analysis" and that "doing so can increase social welfare").

431. For methodological pluralism during this period, see 3 Dorfman, supra note 79, at 205–12 (describing the formation of the American Economic Association and differences between the historical, statistical, and deductive methods of economists during the period); Rodgers, supra note 129, at 409–85 (providing an overview of methodological debates in Progressive social scientific thought); Ross, supra note 92, at 143–470 (same); Rutherford, Institutional Movement, supra note 92, at 3–56 (situating American Institutionalism in the history of economics and social scientific methodological debates between 1918 and 1947);

Deal period, economic sociologists, sociologists of work, and political scientists have developed theoretical models and empirical strategies for assessing "social relations of work and the structure of inequalities" in organizational forms across the "economic and sociological boundaries of the productive configuration."[432] These include developing new theories about the relationship between power, legal and political institutions, and social conventions, and analyzing the social and political strategies firms deploy to collude and stabilize control over labor as an input of production.[433]Political scientists in the emerging field of American Political Economy have sought to study the interconnection of markets and government to understand "the ways in which *institutional configurations* shape *coalitional politics* to produce long-term *developmental processes*."[434] For example, political scientists Kathleen Thelen, Alexander Hertel-Fernandez, and others have developed models and empirical tools for analyzing "institutional sources of business power" from state capture to policy feedback and lock-in effects from state delegation of public functions to corporate actors.[435] Others research the relationship between concentrated economic power, capture, and the potential impact of

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Yonay, supra note 30, at 49–162 (describing methodological debates between institutionalists and neoclassical economists in the interwar period); William J. Novak, Institutional Economics and the Progressive Movement for the Social Control of American Business, 93 Bus. Hist. Rev. 665, 676–94 (2019) (describing the historical and institutional methods deployed by social scientists in the Progressive movement).

432. Martine D'Amours, Leticia Pogliaghi, Guy Bellemare, Louise Briand & Frédéric Hanin, Reconceptualising Work and Employment in Complex Productive Configurations, 38 Work, Emp. & Soc'y 63, 64 (2024).

433. See, e.g., Re-Imagining Economic Sociology 23–27 (Patrik Aspers & Nigel Dodd eds., 2015) (summarizing novel approaches to economic sociology in the study of financial markets, economic structures, and economic relations); Lyn Spillman, Solidarity in Strategy: Making Business Meaningful in American Trade Associations 31–41, 73–370 (2012) (exploring theories of economic governance, the production of business culture, and the influence of business associations in politics through analyzing the social construction of business interests in trade associations); Erik Olin Wright, Working-Class Power, Capitalist-Class Interests, and Class Compromise, 105 Am. J. Socio. 957, 957–61 (2000) (proposing a theoretical framework for understanding working-class power and capitalist-class interests).

434. See Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, The American Political Economy: A Framework and Agenda for Research, *in* The American Political Economy: Politics, Markets, and Power, supra note 416, at 7.

435. See Marius R. Busemeyer & Kathleen Thelen, Institutional Sources of Business Power, 72 World Pol. 448, 453–57 (2020) (exploring how delegation, deregulation, and accretion have enabled businesses to gain institutional power); see also Alexander Hertel-Fernandez, State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation 243–68 (2019) (exploring the relationship between state capture and American democracy); K. Sabeel Rahman & Kathleen Thelen, The Role of Law in the American Political Economy, in The American Political Economy: Politics, Markets, and Power, supra note 416, at 76 (examining "the role of the judiciary in the American political economy, tracing the impact of the law and the courts on political-economic institutions and outcomes, with an emphasis on developments since the 1970s").

countervailing institutions, like unions.[436] These institutional relationships and the coevolution of private and public decision-making are key for antitrust enforcers to understand in assessing how antitrust legal rules can themselves generate and protect employer power.

Research in sociology and political science is particularly useful in vertically disintegrated and "fissured" industries to evaluate lead firms' legal incentives to restructure while retaining monopsony power within their supply chains.[437] Sociologists have developed methods for studying power across supply chains or production networks by using Social Network Analysis (SNA) to analyze "key player[s,] . . . core and periphery positions, . . . [and] level[s] of consolidation" that quantify power "via a firm's financial ties to other entities," dependencies between core and periphery firms, and testing distribution patterns to determine levels of consolidation.[438] These theoretical and empirical contributions move beyond narrow marginalist and even substitution analyses to better

436. See Samuel Ely Bagg, The Dispersion of Power: A Critical Realist Theory of Democracy 1–174 (2024) (proposing a theory of democracy as collective self-rule dependent upon a dispersion of private power and structuring public power to resist state capture); Daniel J. Galvin, Alt-Labor and the New Politics of Workers' Rights 1–35, 66–172 (2024) (examining the rise of alt-labor and the "logic of alt-labor's political development" as a mechanism for building worker power); Chase Foster, Varieties of Neoliberalism: Courts, Competition Paradigms and the Atlantic Divide in Anti-Trust, 20 Socio-Economic Rev. 1653, 1653–78 (2022) (evaluating the contributions of economic interests, business power, and the relative influence of economists on the evolution of antitrust policy in the United States); Chris Howell, Rethinking the Role of the State in Employment Relations for a Neoliberal Era, 74 Indus. & Lab. Rel. Rev. 739, 739–72 (2021) (arguing that an activist state contributed to the liberalization of employment regulation through market making, displacing collective with individual employment regulation, state-directed social pacts, and redrawing the boundaries between work and non-work); Sarah Staszak, Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace, 34 Stud. Am. Pol. Dev. 239, 239–68 (2020) (examining the role of state institutions, politics, and legal developments on the evolution of employment arbitration as a form of justice enhancement to one co-opted by business-friendly conservatives focused on protecting employers from litigation).

437. See Wolfgang Streeck, On the Institutional Conditions of Diversified Quality Production, *in* Beyond Keynesianism: The Socio-Economics of Production and Full Employment 21, 21–57 (Egan Matzner & Wolfgang Streeck eds., 1991) (discussing the mechanisms by which societies can exploit the employment opportunities offered by advanced forms of demand); Kathleen Thelen, The American Precariat: U.S. Capitalism in Comparative Perspective, 17 Persps. on Pol. 5, 8 (2019) ("Firms have become increasingly fragmented . . . as companies construct extensive networks of subcontracting and franchising that allow them to outsource all kinds of operations, using cheaper third party suppliers of goods and services to cut costs, particularly labor costs."); Weil, supra note 384, at 89 ("Businesses at the top of supply chains split off employment so that they can focus their attention on more profitable activities connected to the revenue side of their income statement, leaving the manufacture of products or the provision of service to be fissured off.").

438. See Loka Ashwood, Andy Pilny, John Canfield, Mariyam Jamila & Ryan Thomson, From Big Ag to Big Finance: A Market Network Approach to Power in Agriculture, 39 Agric. & Hum. Values 1421, 1422 (2022).

comprehend the social, political, and institutional sources of employer power that enable employers' ability to profitably reduce pay, working conditions, and worker organizing.

Geography. Geographers study place-based sources of economic power, and their theories and methods could contribute another important dimension to analyzing employer power and its harms.[439] Labor markets—and the determinants of the employment bargain—are highly local: Production occurs based on "unique conjunctures of labour supply conditions, patterns of labour demand and skills acquisition, regulatory and legal frameworks, social conventions, [and] industrial relations practices."[440] Antitrust enforcers already assess employer power based on employers' ability to profitably reduce wages, wage growth, or workplace quality in a particular *geographic* market.[441] But their analysis focuses exclusively on workers' local employment options within their job classification under a marginalist, substitution analysis, ignoring a broader analysis of capital's "spatial fix"—or the "particular geographical distributions" that capital depends on to realize profit—in the broader, uneven development and spatial division of labor produced by capital and labor's relative mobility in space.[442]

Workers employed locally at a small retailer have different bargaining leverage than workers employed in the same town by Walmart or Amazon, even if their jobs are technically substitutable.[443] Large employers compete

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439. For law and a place-based analysis of employer power, see Hiba Hafiz, The Law of Geographic Labor Market Inequality, 172 U. Pa. L. Rev. 1183, 1222–67 (2024) (using a place-based lens to analyze labor market regulation).

440. Andrew Herod, Jamie Peck & Jane Wills, Geography and Industrial Relations, *in* Understanding Work and Unemployment: Industrial Relations in Transition 176, 178 (Peter Ackers & Adrian Wilkinson eds., 2003); see also Alan Manning & Barbara Petrongolo, How Local Are Labor Markets? Evidence From a Spatial Job Search Model, 107 Am. Econ. Rev. 2877, 2905 (2017) ("[U]nemployed workers' search efforts are strongly discouraged by distance to target jobs."); Enrico Moretti, Local Labor Markets, *in* 4B Handbook of Labor Economics 1237, 1238–91 (David Card & Orley Ashenfelter eds., 2011) (discussing the ways that "localized shocks" to a local labor market affect the rest of the economy); Ioana Marinescu & Roland Rathelot, Mismatch Unemployment and the Geography of Job Search, 10 Am. Econ. J.: Macroeconomics 42, 46–51 (2018) (showing that job seekers are less willing to apply to jobs that are further away).

441. See 2023 Merger Guidelines, supra note 341, § 4.3, at 40 ("A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements.").

442. See David Harvey, The Limits to Capital 373–413 (1982) (theorizing the spatial configuration of built environments that affects the relative geographic mobilities of capital and labor); Doreen Massey, Spatial Divisions of Labour: Social Structures and the Geography of Production 7, 65–121 (1984) (developing a theory of uneven development in the spatial structures of capitalist production); Neil Smith, Uneven Development 177 (2008) (noting that spatial equilibrium is a sort of "special fix" to capitalism's tendency toward geographic disequilibrium).

443. See Naidu et al., Labor Market Power, supra note 416, at 297–98 (arguing that large and small employers have different preferences with respect to labor's bargaining power).

economy-wide in their product markets and set human-resource policies at scale, including wages and work standards that exceed those offered by smaller retailers, making it harder for those retailers to compete for workers.[444] But national employment policies can also increase worker organizing costs at larger employers, as we have seen in the Walmart, Amazon, and Starbucks unionization campaigns.[445] Geographers' methods are sensitive to place-specific wage-setting, tackling the sources of employer power that come from the "built environment," but they also analyze how the politics of scale between local and globalized spaces of production impact the relative bargaining leverage of labor and capital.[446] Geographers have also studied "organized abandonment," or the ways capital arrangements with the state manage place-based decline and deregulation, including with regard to labor market institutions and human capital investments.[447] Integrating these conceptual frameworks into analysis of the scope and extent of employer power would aid antitrust enforcement and even generate local multiplier effects by strengthening worker power to achieve local economic development and macroeconomic goals.

Philosophy. Finally, philosophical approaches to coercion enable deeper theorization of the nature and normative stakes of employer power in antitrust policy. Far from focusing narrowly on the microeconomic inefficiencies and even macroeconomic harms of employer dominance, philosophers like Elizabeth Anderson, Judith Shklar, and Ruth Dukes examine the nature and effects of authoritarian power over workers' lives, on and off duty, within a longer tradition of conceptualizing the nature of freedom, dignity, and economic self-determination.[448] Philosophical

444. See id. at 297 (explaining that larger employers set economy-wide human resources policies).

445. See id. (arguing that national union enterprise laws can encourage workers to form unions at large employers).

446. See Andrew Herod, Scale 1–58 (2010) (conceptualizing the role of geographic scale in capitalist production and its impact on the relative power of private and public actors).

447. See Harvey, supra note 442, at 397 (describing "'red-lining' by financial institutions and urban renewal" as "entail[ing] organized abandonment" through state institutional arrangements with private actors, effectuating "a hierarchy of means—market, institutional and state—for the production, modification and transformation of spatial configurations to the built environment"); see also Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 13–29 (2007) (explaining that the state of California has used its prison system to extract free labor from incarcerated individuals).

448. See Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) 37–74 (2017) (theorizing the modern workplace as a form of "private government" that governs by "communist dictatorship"); Ruth Dukes, The Labour Constitution: The Enduring Idea of Labour Law 33–68 (2014) (discussing the ways in which codetermination between employers and employees can be empowering for the latter); Judith N. Shklar, American Citizenship: The Quest for Inclusion 63–104 (1991) (arguing that, "[t]o be a recognized and active citizen," one "must be an equal member of the polity, a voter," and also "must be an 'earner,' . . . one who is rewarded for the actual work he has

understandings of economic power invite general consideration of theories of subordination and domination by extracting general principles of arbitrariness, control, and consent that can be public, intersubjective, or entirely subjective. Anderson has reconceptualized the role of negative, positive, and republican freedoms in employment as a form of "private government" in ways that challenge the "theory of the firm as ideological blinder":

> While this theory explains why firms exist and why they are constituted by hierarchies of authority, it does not explain the sweeping scope of employers' authority over workers in the United States. It does not explain, for example, why employers continue to have authority over workers' off-duty lives, given that their choice of sexual partner, political candidate, or Facebook posting has nothing to do with productive efficiency.[449]

What enables employers' authoritarian control, according to Anderson, is a "complex system of laws" that "determines the scope and limits of the employer's authority," most especially by establishing "the default employment contract" as "employment-at-will."[450] Answers to deeper philosophical questions regarding these fundamental values and sources of economic freedom and authoritarian control are often implicit in antitrust policy discussions, enforcement decisions, and judicial opinions—they are rarely rigorously surfaced and debated to ascertain the normative positions that inform statutory interpretation, enforcement priorities, and policy decisions. This is particularly true with regard to technocratic economic analysis of employer power. But to expand beyond a "commodified" understanding of labor and accord antitrust enforcement with Congress's vision of and public policy towards labor, more robust philosophical inquiry is warranted.

Broader Legal Thought. Finally, enforcers can draw on broader legal thought to service thinking about employer power harms *beyond* competition-based harms. Most importantly, consistent with the Clayton

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done"); Hiba Hafiz, Beyond Liberty: Toward a History and Theory of Economic Coercion, 83 Tenn. L. Rev. 1071, 1074 (2016) (arguing for a theory of economic coercion that incorporates theoretical notions of individual and collective power); Diana S. Reddy, After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions, 132 Yale L.J. 1391, 1452 (2023) ("At its core, American labor law empowers workers to join together to secure better pay, benefits, voice, and dignity.").

449. See Anderson, supra note 448, at 48, 52; see also id. at 45–61 (developing theory of "private government"). For employers' digital surveillance, see Brishen Rogers, Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class 6 (2023) (stating that employers use novel surveillance technologies to monitor and control their workers' attempts to organize); Veena Dubal, On Algorithmic Wage Discrimination, 123 Colum. L. Rev. 1929, 1930 (2023) ("Over the past two decades, technological developments have ushered in extreme levels of workplace monitoring and surveillance across many sectors.").

450. See Anderson, supra note 448, at 53.

and Norris–LaGuardia Acts, antitrust enforcers could admit as evidence of cognizable antitrust harm employer conduct recognized under other legal frameworks as reducing individual workers' "full freedom of association . . . in the designation of such representatives . . . for the purpose of collective bargaining."[451]

There are excellent proxies for such infringements: employers' unfair labor practices that violate the NLRA. At the very least, violations of the right to organize, collectively bargain, and strike should contravene the antitrust laws *regardless* of whether that conduct reduces competition between employers for workers' services. But analysis could extend beyond currently cognizable unfair labor practices to include analyses of workers' reduced countervailing power based on case-by-case assessments of employers' interference with, restraint, or coercion of workers' full freedom of association. More generally, given the significant market frictions and lock-in effects that increase switching costs in employment relationships, employer conduct that reduces or chills worker coordination to assert countervailing leverage is much more likely to strengthen employer wage-setting power—and reduce worker earnings and working conditions—than reducing competition with that employer's competitors.[452]

B. *Toward Progressive Labor Antitrust Methods*

While identifying the range of theories and methods that can inform an analysis of employer power and its harms is an important first step, operationalizing those theories and methods within enforcement institutions is much more challenging. The weight of judicial decisions and standards of proof—as well as the symbiotic development of expertise and training in the evolution and entrenchment of IO methods—imposes considerable pressure on maintaining the status quo.[453] While this Article cannot entirely solve for this, this section suggests concrete steps forward in adapting new methods of analyzing employer power into labor antitrust enforcement.

Establishing a Presumption of Imperfect Competition. First, as discussed, public and private litigators should avoid further "commodifying" labor by measuring employer power through market-based valuations and argue for a judicial presumption of employer power in labor antitrust cases that

451. See 29 U.S.C. § 102 (2018).

452. See, e.g., Suresh Naidu & Eric A. Posner, Labor Monopsony and the Limits of the Law, 57 J. Hum. Res. (Special Issue) S284, S284 (2022) (describing labor market frictions and arguing that "there are strong reasons for believing that antitrust enforcement will be insufficient for countering labor market power"); id. at S314–15 (describing the importance of unionization "to counter the labor market power of employers").

453. See supra section II.B.

employers may rebut.[454] If defendants resort to current IO methods to prove their lack of market power in response, litigators could incorporate the broader set of theories and methods outlined above to counter employers' rebuttal.[455] Outside the context of litigation, policymakers, agency officials, and labor advocates can work to incorporate these broader approaches into draft legislation, agency guidance, comments to rulemakings, white papers, advocacy documents, and academic and popular writing.

Deploying New Methods in Enforcement. Integrating new theories and methods of discerning employer power and its harms into current approaches will come down to two things: (1) the nature and sources of broader evidence relevant for analyzing employer power and its harms; and (2) how that evidence should be weighted relative to evidence enforcers currently rely on, namely, the wage effects of anticompetitive conduct and reductions to competition.

Evidence and Data Collection. Enforcers can supplement IO and its substitution analysis with qualitative survey data, behavioral evidence, as well as industry-specific corporate, legal, and historical research. Starting with useful evidence from labor economics: In prior co-authored work with Ioana Marinescu, this author developed bargaining power indicators that draw on economic and legal sources of bargaining leverage to analyze workers' and employers' relative exit and voice options.[456] These included analyses of labor market tightness, labor share, union density, average period to a first collective bargaining agreement, strike activity, existence of organizing drives, and prior violations of workers' rights under antitrust, labor, and employment law, and so on.[457] Enforcers can also look to evidence of labor market frictions like matching costs, search and mobility costs, and information asymmetries. For these, heavier reliance on survey evidence from workers and from federal, state, and local labor and

454. See supra notes 399–406 and accompanying text.

455. See supra section III.A.

456. See Hafiz & Marinescu, supra note 379, at 494–96.

457. See id. at 495; see also SEIU Healthcare Pa. Strategic Org. Ctr., Complaint Against University of Pittsburgh Medical Center Regarding Potential Attempted and Actual Monopolization and Monopsonization in Violation of Section 2 of the Sherman Act 25, 44–45, 50 (filed with DOJ, May 18, 2023), https://thesoc.org/wp-content/uploads/2023/05/COMPLAINT_5.17_redacted.pdf [https://perma.cc/37QT-JPHK] (accusing the University of Pittsburgh Medical Center of "engaging in widespread and ongoing violations of workers' labor law rights, which prevents workers from asserting bargaining power that could act as a restraint on UPMC's monopsony power" in violation of Section 2 of the Sherman Act); Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony 2, 16–17 (Roosevelt Inst., Working Paper, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrustProtection_workingpaper_201812.pdf [https://perma.cc/V9WQ-NLPN] ("We propose draft legislation that would strengthen the law so that workers, aggrieved competitors, antitrust agencies and attorneys general can more easily bring lawsuits against labor monopsonists.").

employment law enforcers, unions, workers' centers, and worker advocacy organizations is useful. Survey data could offer more detailed information about workers' experiences of employer control both at work and outside of work, workers' willingness to pay for nonwage amenities like "dignity at work,"[458] and workers' experiences of fear in advocating for themselves or their co-workers.[459] Behavioral evidence of employer power could comprise survey evidence of workers' awareness of rights that strengthen their countervailing power, including: their (mis)understanding of their employment contracts; at-will defaults; enforceability of noncompete agreements; and broader rights established under the labor, employment, and antitrust laws. Antitrust enforcers can also solicit expert testimony and evidence of employer power beyond IO economists, including from labor economists, behavioral economists, macroeconomists, sociologists, political scientists, historians, and even philosophers, to clarify their "theory of the case" and contextualize the quantitative and qualitative evidence they submit in litigation or to justify agency actions or judicial opinions.

Evaluating and Weighing New Evidence. While enforcers should weigh non-IO evidence of employer power and its harms relative to IO-based evidence, no legal standards yet govern non-IO evidence's admissibility, credibility, or sufficiency. For this reason, it is critical for enforcers to experiment and clarify the relationship of that evidence to novel approaches to employer power within the Clayton and Norris–LaGuardia Acts' strictures. Antitrust's "antitextualist" history reveals that interpretations of antitrust statutes are highly underdetermined.[460] As Part I discusses, various economic—and even noneconomic—approaches have been adopted to interpret the statutes, from the rise and fall of the S-C-P and Chicago School paradigms to the rise of the Neo-Brandeisian School, and the weight of consensus within the antitrust community ultimately determines how to value certain types of evidence over others.

Remedial Design. Another critical means of protecting workers from noncompetition-based harms—and ensuring their countervailing leverage through institutions that can secure them "acceptable terms and conditions of employment"—is incorporating worker power strengthening mechanisms into antitrust remedial design.[461] Current approaches limit remedies to treble damages of workers' lost compensation measured

458. Dube et al., supra note 419, at 15 (internal quotation marks omitted).

459. See Corey Robin, Fear: The History of a Political Idea 190–99, 215–48 (2004) (detailing how fear in the workplace stops workers from advocating on their own behalf).

460. See Crane, supra note 403, at 1205–06 (discussing how the "antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating").

461. See Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)). For merger-specific remedial design in labor antitrust, see Hafiz, Rethinking Breakups, supra note 365, at 1527–95 (describing methodologies that agencies should deploy to incorporate worker power into antitrust remedial design).

against a "competitive" wage.[462] Instead, remedies should at least include: (1) ensuring robust labor market institutions that strengthen workers' voice and countervailing power; and (2) damages measured based on compensation and labor conditions (or quality-adjusted compensation) that would have existed had workers been truly free to coordinate and collectively demand improved terms and conditions of work, best approximated by union premium wages and security agreements.

Expanding Expertise and Institutional Capacity. Beyond specific reforms in labor antitrust enforcement, it is critical that Congress and the antitrust agencies expand their expertise and strengthen their institutional capacity in non-IO research fields investigating employer power. This will require funding and institution building, like creating an "Office of Labor Policy" akin to the various industry sections within the DOJ's Antitrust Division and the Office of Technology at the FTC.[463] The antitrust agencies currently lack any institutional center for labor antitrust enforcement, and there is no single agency official charged with establishing a unified agency-wide policy or resolving competing interpretations within the agency of its labor regulatory mandate.[464] The agencies' politically appointed economists and social scientifically-trained staff are overwhelmingly IO-trained with the recent addition of a small number of labor economists.[465] Establishing Offices of Labor Policy within the Antitrust Division and FTC would place a politically appointed official, a Chief Labor Officer, in charge of managing and monitoring the respective agencies' labor antitrust portfolios. The Office could hire a broad array of social scientists with labor expertise to work with the Chief Labor Officer to devise policy on where to prioritize enforcement, how to integrate IO and non-IO evidence into agency actions, and how to coordinate with the various offices and staff attorneys within the agency to formulate and ensure a uniform approach to labor antitrust enforcement. The Chief

462. See supra section II.C.

463. Industry-specific sections in the DOJ Antitrust Division focus on: Defense, Industrials, and Aerospace; Financial Services, Fintech, and Banking; Healthcare and Consumer Products; Media, Entertainment, and Communications; Technology and Digital Platforms; and Transportation, Energy, and Agriculture. See Sections and Offices, Antitrust Div., DOJ, https://www.justice.gov/atr/sections-and-offices [https://perma.cc/TTZ6-3XVH] (last visited Feb. 15, 2025). For the FTC's Office of Technology, see Office of Technology, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/office-technology [https://perma.cc/96KH-V736] (last visited Feb. 15, 2025).

464. Between October 2022 and October 2023, the author served as an Expert Advisor to the FTC on labor competition matters. These observations are based only on publicly available information about the FTC's organizational structure.

465. See Bureau of Economics Biographies, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/bureau-economics-biographies [https://perma.cc/B66F-74WF] (last visited Oct. 13, 2024) (showing biographies of economists who work in the Bureau of Economics); About EAG, Antitrust Div., DOJ, https://www.justice.gov/atr/about-eag [https://perma.cc/6PE6-EUFZ] (last visited Oct. 13, 2024) (showing biographies of economists who work in the Expert Analysis Group).

Labor Officer could also supervise hiring labor and behavioral economists, macroeconomists, sociologists, political scientists, philosophers, and even union organizers and labor movement experts—much like the CFPB, SEC, and EPA do with their own interdisciplinary expert hiring (and much like the Division of Economic Research at the NLRB did during the New Deal).[466] The Officer could monitor and utilize the newly established interagency memoranda of understanding (MOUs) between the antitrust and labor agencies to ensure that the agencies are sharing information and working together to review the effects of their respective investigations, merger reviews, and enforcement actions on workers.[467] The MOUs can also enable the agencies to devise policy consistent with their respective federal mandates.[468]

CONCLUSION

In passing the 1914 and 1932 labor exemptions, Congress established a clear labor and wage policy that rejected viewing labor as a commodity, favoring protection for worker coordination that could take the outcomes of the employment bargain outside the market and its logic of supply and demand. Current New Labor Antitrust methods for calculating labor's value—and corollary measurement of employer power and its harms—have de facto commodified labor, only mobilizing antitrust protections to the extent employers deviate from an ideal of market-set wages and protections reduce labor market competition. But antitrust enforcers have had—and continue to have—a wealth of options for setting enforcement standards and metrics that trigger antitrust's protections. The rise of labor antitrust enforcement in the past decade is a long overdue development, and it should take advantage of the range of human effort and disciplinary expertise that has evolved to better understand how the employment bargain works and what the most accurate descriptions and predictors are of employer power and its broader harms. Without reforming the methods of antitrust analysis, antitrust policy can only go so far to protect workers from dominant employers.

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466. See Hafiz, Economic Analysis, supra note 252, at 1165 (discussing the importance of hiring an interdisciplinary staff).

467. See Hiba Hafiz, Roosevelt Inst., A Whole-of-Government Approach to Increasing Worker Power 6 (2022) https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_WholeofGovernmentApproachtoIncreasingWorkerPower_Brief_202212.pdf [https://perma.cc/W4TZ-YN33] (discussing the importance of wielding interagency coordination to strengthen worker power); Hiba Hafiz, Interagency Coordination on Labor Regulation, 6 Admin. L. Rev. Accord 199, 205 (2021) [hereinafter Hafiz, Interagency Coordination] (recognizing the importance of interagency coordination to enhancing the efficiency of the administrative state); Hiba Hafiz, Interagency Merger Review in Labor Markets, 95 Chi.-Kent L. Rev. 37, 39 (2020) (emphasizing the importance of interagency merger review to ensure long-term labor market health).

468. See Hafiz, Interagency Coordination, supra note 467, at 207 (discussing how MOUs can help administrative agencies create policies in line with their federal jurisdiction).

NOTE

LABOR-PEACE AGREEMENTS IN EMERGING INDUSTRIES

*Juan Ramon Riojas**

Labor unrest poses serious challenges to the development of new industries and to the implementation of public investment projects such as the Inflation Reduction Act. One way to converge the interests of employers, workers, and the public is through labor-peace agreements (LPAs). Because federal and state government actors are some of the biggest investors in the recent development projects, proponents of LPAs argue that these federal and state government actors should have the power to require, or at least incentivize, LPAs on the projects they invest in. To that effect, former President Joseph Biden issued an executive order that requires project labor agreements, a form of LPAs unique to the construction industry, on federally funded projects worth $35 million or more.

But opponents claim that this act is preempted by federal labor law, and the federal courts of appeals have split on what state action constitutes permissible nonregulation. While the circuits agree that there is a market participant exception to federal labor preemption, they disagree as to the test—and whether other forms of nonregulation can survive. This Note demonstrates why the Seventh Circuit's interpretation—which allows conditional spending to circumvent preemption so long as it's not coercive—is the most consistent with Supreme Court precedent in the field of labor preemption and other similar doctrines.

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INTRODUCTION

On August 16, 2022, President Joseph Biden signed the Inflation Reduction Act (IRA)[1] into law to "deliver[] progress and prosperity to American families."[2] The IRA allocates billions of dollars for investment in

1. Pub. L. No. 117-169, 136 Stat. 1818 (2022) (codified as amended in scattered titles of the U.S.C.).

2. Joseph R. Biden Jr., President, Remarks by President Biden at Signing of H.R. 5376, The Inflation Reduction Act of 2022 (Aug. 16, 2022), https://www.whitehouse.gov/briefing-

clean energy infrastructure.[3] As a result of this statute, a tremendous amount of money is now flowing to states to undertake major infrastructure projects.[4] But what will the jobs look like on such projects? And, in an era of rising labor unrest,[5] to what extent will labor peace be assured on such projects?

Labor-peace agreements (LPAs) can serve as key tools in achieving good jobs, ensuring labor peace, and procuring timely completion of large-scale projects. Project labor agreements (PLAs), a type of LPA specific to the construction industry, can help in the initial stages of the implementation of the IRA by "promoting efficient, timely construction of clean energy projects."[6] Neutrality and card check agreements, common provisions in LPAs, can provide fair terms for laborers to select unions to represent them in a less hostile environment for all parties.[7] Unlike PLAs, neutrality and card check agreements can exist in nonconstruction contexts.[8]

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room/speeches-remarks/2022/08/16/remarks-by-president-biden-at-signing-of-h-r-5376-the-inflation-reduction-act-of-2022/ [https://perma.cc/7VQE-NPXQ].

3. Chris Chyung, Sam Ricketts, Kirsten Jurich, Elisia Hoffman, Frances Sawyer, Justin Balik & Kate Johnson, How States and Cities Can Benefit From Climate Investments in the Inflation Reduction Act, Ctr. for Am. Progress (Aug. 25, 2022), https://www.americanprogress.org/article/how-states-and-cities-can-benefit-from-climate-investments-in-the-inflation-reduction-act/ (on file with the *Columbia Law Review*).

4. See Summary of Inflation Reduction Act Provisions Related to Renewable Energy, EPA, https://www.epa.gov/green-power-markets/summary-inflation-reduction-act-provisions-related-renewable-energy [https://perma.cc/NT8W-5KA9] (last updated Jan. 28, 2025) (noting that money from the IRA will flow to states in the form of investment and tax credits).

5. See Margaret Poydock & Jennifer Sherer, Econ. Pol'y Inst., Major Strike Activity Increased by 280% in 2023 (2024), https://files.epi.org/uploads/279299.pdf [https://perma.cc/5VQY-7ANK] ("Last year saw a resurgence in collective action among workers.").

6. The Inflation Reduction Act and Qualifying Project Labor Agreements, DOL, https://www.dol.gov/general/inflation-reduction-act-tax-credit/project-labor-agreements [https://perma.cc/9UXK-ZPV7] (last visited Oct. 5, 2024).

7. See James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819, 827 (2005) ("[M]ore than 90% of the agreements called for some form of dispute resolution, most often arbitration, to address differences about unit determination or allegations of non-neutral conduct by one of the parties."); James Y. Moore & Richard A. Bales, Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy, 87 Ind. L.J. 147, 157 (2012) (noting that neutrality agreements may prevent employers and unions from making negative comments against each other or may require a hostility-free environment).

8. See Howard Stutz, With Contracts Settled, Culinary Union Eyes Aggressive Growth in 2024, Nev. Indep. (Mar. 31, 2024), https://thenevadaindependent.com/article/with-contracts-settled-culinary-union-eyes-aggressive-growth-in-2024 (on file with the *Columbia Law Review*) (reporting on a culinary union's neutrality agreements with restaurants in Las Vegas).

Some governmental units have attempted to achieve these ends by requiring LPAs.[9] These mandates have faced significant legal challenges.[10] Opponents argue that the National Labor Relations Act (NLRA)[11] preempts states, localities, and federal executive agencies from engaging in or requiring these agreements.[12] But in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (*Boston Harbor*), the Supreme Court held that the NLRA doesn't preempt states or local governments when they act as market participants.[13] Since that case was decided, the federal circuits have consistently recognized the market participant exception to the NLRA.[14] But the circuits split on how broad that exception is and what test they use to determine if the government is acting as a market participant or as a regulator.[15] This circuit split causes uncertainty for federal, state, and local policymakers,[16] which

9. See, e.g., Chi., Ill., Ordinance SO2019-9497 (Dec. 18, 2019) (requiring labor-peace agreements for Chicago-funded nonprofits that provide health and social services to Chicago residents and communities).

10. See, e.g., Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1077 (9th Cir. 2017) ("The associations contend that [the municipal provision requiring LPAs] . . . is preempted by two federal labor statutes . . . ."); N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1005 (7th Cir. 2005) ("An association of non-union contractors (and one of its members) filed this suit . . . seeking a declaratory judgment that the requirement of a project labor agreement is preempted by federal law.").

11. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

12. See, e.g., Robert C. Nagle, NYC 'Labor Peace' Order May Clash With Federal Law, Law360 (Aug. 9, 2016), https://www.law360.com/articles/826157/nyc-labor-peace-order-may-clash-with-federal-law (on file with the *Columbia Law Review*) (explaining that an LPA could be challenged on the grounds of being a local regulatory measure in conflict with the NLRA).

13. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227 (1993) ("We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor.").

14. See, e.g., Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1022–23 (9th Cir. 2010) ("In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant."); *Lavin*, 431 F.3d at 1006 ("A city or state acting as proprietor, however, is a market participant rather than a market regulator." (citing *Boston Harbor*, 507 U.S. at 230–31)); Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 213 (3d Cir. 2004) ("But a state will not be subject to preemption analysis when it acts as a 'market participant.'"); Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 34–35 (D.C. Cir. 2002) (recognizing a market participant exception).

15. See Chelsea Button, Comment, "Fair and Open Competition" or Death to the Union? Project Labor Agreements in Today's Politically Contentious Atmosphere, 52 UIC J. Marshall L. Rev. 531, 561 (2019).

16. See Michael John Garcia, Craig W. Canetti, Alexander H. Pepper & Jimmy Balser, Cong. Rsch. Serv., R47899, The United States Courts of Appeals: Background and Circuit Splits From 2023, at 7 & n.47, https://crsreports.congress.gov/product/pdf/R/R47899 (on file with the *Columbia Law Review*) (last updated Apr. 1, 2024) (observing that circuit splits may "lead to greater uncertainty," result "in the non-uniform treatment of similarly situated

in turn decreases the use of innovative labor-peace tools that could help workers obtain protections while efficiently providing public benefits.

The courts of appeals have applied three different market participant tests. The Third Circuit interprets *Boston Harbor* to require two jointly necessary conditions.[17] First, the state or municipality must have a proprietary interest.[18] Second, the policy must be narrowly tailored to avoid a regulatory effect.[19] The Ninth Circuit uses essentially the same conditions but holds that they are independently sufficient—a state need only have a proprietary interest or narrowly tailor its policy to avoid regulatory effects.[20] The Seventh Circuit's *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*[21] decision is a third wing of the circuit split. *Lavin* held that even when a state doesn't act as a proprietor, it can nonetheless condition spending in a way that may avoid preemption under the principles of *Boston Harbor*.[22] The court explained that preemption prevents conflicting *regulation*, and conditional spending is almost never regulation under the Supreme Court's precedent.[23] The D.C. Circuit has not offered a clear test, instead opting for a piecemeal approach to the market participation exception.

This Note provides two primary contributions. First, it offers a resolution to the circuit split regarding the market participant exception to federal labor preemption. Second, it demonstrates how that resolution could enable actors in all levels of government to use LPAs to support laborers in emerging industries.

Part I considers the types and benefits of labor-peace agreements, then provides a few examples of how these agreements appear in emerging industries. Part II explains NLRA preemption and the circuit split regarding the market participant exception. Part III offers a resolution to the split by looking at other constitutional doctrines. Finally, Part IV applies the resolution in Part III to modern uses of labor-peace agreements in emerging industries.

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litigants," and affect governmental bodies "responsible for implementing statutes and regulations subject to conflicting judicial rulings").

17. See Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("Only if both conditions are met is a government acting as a market participant." (citing *Sage*, 390 F.3d at 216)).

18. *Sage*, 390 F.3d at 216.

19. Id.

20. See Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir. 2010) ("[S]tate action need only satisfy one of the two . . . prongs to qualify as market participation not subject to preemption.").

21. 431 F.3d 1004 (7th Cir. 2005).

22. See id. at 1006 (distinguishing between conditional spending and regulation).

23. See id. ("The question 'is a condition on the receipt of a grant a form of regulation?' comes up frequently, and the answer almost always is negative.").

I. LABOR-PEACE AGREEMENTS AND WHY THEY MATTER

Federal labor law generally prohibits employers from making agreements with a union before a majority of employees elect that union to represent them.[24] For the purposes of this Note, the term "labor-peace agreement" describes the type of agreements that seek to circumvent that general prohibition. This Note focuses on neutrality, card check, and project labor agreements.

Section I.A elaborates on typical LPAs and how they benefit workers, employers, and the general public. Then, section I.B examines three recent applications of LPAs—one entirely in the private sector and two required by a state or local government. Those examples provide a baseline for Part IV, which argues that government actors should explore expanded, creative uses of LPAs to support emerging industries.

A. *The Concept and History of LPAs*

Project labor agreements have existed since the 1930s,[25] but neutrality and card check agreements developed somewhat more recently.[26] These later agreements grew out of union experiments to combat declining unionization rates.[27]

Unionization rates have continued to decline. In the 1950s, one in three workers was represented by a union.[28] By the 1980s, that rate was one in five, and now it is one in ten.[29] Unionization rates even slightly dropped in 2022,[30] despite the recent developments concerning labor victories at

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24. 29 U.S.C. § 158(e) (2018). But see id. § 158(f) (establishing the construction industry exception to the bar on prehire agreements).

25. See Kimberly Johnston-Dodds, Constructing California: A Review of Project Labor Agreements 9 (2001), https://alamedamgr.files.wordpress.com/2015/06/california-research-bureau-article-on-plas.pdf [https://perma.cc/PF87-GT4A] ("The first use of a public project labor agreement in California occurred on the construction of the Shasta Dam . . . .").

26. See Brudney, supra note 7, at 825 (noting that neutrality agreements began appearing in the 1970s and were negotiated "with greater frequency" by the late 1990s).

27. See Andrew M. Kramer, Lee E. Miller & Leonard Bierman, Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?, 23 B.C. L. Rev. 39, 42 (1981) ("The recent emergence of neutrality agreements as a significant organizing tool parallels organized labor's frustration in other arenas.").

28. Sarah Chernikoff, Here's Why the US Labor Movement Is So Popular but Union Membership Is Dwindling, USA Today (Sept. 4, 2023), https://www.usatoday.com/story/money/nation-now/2023/09/04/us-union-membership-shrinking/70740125007/ [https://perma.cc/J3ZV-QEX8] (last updated Sept. 7, 2023).

29. See Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022, U.S. Bureau of Lab. Stat. (Jan. 24, 2023), https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm [https://perma.cc/H86F-THGV].

30. Id.

certain Starbucks and Amazon workplaces.[31] The continued decrease in unionization may seem surprising given that unions retain fairly high levels of support from the American public.[32]

To explain the decline, commentators have pointed to the lack of support from federal labor law, and in particular, the NLRA's weak enforcement mechanisms.[33] In a space that is thus often underregulated, the asymmetry in capital between management and labor allows management to exploit its capital to engage in anti-union tactics.[34] Large companies can turn to their deep purses to fund expensive and extreme union busting techniques. Amazon alone spent more than $14 million on anti-labor consultants in 2022, according to its own disclosures.[35]

1. *Neutrality and Card Check Agreements.* — Since the NLRA's election laws and enforcement mechanisms provide labor with limited support, labor has turned to private agreements with employers to set ground rules for the duration of the organizing and election period.[36] In a neutrality

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31. See Kalie Drago, 70 Starbucks Locations Have Now Voted to Unionize, Forbes (May 13, 2022), https://www.forbes.com/sites/kaliedrago/2022/05/13/70-starbucks-locations-have-now-voted-to-unionize/ (on file with the *Columbia Law Review*) (last updated May 16, 2022); Rachel Lerman, Greg Jaffe, Jeff Stein & Anna Betts, Amazon Workers Vote to Join a Union in New York in Historic Move, Wash. Post (Apr. 1, 2022), https://www.washingtonpost.com/technology/2022/04/01/amazon-union-staten-island/ (on file with the *Columbia Law Review*) (last updated Apr. 2, 2022).

32. Gallup has run a poll every year since at least 2001 that simply asks, "Do you approve or disapprove of labor unions?" Unions have received more than fifty percent support in every year except for 2009, when the United States was reeling from the Great Recession. See Labor Unions, Gallup, https://news.gallup.com/poll/12751/Labor-Unions.aspx [https://perma.cc/295K-L3Y4] (last visited Oct. 10, 2024). Although some associate the labor movement with Democratic ideology, forty-three percent of Republicans and GOP leaners say the decline of union membership is bad for working people. See Ted Van Green, Majorities of Adults See Decline of Union Membership as Bad for the U.S. and Working People, Pew Rsch. Ctr. (Feb. 18, 2022), https://www.pewresearch.org/short-reads/2023/04/19/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-u-s-and-working-people/ [https://perma.cc/HC3C-VFSL] (last updated Mar. 12, 2024).

33. See, e.g., Kate Andrias, The New Labor Law, 126 Yale L.J. 2, 6 (2016) (highlighting the traditional explanation for workers' declining influence over their workplaces, which is that "the National Labor Relations Act's (NLRA) weak enforcement mechanisms, slight penalties, and lengthy delays—all of which are routinely exploited by employers resisting unionization—fail to protect workers' ability to organize and bargain collectively with their employers").

34. For a documentation of the "explosion of employer unfair labor practices" and the relation of this phenomenon to unionization election results, see Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1770, 1781 (1983).

35. See Dave Jamieson, Amazon Spent $14 Million on Anti-Union Consultants in 2022, HuffPost (Mar. 31, 2023), https://www.huffpost.com/entry/amazon-anti-union-spending-2022_n_6426fd1fe4b02a8d518e7010 [https://perma.cc/WQN3-UPCX].

36. See Laura J. Cooper, Lecture, Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator, 83 Ind. L.J. 1589, 1590–92 (2008) ("The failure to achieve statutory reform approximately coincides with the rise of union self-help measures in the form of neutrality agreements.").

agreement, an employer agrees to remain neutral as its employees determine whether they want union representation.[37] To win this important concession from an employer, unions have to give up something in return—typically in the form of a no-strike pledge.[38]

Unions have negotiated neutrality agreements since the 1970s. In 1976, the United Auto Workers Union (UAW) negotiated what is considered to be the first such agreement with General Motors.[39] There, General Motors agreed to "neither discourage nor encourage the [UAW's] efforts in organizing production and maintenance employe[e]s" while UAW agreed to "not misrepresent to employe[e]s the facts and circumstances surrounding their employment."[40] This and other early neutrality agreements weren't required by the government. Rather, they were built on mutual respect that had been developed between auto worker unions and automotive employers over the preceding forty years.[41]

Many LPAs additionally, or exclusively, contain a card check provision.[42] To understand these provisions, some background information about unionization campaign procedures is necessary. During a unionization campaign, the union distributes "cards" to employees that allow the employees to designate that union as their bargaining representative.[43] Once a majority of employees have signed cards, the union can request official recognition from the employer.[44] But employers typically don't have to consent to that request; instead, they can assert their right to

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37. Id. at 1590.

38. See Sophie Peel, Contractors Say a City Policy to Boost Workers' Rights Is Benefiting an Embattled, Out-of-Town Security Giant, Willamette Wk. (June 15, 2022), https://www.wweek.com/news/2022/06/15/contractors-say-a-city-policy-to-boost-workers-rights-is-benefiting-an-embattled-out-of-town-security-giant/ [https://perma.cc/NN7G-74CC] ("In such an agreement, companies pledge to remain neutral in any union negotiations and not to block labor organizing. In return, workers pledge not to strike or create a work stoppage.").

39. See Kramer et al., supra note 27, at 40–41 ("Labor neutrality agreements are of relatively recent origin. It was not until 1976 that the United Automobile, Aerospace, and Agricultural Implement Workers Union (UAW) and the General Motors Corporation (GM) entered into the first such agreement.").

40. Id. at 40–41 n.6 (quoting Letter from George B. Morris, Jr., Vice President, United Auto Workers, to Irving Bluestone, Vice President, Gen. Motors (Dec. 8, 1976)).

41. See id. ("Over the years General Motors has developed constructive and harmonious relationships based upon trust, integrity, and mutual respect with the various unions which currently represent its employe[e]s. These relationships date back, in the case of the UAW, nearly 40 years." (quoting Letter from George B. Morris, Jr., Vice President, United Auto Workers, to Irving Bluestone, Vice President, Gen. Motors (Dec. 8, 1976))).

42. See Cooper, supra note 36, at 1590 ("Although including both [a neutrality provision and a card check] is most typical, an organizing agreement could include one and not the other.").

43. See Nat'l Lab. Rels. Bd. v. Gissel Packing Co., 395 U.S. 575, 580, 595 (1969) (describing the process of gathering cards).

44. Brudney, supra note 7, at 824.

a representation election.[45] A card check provision in a labor-peace agreement bypasses this process by guaranteeing that the employer will recognize union majority status once a majority of its employees have signed union membership cards.[46] This helps unions avoid costly elections and the concurrent union-busting tactics.[47]

Neutrality and card check agreements benefit unions by making unionization easier, especially for workplaces with a large number of employees.[48] But how do unions help employers, workers, and the public? First, unions typically improve employee retention, which helps employers.[49] Second, they can raise wages, which helps workers.[50] Third, they increase civic engagement, which helps the general public.[51]

Even if unionization isn't preferrable for all parties, LPAs may still be net beneficial for a couple of reasons. First, they create a less hostile environment during attempts at unionization.[52] A less hostile environment leads to fewer resources being spent on concerns beyond the scope of the

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45. Id. at 824–25.

46. What Is Card Check Neutrality?, Teamsters Loc. 492 (Oct. 4, 2017), https://www.teamsters492.org/?zone=/unionactive/view_subarticle.cfm&subHomeID=124704&topHomeID=220607&page=49220Welcome20Message [https://perma.cc/M2PU-FMKE].

47. Hayley Brown & Sylvia Allegretto, Workers, Unchecked: The Case for Card Check This Labor Day, Ctr. for Econ. & Pol'y Rsch. (Aug. 21, 2024), https://www.cepr.net/workers-unchecked-the-case-for-card-check-this-labor-day/ [https://perma.cc/Y9PV-KS9J] (arguing that a card check agreement is a "quick and efficient way for workers to indicate whether they want to be represented by a union" and that having a card check agreement "reduces opportunities for employer interference").

48. See Brudney, supra note 7, at 830 (describing how success rates in union elections tend to decrease as the size of the bargaining unit increases).

49. Leonard Bierman, Rafael Gely & William B. Gould IV, Achieving the Achievable: Realistic Labor Law Reform, 88 Mo. L. Rev. 311, 358 (2023) ("[T]he presence of a union and an effective union-management collective bargaining agreement could make it easier to recruit, train, and retain employees.").

50. See Asha Banerjee, Margaret Poydock, Celine McNicholas, Ihna Mangundayao & Ali Sait, Econ. Pol'y Inst., Unions Are Not Only Good for Workers, They're Good for Communities and for Democracy 2–3 (2021), https://files.epi.org/uploads/236748.pdf [https://perma.cc/7HWL-FJRW] ("When union density is high, nonunion workers benefit, too, because unions effectively set broader standards—including higher wages . . . .").

51. Cf. id. at 4 ("[W]eakening unions . . . has significant long-term political and economic effects, such as lower voter turnout, lowered organized labor contributions, less voter mobilization, fewer working-class candidates serving in state legislatures and Congress, and more conservative state policy." (citing James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws (Nat'l Bureau of Econ. Rsch., Working Paper No. 24,259, 2018))).

52. See Adrienne E. Eaton & Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Indus. & Lab. Rels. Rev. 42, 49–50 (2001) (finding that the frequency and intensity of anti-union campaigns was reduced under card check agreements, and neutrality agreements reduce "some, but not all, management tactics").

industry.[53] That is, it prevents money from being wasted on anti-union consultants, which allows more money to be allocated toward higher-quality production and services.[54] Second, LPAs force parties to negotiate. This allows the parties to tailor terms that are more relevant to their specific industry than the NLRA's one-size-fits-all procedure. Also, neutrality agreements allow "the parties to concretely discuss the type of terms achievable in case the union obtains majority support and thus provides employees the opportunity to assess—at a very granular level—the advantages and disadvantages of union representation."[55]

Local governments seeking to support labor have begun to require LPAs in certain circumstances.[56] Typically, the requirement for a neutrality or card check provision—each of which is thought to favor unions[57]—is counterbalanced with a no-strike provision, which gives employers a benefit.[58] Though this balance seems to disproportionately hurt workers by stripping them of their most powerful advocacy mechanism,[59] it forces employers to the bargaining table, which in turn allows labor to win concessions.[60] The employer needs to sign an LPA, and labor won't give up the right to strike for nothing in return, so labor can win concessions such as neutrality agreements.

2. *Project Labor Agreements.* — Section 8(f) of the NLRA allows construction industry employers to make prehire agreements[61] with

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53. See Bierman et al., supra note 49, at 358 (noting that neutrality agreements may prevent "the costs of mounting a vigorous anti-union campaign").

54. Id.

55. Id. at 356.

56. See, e.g., Alejandro Figueroa, Measure 119 Will Ask Oregon Whether to Give Cannabis Workers an Easier Route to Unionize, Or. Pub. Broad. (Sept. 30, 2024), https://www.opb.org/article/2024/09/30/cannabis-workers-unions-unionize-marijuana-labor-peace-agreement/ [https://perma.cc/2RAT-UDCA] (reporting on a ballot measure that would require "employers at cannabis retail and processing businesses" to sign LPAs).

57. Bierman et al., supra note 49, at 356–58 (noting that the benefits of neutrality agreements to unions "can easily be identified").

58. See, e.g., Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1077 (9th Cir. 2017) (considering a Los Angeles policy that mandated LPAs and required them to contain prohibitions on picketing, boycotting, or stopping work).

59. For example, the Great Steel Strike of 1919–1920 famously brought the American steel industry to a halt and contributed to the Supreme Court's support of the NLRA in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See Diana S. Reddy, "There Is No Such Thing as an Illegal Strike": Reconceptualizing the Strike in Law and Political Economy, 130 Yale L.J. Forum 421, 432–33 (2021), https://www.yalelawjournal.org/pdf/ReddyEssay_8dhue31d.pdf [https://perma.cc/CWN2-5H4V].

60. See *L.A. World Airports*, 873 F.3d at 1077 ("[I]f an employer may not operate without such an agreement, the employer may need to give benefits to its employees to induce them to enter the agreement.").

61. Prehire agreements are contracts "agreed to by an employer and a union before the workers to be covered by the contract have been hired." Harold S. Roberts, Roberts' Dictionary of Industrial Relations 562 (3d ed. 1986).

unions that haven't been elected by the employees.[62] These exclusive prehire bargaining agreements typically last for the duration of the project and are called PLAs.[63] PLAs have existed at least since the construction of the Shasta Dam in California, which began in 1938.[64] PLAs bind all contractors and subcontractors and, unlike default labor law, allow employers to negotiate with a union before a majority of employees affirmatively select a union as their representative.[65] Generally, PLAs grant employees better working conditions, benefits, and union-scale pay in exchange for provisions that guarantee against strikes and lockouts.[66]

When a bid solicitation stipulates that parties will be bound to a PLA, transaction costs are reduced.[67] Prospective contractors and subcontractors can more accurately weigh the costs and benefits of bidding on a project when they know the wage and workplace safety requirements. All stakeholders benefit from the fact that PLAs help ensure projects are completed on budget.[68] Although enhanced wage and safety standards may add to the initial cost of a project, studies indicate that enhanced standards don't increase the overall cost because they lead to efficiency and quality gains that offset the initial cost.[69] Similarly, all stakeholders

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62. See 29 U.S.C. § 158(f) (2018) ("It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make [PLA] agreement[s] . . . .").

63. Cong. Rsch. Serv., R41310, Project Labor Agreements 1 (2012) https://www.everycrsreport.com/files/20120628_R41310_731846eb1c5bc373a7ea40ebd566f72ded8a8771.pdf [https://perma.cc/F5Y6-YVXW] ("A project labor agreement (PLA) is a collective bargaining agreement that applies to a specific construction project and lasts only for the duration of the project.").

64. See Johnston-Dodds, supra note 25, at 9 (documenting the construction of the Shasta Dam, which occurred between 1938 and 1944).

65. See Button, supra note 15, at 533–34.

66. See, e.g., Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1016–17 (9th Cir. 2010) (analyzing an agreement that "prohibited strikes, picketing, and other disruptions" and required contractors to "contribute to union vacation, pension, and health plans"); see also Cong. Rsch. Serv., supra note 63, at 1–2; Dale Belman, Matthew M. Bodah & Peter Philips, Project Labor Agreements 8–9 (2007), https://files.epi.org/page/-/pdf/031611-earn-pla.pdf [https://perma.cc/N8BJ-D3PS] (noting that "PLAs set wages and benefits close to or at the local union rates" and "have no-strike clauses").

67. See Fred B. Kotler, Project Labor Agreements in New York State: In the Public Interest 3 (2009), https://faircontracting.org/wp-content/uploads/2019/05/Project-Labor-Agreements-in-New-York-State-In-the-Public-Interest-Kotler-2009.pdf [https://perma.cc/S6WW-4HZY] (noting that PLAs can reduce costs through standardization).

68. Aurelia Glass & Karla Walter, How Project Labor Agreements and Community Workforce Agreements Are Good for the Biden Administration's Investment Agenda, Ctr. for Am. Progress (July 21, 2023), https://www.americanprogress.org/article/how-project-labor-agreements-and-community-workforce-agreements-are-good-for-the-biden-administrations-investment-agenda/ (on file with the *Columbia Law Review*).

69. See, e.g., Kotler, supra note 67, at 35–36 (examining a suite of four New York PLAs and noting that fifteen studies found there would be substantial cost savings for the city).

benefit from the relative gains in predictability and on-time completion of large-scale construction projects.

Not everybody considers PLAs beneficial, and some states have even banned local governments from requiring PLAs.[70] Michigan passed such a bill in 2011, but a federal district judge struck it down, finding it was preempted by the NLRA.[71] In response, Michigan passed an amended version of the act that superseded the 2011 version and specified that the act's intent was to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services."[72] In his successful defense of the revised act, then-Governor Rick Snyder cited reports written by conservative think tanks such as the Cato Institute and the Beacon Hill Institute.[73] These reports suggest the costs of public projects *increase* as a result of PLAs.[74] These reports are hotly contested.[75]

B. *Examples of Labor-Peace Agreements in Emerging Industries*

This section surveys three different ways in which labor-peace agreements are being used in emerging industries. Two of these examples are government initiated: the Biden Administration's requirement of PLAs on federally funded projects costing more than $35 million[76] and various state policies requiring or incentivizing neutrality agreements for cannabis

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70. See, e.g., Open Competition Law, La. Stat. Ann. § 38:2225.5 (2024) (banning Louisiana public entities from requiring key PLA terms such as prevailing wages on state or locally funded projects).

71. See Mich. Bldg. & Constr. Trades Council v. Snyder (*Snyder I*), 846 F. Supp. 2d 766, 783 (E.D. Mich. 2012) ("Because the NLRA and the Act 'cannot move freely within the orbits of their respective purposes without impinging upon one another,' the Act is preempted." (quoting Hill v. Florida, 325 U.S. 538, 543 (1945))).

72. See 2012 Mich. Pub. Acts 238 (codified at Mich. Comp. Laws § 408.872 (2024)); see also Mich. Bldg. & Constr. Trades Council v. Snyder (*Snyder II*), 729 F.3d 572, 574 (6th Cir. 2013) ("[T]he act furthers Michigan's proprietary goal of improving efficiency in public construction projects, and the act is no broader than is necessary to meet those goals. Thus, the law is not preempted by the NLRA.").

73. See *Snyder II*, 729 F.3d at 574 n.1 (noting the reports cited by Governor Snyder).

74. David G. Tuerck, Sarah Glassman & Paul Bachman, Beacon Hill Inst., Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem 21–22 (2009), https://www.beaconhill.org/BHIStudies/PLA2009/PLAFinal090923.pdf (on file with the *Columbia Law Review*) ("The Massachusetts PLA Study found that PLAs add 12% to the cost of construction while the Connecticut PLA Study found that PLAs add 18% to the cost of construction.").

75. See supra note 69 and accompanying text.

76. Exec. Order No. 14,063, 87 Fed. Reg. 7363 (Feb. 9, 2022) (requiring PLAs for "large-scale construction projects," which are defined as federal construction projects "for which the total estimated cost of the construction contract to the Federal Government is $35 million or more").

licensees.[77] Part IV of this Note returns to these government actions to consider their legality.

The third example is that of a private company, Akash Systems, which reached an LPA with the Communication Workers of America that includes project labor and neutrality provisions.[78] The Akash example is relevant because some courts, when considering whether a government can condition spending on the inclusion of a labor-peace agreement, seek a finding that private parties have entered into similar agreements.[79]

1. *Biden's Project Labor Agreement Executive Order.* — In 2022, President Biden signed an executive order that required PLAs on federally funded projects valued over $35 million.[80] According to Biden, project labor agreements "ensure that major projects are handled by well-trained, well-prepared, highly skilled workers."[81] Acting Labor Secretary Julie Su announced final regulations to implement the executive order in December 2023.[82] Labor allies have praised this move as a step in the right direction but urged further action.[83]

Some open-shop contractor associations, such as Associated Builders and Contractors, oppose this rule.[84] These opponents claim that the rule

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77. See, e.g., Figueroa, supra note 56 (outlining an Oregon ballot measure that would require employers in the cannabis industry to sign labor peace agreements with unions).

78. See Press Release, Commc'ns Workers of Am., First-Ever Comprehensive Labor Neutrality Agreement in Semiconductor Industry Sets Historic New Precedent on Brink of $52 Billion Allocation of Federal CHIPS Funding (Nov. 27, 2023), https://cwa-union.org/news/releases/first-ever-comprehensive-labor-neutrality-agreement-semiconductor-industry-sets [https://perma.cc/32LR-Z2GT].

79. For discussion of a court that put stock in whether a method was "tried and true" in the private sector when making a market participant exception determination, see infra note 189 and accompanying text.

80. Exec. Order No. 14,063, 87 Fed. Reg. 7363; see also Press Release, Joseph R. Biden Jr., President, Executive Order on Use of Project Labor Agreements for Federal Construction Projects, (Feb. 4, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/04/executive-order-on-use-of-project-labor-agreements-for-federal-construction-projects/ [https://perma.cc/3VDE-AJWJ].

81. Ian Kullgren & Josh Wingrove, Biden's Labor Order Aims to Raise Wages on Infrastructure Jobs, Bloomberg (Feb. 4, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X97B91NK000000 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting President Biden).

82. See Rebecca Rainey, Biden Cements Labor Agreement Rules for Federal Projects (1), Bloomberg (Dec. 18, 2023), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5FD3ORG000000?bna_news_filter=daily-labor-report (on file with the *Columbia Law Review*) (reporting on the "new requirements announced by Acting Labor Secretary Julie Su").

83. See, e.g., Glass & Walter, supra note 68 (arguing that by passing the IRA and related legislation, "the Biden administration has an opportunity to create tens of thousands of good jobs nationwide" but that the federal government must continue to encourage businesses "to commit to adopting project labor agreements").

84. See Letter from Am. Concrete Pumping Ass'n et al. to U.S. Cong. 1 (Jan. 4, 2024), https://www.abc.org/Portals/1/PLA/Construction%20Coalition%20Letter%20to%20Congress%20Supporting%20FOCA%20Opposing%20Biden%20Project%20Labor%20Agreeme

affects 120 construction projects, supplements the IRA tax incentives to include PLAs, and coerces contractors to use union labor.[85] The Associated Builders and Contractors have sued to enjoin the executive order and complementary regulations from going into effect.[86]

2. *Cannabis Licensing*. — Although marijuana possession and distribution is still illegal federally, thirty-eight states have legalized the medical use of cannabis and twenty-four have created schemes to regulate recreational use.[87] Since 2012, when Colorado and Washington became the first states to legalize recreational marijuana,[88] the (regulated) cannabis sector has budded into a multibillion-dollar industry.[89] One report found that the legal cannabis industry supports more than four hundred thousand full-time jobs.[90]

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nt%20Final%20Rule%20010424.pdf (on file with the *Columbia Law Review*) ("The undersigned diverse group of construction and business associations . . . write to ask for your leadership opposing the new rule and other policies pushing controversial PLAs on federal and federally assisted construction projects funded by taxpayers.").

85. Id. at 3 ("President Biden's new policy mandat[es] PLAs on an estimated 120 construction projects . . . .").

86. See Complaint at 47, Associated Builders & Contractors v. Clark, No. 24-cv-318-WWB-MCR (M.D. Fla. filed Mar. 28, 2024) [hereinafter *Clark* Complaint] (requesting "a preliminary injunction pending a final decision on the merits, enjoining Defendants from further implementing the challenged [Executive Order and] PLA Rule"). The legality of this executive order may become moot over the course of the second Trump Administration. As of this Note's publication, Trump has yet to rescind this executive order. But an Article I court held that the executive order violates federal contract competition rules. See MVL USA, Inc. v. United States, 174 Fed. Cl. 437, 470 (2025). Nevertheless, since the "executive orders surrounding the use of project labor agreements in government construction have 'ping-ponged'" for the last thirty years, id. at 441, the issue is likely to become relevant again in the future.

87. Alex Leeds Matthews & Christopher Hickey, More US States Are Regulating Marijuana. See Where It's Legal Across the Country, CNN, https://www.cnn.com/us/us-states-where-marijuana-is-legal-dg [https://perma.cc/AY7V-SK64] (last updated Apr. 19, 2024). Puerto Rico and the U.S. Virgin Islands have legalized the medical use of cannabis, and Washington, D.C., has legalized both recreational and medical cannabis. See State Medical Cannabis Laws, Nat'l Conf. State Legislatures, https://www.ncsl.org/health/state-medical-cannabis-laws [https://perma.cc/769U-E64F] (last updated July 12, 2024).

88. Aaron Smith, Marijuana Legalization Passes in Colorado, Washington, CNN (Nov. 8, 2012), https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html [https://perma.cc/Y58W-AEMT].

89. See Market Insights: Cannabis – United States, Statista, https://www.statista.com/outlook/hmo/cannabis/united-states [https://perma.cc/3F8R-GD2A] (last visited Oct. 4, 2024) (noting that the "Global Legal Adult-Use Cannabis Market" stands at $16.5 billion and that North America has 96.8% of the market share). For a state-by-state analysis of recreational marijuana sales in 2023, see Andrew Long, Adult-Use Marijuana Sales Growth in 2023 Varied by Market Age, MJBizDaily (Jan. 10, 2024), https://mjbizdaily.com/state-by-state-review-of-adult-use-marijuana-sales-2023/ [https://perma.cc/GT6Y-CLMM] (last updated Mar. 7, 2024).

90. Bruce Barcott & Beau Whitney, Vangst, Jobs Report 2024: Positive Growth Returns 3 (2024), https://5711383.fs1.hubspotusercontent-na1.net/hubfs/5711383/VangstJobsReport2024-WEB-FINALFINAL.pdf [https://perma.cc/DRV2-ACQY] (identifying 440,445 jobs in the legalized-cannabis industry).

The cannabis industry appears to be a ripe target for unionization. Cannabis jobs, such as those in the agricultural or processing sectors, can expose workers to health and safety risks.[91] And since cannabis cultivation is not legal at the federal level, there aren't federal protections for workers in the industry, inspiring some unions to target this newly regulated industry for unionization.[92]

States have increasingly supported this objective by encouraging licensees to negotiate LPAs with bona fide unions.[93] Some states, such as Rhode Island and New York, *require* licensees to negotiate LPAs whereas others, such as Illinois, provide noncompulsory incentives.

Rhode Island enacted its Cannabis Act in 2022, which legalized the possession of small amounts of marijuana and created a licensing scheme for legal distribution.[94] One section of Rhode Island's Cannabis Act requires retail licensees and compassion centers to "enter into, maintain, and abide by the terms of a labor peace agreement."[95] The law requires that the LPAs, at a minimum, prohibit labor unions and members from picketing and boycotting.[96]

Greenleaf, a nonprofit medical marijuana dispensary, sued Rhode Island, alleging that the policy is preempted by the NLRA and the Supremacy Clause of the Constitution.[97] Section IV.B of this Note returns

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91. See Michelle Berger, The Cannabis Industry and Labor Unions, OnLabor (Jan. 9, 2024), https://onlabor.org/the-cannabis-industry-and-labor-unions/ [https://perma.cc/RWC7-9R3T] (documenting reasons to support the claim that "[a]ll three sectors" of the cannabis industry "can be challenging places to work").

92. See, e.g., Local 338 - Ensuring that Cannabis Jobs Are Good Careers!, Local 338, https://www.local338.org/cannabisunion [https://perma.cc/58RX-E7SB] (last visited Oct. 4, 2024) ("Since New York's medical cannabis program officially launched in 2015, Local 338 has been successfully engaged in organizing efforts to ensure that the jobs in this emerging industry set a standard for what cannabis careers can and should be, by providing family sustaining wages and benefits.").

93. See Unions & Labor Peace Agreement Laws in the Cannabis Industry, Justia, https://www.justia.com/cannabis-law/unions-in-the-cannabis-industry/ [https://perma.cc/5F5M-H936] (last visited Oct. 4, 2024) ("As legalized marijuana spreads across the United States, . . . laws often require a business to reach a 'labor peace agreement' or adopt a similar stance toward unions in exchange for receiving a cannabis license from the state.").

94. See Rhode Island Cannabis Act, 21 R.I. Gen. Laws § 21-28.11-1–32 (2024).

95. Id. § 21-28.11-12.2.

96. Id. § 21-28.11-12.2(a)(2) ("'Labor peace agreement' means an agreement between a licensee and a bona fide labor organization that, at a minimum, protects the state's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the entity."). Although requiring an LPA with a no-strike clause seems one-sided against laborers, this requirement forces employers to the table where laborers can win concessions. For discussion of this phenomenon, see supra note 60 and accompanying text.

97. Complaint at 1–2, Greenleaf Compassion Care Ctr. v. Santacroce, No. 1:23-cv-00282-MSM-LDA (D.R.I. filed July 10, 2023) (seeking "injunctive and declaratory relief because the Rhode Island Cannabis Act . . . is preempted by the Supremacy Clause . . . and

to Greenleaf's challenge and concludes that, had the case gone to the merits, it probably would have succeeded.

But Illinois's scheme is quite different. Instead of requiring businesses to sign LPAs, it incentivizes them to do so by awarding five points in its scoring system.[98] The scoring system helps the Illinois Department of Financial and Professional Regulation and the Illinois Department of Agriculture determine which cannabis businesses receive licenses to operate in Illinois.[99] Applicants compete for a finite number of licenses, and the applicants with the highest points receive the licenses.[100] An applicant can earn up to 250 points, with the most points being awarded based on the applicant's business plan (65 points) as well as its security and recordkeeping (also 65 points).[101]

3. *Semiconductors.* — Semiconductor production and research is also a burgeoning industry in the United States. Semiconductors are crucial to the modern supply chain.[102] One week before President Biden signed the IRA into law, he signed the CHIPS and Science Act,[103] which allocates more than $50 billion towards semiconductor production and research.[104] One of the greatest challenges in developing a thriving, stable semiconductor industry in the United States is building a skilled workforce,[105] with

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the National Labor Relations Act"); see also Nancy Lavin, Cannabis Dispensary Lawsuit Challenges Labor Provisions of Recreational Marijuana Law, R.I. Current (July 11, 2023), https://rhodeislandcurrent.com/2023/07/11/cannabis-dispensary-lawsuit-challenges-labor-provisions-of-recreational-marijuana-law/ [https://perma.cc/5L84-35AY] ("Greenleaf Compassion Center filed a complaint in federal court on Monday, contending that the marijuana legalization law signed in May 2022 violates the U.S. Constitution and national labor standards.").

98. See Cannabis Regulation and Tax Act, 410 Ill. Comp. Stat. Ann. 705 / 15-30(c)(6) (West 2024) (explaining that an applicant can earn five points by describing its "plans to provide a safe, healthy, and economically beneficial working environment for its agents, including, but not limited to . . . entering a labor peace agreement with employees").

99. See 410 Ill. Comp. Stat. Ann. 705 / 5-10; id. 705 / 5-15; id. 705 / 15-5.

100. Id. 705 / 15-25(a).

101. See id. 705 / 15-30(c)(2)–(3).

102. See Cassie D. Roberts, Note, The Gap-Filling Role of Private Environmental Governance: A Case Study of Semiconductor Supply Chain Contracting, 51 Vand. J. Transnat'l L. 591, 605 (2018) (noting that "highly successful brand-name merchandisers," like "Apple and Google," have products that "all rely on semiconductors").

103. CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (codified as amended in scattered titles of the U.S.C.).

104. See Lamar Johnson, Biden Ends Slog on Semiconductor Bill With Signature, Politico (Aug. 9, 2022), https://www.politico.com/news/2022/08/09/biden-ends-slog-on-semiconductor-bill-with-signature-00050530 (on file with the *Columbia Law Review*) ("President Joe Biden signed the CHIPS and Science bill into law Tuesday, authorizing $52 billion in subsidies for semiconductor production and boosting funding for research.").

105. See Ariz. Com. Auth., A Roadmap to Success for the U.S. Semiconductor Industry, Harv. Bus. Rev. (May 30, 2023), https://hbr.org/sponsored/2023/05/a-roadmap-to-success-for-the-u-s-semiconductor-industry [https://perma.cc/HT6B-MQS3] ("One of the semiconductor industry's greatest challenges is building its workforce. In the U.S., the sector employs roughly 277,000 workers. To meet the future demands [the National

some predicting the industry needs "more than one million additional skilled workers" by 2030.[106]

Akash Systems, a space tech company, is one of hundreds of firms vying for CHIPS funding.[107] Akash plans to build a $432 million semiconductor factory in Oakland, California.[108] In November 2023, Akash signed an LPA with a division of the Communications Workers of America and the Alameda County Building Trades Council.[109] Cooperating with the labor community made Akash's application for funding more appealing to the Biden Administration, and the agreement demonstrated its commitment to "empower[ing] West Oakland through sustainable advancements in space and green technology."[110] Although the parties didn't publish the precise terms of the agreement, their press releases suggest there were two major components: a project labor agreement for the construction of the factory and a neutrality agreement for the operation of the facility once constructed.[111]

II. WHEN STATES CAN REQUIRE LABOR-PEACE AGREEMENTS: A CIRCUIT SPLIT

Private parties, like Akash, are free to enter into LPAs with unions, so long as they don't grant exclusive recognition to a minority union.[112] But

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Semiconductor Economic Roadmap] envisions, that labor pool would need to grow by hundreds of thousands of people over the next decade.").

106. See, e.g., The Global Semiconductor Talent Shortage: How to Solve Semiconductor Workforce Challenges, Deloitte, https://www2.deloitte.com/us/en/pages/technology/articles/global-semiconductor-talent-shortage.html [https://perma.cc/GZM6-47KV] (last visited Oct. 4, 2024).

107. See Akash Under Consideration for the Transformative CHIPS & Science Act Funding, Akash Sys. (Aug. 10, 2023), https://akashsystems.com/akash-under-consideration-for-funding/ [https://perma.cc/45JS-QYC8].

108. Press Release, Commc'n Workers of Am., supra note 78 (announcing a "first-in-the-industry labor neutrality agreement for semiconductor production workers at a new $432 million Akash Systems factory set for construction in West Oakland, California").

109. See Mackenzie Hawkins, Chipmaker Vying for US Funds Pledges to Hire Unionized Workers, Bloomberg (Nov. 28, 2023), https://www.bloomberg.com/news/articles/2023-11-28/chipmaker-vying-for-us-funds-enters-rare-union-agreement?embedded-checkout=true (on file with the *Columbia Law Review*).

110. Akash Under Consideration for the Transformative CHIPS & Science Act Funding, supra note 107 (internal quotation marks omitted) (quoting Felix Ejeckam, CEO, Akash Systems); see also Hawkins, supra note 109 ("We are aware that the Biden administration's excited about [unions] and so we're certainly leaning into that." (internal quotation marks omitted) (quoting Ejeckam)).

111. Press Release, Commc'n Workers of Am., supra note 78.

112. See Dana Corp. (*Dana II*), 356 N.L.R.B. 256, 256–57, 264 (2010) (upholding the lawfulness of an LPA—entered into by a private company and a union—that contained a no-strike clause and a neutrality provision). But see Majestic Weaving Co. of N.Y., 147 N.L.R.B. 859, 860 (1964) (finding that a private company's "contract negotiation with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the [NLRA]"), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).

when states, local governments, or the executive seek to *require* LPAs, they face further restrictions. This Part first provides the background of federal labor preemption and then considers when various circuits allow governmental units to require LPAs.

Congress created much of the existing federal regulatory scheme for labor law by enacting the NLRA in 1935 and the Taft–Hartley Act of 1947.[113] The NLRA, enacted by the pro-labor Roosevelt Administration, sought to strengthen the rights of workers and their ability to organize.[114] The Taft–Hartley Act, which was opposed by unions, rendered a less favorable environment for organized labor.[115]

With one exception, the NLRA itself remains silent on the extent of its preemption, or lack thereof.[116] Thus, defining the scope of NLRA preemption has been a court-led endeavor. The Supreme Court has developed an expansive regime of NLRA preemption.[117] This regime prevents states and localities from making labor law through traditional regulatory means.[118]

For an account that seeks to reconcile *Dana II* and *Majestic Weaving*, see Jonah J. Lalas, Recent Cases, Taking the Fear Out of Organizing: *Dana II* and Union Neutrality Agreements, 32 Berkeley J. Emp. & Lab. L. 541, 549–50 (2011) (noting that *Dana II* "affirmed neutrality agreements as an appropriate vehicle for unionization" and limited *Majestic Weaving* to situations in which there was "exclusive recognition of a minority union"). But see *Dana II*, 356 N.L.R.B. at 265 (Member Hayes, dissenting) ("[P]remature recognition is *not* a prerequisite for finding unlawful support in dealings between an employer and a minority union.").

113. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)); Labor–Management Relations (Taft–Hartley) Act, ch. 114, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.); Labor–Management Reporting and Disclosure (Landrum–Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.)).

114. 29 U.S.C. § 151 (finding that commerce was burdened by the "denial by some employers of the right of employees to organize" and the "inequality of bargaining power between employees who do not possess full freedom of association . . . and employers").

115. See Henry H. Drummonds, Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy, 70 La. L. Rev. 97, 100 (2009) (claiming that the Taft–Hartley Act was "vociferously opposed by the unions").

116. See 29 U.S.C. § 164(b) (empowering states to promulgate right-to-work laws by allowing them to prohibit "agreements requiring membership in a labor organization as a condition of employment").

117. See infra section II.A; see also Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Regul. 355, 374–76 (1990) (describing the "overbreadth" of the Supreme Court's NLRA preemption rules).

118. See Benjamin I. Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 Harv. L. Rev. 1153, 1155 (2011) [hereinafter Sachs, Despite Preemption] ("Preemption rules have, aside from a few narrow exceptions, eliminated traditional forms of labor law in cities and states . . . ." (footnote omitted)).

A. *Labor Law Preemption Background*

The NLRA created an administrative body, the National Labor Relations Board (NLRB),[119] to determine representation-related disputes between parties through case proceedings, which are subject to review by federal courts of appeals.[120] From the creation of the NLRB, the Supreme Court quickly inferred Congressional intent "to obtain uniform application of [Congress's] substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."[121]

There are two main threads of federal labor preemption doctrine that yield an unusually expansive preemption regime.[122] First, the Court in *San Diego Building Trades Council v. Garmon* found that the NLRA preempts all state regulation of labor activities that it "arguably" protects or prohibits.[123] Scholars have called *Garmon* preemption "one of the broadest rules of preemption in any field of federal law."[124] *Garmon* preemption protects the NLRB's ability to determine what constitutes fair labor practices.[125]

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119. See 29 U.S.C. § 153 (creating the NLRB).

120. Id. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . .").

121. Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485, 490 (1953).

122. See Stephen F. Befort & Bryan N. Smith, At the Cutting Edge of Labor Law Preemption: A Critique of *Chamber of Commerce v. Lockyer*, 20 Lab. Law. 107, 107 ("These cases have yielded two distinct theories of labor law preemption."); Sachs, Despite Preemption, supra note 118, at 1154–55 (calling labor preemption "one of the most expansive preemption regimes in American law"). There is a third strain of labor preemption that arises out of section 301 of the Taft–Hartley Act. See 29 U.S.C. § 185 (2018). The Supreme Court has found that section 301 preempts state-law-based contractual lawsuits related to a collective bargaining agreement. See Phillip J. Closius, Protecting Common Law Rights of the Unionized Worker: Demystifying Section 301 Preemption, 46 U. Balt. L. Rev. 107, 109 (2016) ("[T]he Court also has held that § 301 preempts any state lawsuit alleging a contractual breach of a collective bargaining agreement."). This Note, however, does not discuss this third strain of preemption since it lacks relevance to LPAs.

123. See 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to [the NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."). Justice Clarence Thomas recently indicated a willingness to hear a challenge to the legitimacy of *Garmon* preemption. See Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1417 (2023) (Thomas, J., concurring in the judgment) ("[I]n an appropriate case, we should carefully reexamine whether the law supports *Garmon*'s 'unusual' pre-emption regime.").

124. Michael Shultz & John Husband, Federal Preemption Under the NLRA: A Rule in Search of a Reason, 62 Denv. U. L. Rev. 531, 535 (1985).

125. See Robert Rachal, *Machinists* Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain, 58 La. L. Rev. 1065, 1066–67 (1998) ("*Garmon* preemption is thus based on a 'primary jurisdiction' theory, that determination of whether conduct is an 'unfair labor practice' under the NLRA is for the NLRB." (quoting *Garmon*, 359 U.S. at 245)).

Seventeen years later, the Court extended labor preemption further in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, holding that federal law preempts all state regulation of activities that Congress intended to leave to the market of economic forces.[126]

Although this Note often uses the term "state action" for concision, NLRA preemption applies to actions beyond those taken by states. The Supreme Court has extended its labor preemption doctrine equally to local government action.[127] The D.C. Circuit has extended *Machinists* preemption even further, holding in *Chamber of Commerce v. Reich* that exercises of federal executive power that conflicted with the NLRA were preempted.[128]

B. *Market Participant Exception:* Gould, Boston Harbor, *and* Brown

Not all state action, however, constitutes regulation that is preempted by federal labor law. The Supreme Court has held that when a state acts as a "market participant"—that is, when it participates in the market like a private party instead of as a regulator—its actions fall into the market participant exception and thus aren't preempted.[129] A typical example of this is the purchase of goods or services.[130] To avail themselves of the market participant exception, states often rely on their spending power rather than police power to show that they are participating in the market.

The Supreme Court has considered three cases in which states have attempted to circumvent NLRA preemption by relying on their spending power. First, the Supreme Court considered a Wisconsin statute that prohibited "certain repeat violators of the [NLRA] from doing business

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126. 427 U.S. 132, 150–51 (1976) (finding impermissible any state regulation that impedes on the area "left for the free play of contending economic forces" (internal quotation marks omitted) (quoting Howard Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*, 72 Colum. L. Rev. 469, 478 (1972))).

127. See Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 619 (1986) (applying *Machinists* preemption to local government action).

128. 74 F.3d 1322, 1334 (D.C. Cir. 1996) ("Nor, as we have noted, is there any doubt that *Machinists* 'pre-emption' applies to federal as well as state action."). For a critique of this decision and the assumptions it made when extending *Machinists* preemption to the executive branch, see Charles Thomas Kimmett, Note, Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in *Chamber of Commerce v. Reich*, 106 Yale L.J. 811, 829–32 (1996).

129. See *Boston Harbor*, 507 U.S. 218, 229 (1993). This is similar to the market participant exception in the context of the Dormant Commerce Clause. For further discussion, see infra section III.B.3.

130. See, e.g., Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 212–13 (3d Cir. 2004) ("To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." (quoting *Boston Harbor*, 507 U.S. at 231)).

with the State" in *Wisconsin Department of Industry v. Gould, Inc.*[131] Wisconsin argued that its law should survive preemption because not doing business with certain entities was an exercise of the state's spending rather than police powers.[132] Justice Harry Blackmun, writing for a unanimous Supreme Court, explained that reliance on spending rather than police powers wasn't a get-out-of-jail free card for preemption.[133] To reach this conclusion, Blackmun endorsed a functional rather than formalist approach: Wisconsin's law conflicts with Congressional intent to leave the enforcement of the NLRA to the NLRB "[b]ecause Wisconsin's debarment law *functions* unambiguously as a supplemental sanction for violations of the NLRA."[134] Thus, the NLRA preempted Wisconsin's law under *Garmon* preemption.[135]

Six years later, Blackmun would once again endorse a functional approach while writing for a unanimous Court in *Boston Harbor*.[136] There, nonunion construction employers challenged the enforcement of a state bidding requirement, Bid Specification 13.1, related to the state's multibillion dollar effort to clean the Boston Harbor.[137] Bid Specification 13.1 conditioned the award of a contract related to the clean-up efforts on the contractor agreeing to be bound by a PLA.[138] This time, the Court found against preemption.[139] Blackmun explained that if a state acted as a market participant rather than as a regulator, it would not be preempted.[140] "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*."[141]

Finally, and most recently, the Court considered whether a California law that sought to enforce labor neutrality by prohibiting some employers from spending state money "to assist, promote, or deter union organizing"

131. 475 U.S. 282, 283 (1986).

132. Id. at 287.

133. See id. at 289 ("That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict . . . .").

134. See id. at 288 (emphasis added).

135. Id.

136. *Boston Harbor*, 507 U.S. 218 (1993).

137. Id. at 221–23.

138. Id. at 222 ("[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement . . . ." (first alteration in original) (internal quotation marks omitted) (quoting Appendix to Petition for Writ of Certiorari at 141a–142a, *Boston Harbor*, 507 U.S. 218 (No. 91-261))).

139. See id. at 232.

140. See id. at 227.

141. Id.

was preempted by the NLRA in *Chamber of Commerce v. Brown*.[142] The law required detailed records maintenance and reporting, and it provided taxpayers with a private right of action through which they could seek double damages.[143] The Ninth Circuit had held that the law wasn't covered by the market participant doctrine because it was regulatory[144] but that it nevertheless survived *Machinists* preemption since "the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces."[145]

The Supreme Court disagreed.[146] In doing so, the Court first agreed with the Ninth Circuit that the law was regulatory in nature.[147] Then, Justice John Paul Stevens—writing for the Court—proceeded to follow Blackmun's functional approach: "[The California law] couples its 'use' restriction with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds."[148] In other words, California exercised its spending power *coercively*.

C. *The Circuit Split:* Rancho Santiago*,* Sage*, and* Lavin

The Supreme Court hasn't synthesized a test for lower courts to determine when a state acts as a market participant so that its actions aren't preempted by the NLRA. Thus, lower courts have taken varied approaches.[149] One of the first courts to consider the question after *Boston Harbor* was the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*.[150] There, the court synthesized a two-question inquiry:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its

142. 554 U.S. 60, 62 (2008) (internal quotation marks omitted) (quoting Cal. Gov't Code §§ 16645–16649 (2008)).

143. Id. at 63–64.

144. See Chamber of Com. v. Lockyer, 463 F.3d 1076, 1084 (9th Cir. 2006), rev'd sub nom. *Brown*, 554 U.S. 60.

145. See id. at 1087 (citing *Boston Harbor*, 507 U.S. at 225–26).

146. See *Brown*, 554 U.S. at 69.

147. See id. at 70 ("It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant.").

148. See id. at 71.

149. See City of Chicago v. IBEW, Local No. 9, 239 N.E.3d 526, 531 n.1 (Ill. App. Ct. 2022) ("Illinois courts have not addressed what constitutes a 'market participant' for the purposes of NLRA preemption. The federal circuits apply slightly different tests.").

150. 180 F.3d 686 (5th Cir. 1999).

> primary goal was to encourage a general policy rather than address a specific proprietary problem?[151]

Many other lower courts have adopted this test, but they differ on whether the prongs are jointly necessary or independently sufficient. The Third Circuit requires states to fulfill both prongs to be exempted from preemption, whereas the Ninth Circuit exempts the state if their action satisfies either prong.[152] The Seventh Circuit, meanwhile, follows a different approach by asking only whether the state is merely incentivizing or instead compelling private action—if the latter, it is impermissibly regulating.[153]

1. *The Third Circuit's Conjunctive Test.* — The Third Circuit has developed its approach to the market participant exception over two decisions: *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage*[154] and *Associated Builders & Contractors Inc. New Jersey Chapter v. City of Jersey City*.[155] In *Sage*, the court upheld a City of Pittsburgh policy (Ordinance 22) that conditioned "a grant of tax increment financing upon the recipient's acceptance of labor neutrality agreement."[156] When discussing the two *Cardinal Towing* prongs, the court indicated they are jointly necessary:

> If a condition of procurement satisfies the[] two steps, then it reflects the government's action as a market participant and escapes preemption review. But if the funding condition does not serve, or sweeps more broadly than, a government agency's proprietary economic interest, it must submit to review under labor law preemption standards.[157]

The court thus began by addressing whether Ordinance 22 was designed to further a proprietary interest beyond merely raising tax revenue (which would not be a comparable interest to a private market

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151. See id. at 693.

152. Compare Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("Only if both conditions are met is a government acting as a market participant." (citing Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 216 (3d Cir. 2004))), with Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir. 2010) (finding "a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption").

153. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005) (explaining that permissible conditions, unlike regulations, maintain a party's ability to "decline the offer").

154. 390 F.3d 206.

155. 836 F.3d 412.

156. See *Sage*, 390 F.3d at 207. Some commentators believe Ordinance 22 would also survive scrutiny after the Supreme Court's *Brown* decision. See Benjamin Sachs, Revitalizing Labor Law, 31 Berkeley J. Emp. & Lab. L. 333, 342 (2010) (noting that decisions such as *Sage* "seem viable" after *Brown*).

157. See *Sage*, 390 F.3d at 216.

participant).[158] The court explained that sixty percent of the tax revenues were sent to the Urban Redevelopment Authority of Pittsburgh (URA), which relied on the funds to "support debt service, repay bonds, and finance other development" like any other developer would.[159]

Finally, the court held that Ordinance 22 wasn't unduly broad.[160] The court emphasized that the requirement of signing a labor agreement was limited to hotels and hospitality projects that received tax increment financing from the URA.[161]

Twelve years later in *Associated Builders & Contractors v. City of Jersey City*, the Third Circuit considered a New Jersey policy offering tax exemptions for private developers that executed PLAs.[162] The court reaffirmed *Sage*'s two-prong test and explicated its conjunctive nature.[163] In doing so, the Third Circuit acknowledged that its approach differed from those of the Seventh and Ninth Circuits.[164] Unlike in *Sage*, the conjunctive nature of the test was material here, as the court found that no further inquiry was necessary once the policy failed the first prong of the test.[165] The court held that the tax breaks failed the first prong of the test since they didn't constitute a proprietary interest.[166] The court distinguished the facts from *Sage* on the basis that, in *Jersey City*, no money was being loaned or spent.[167] Had the court instead followed the tests of either the Ninth or the Seventh Circuit, the inquiry wouldn't have been complete and the policy may have survived preemption analysis.

2. *The Ninth Circuit's Disjunctive Test.* — Unlike the Third Circuit, the Ninth Circuit considers each *Cardinal Towing* question to be independently sufficient. That is, to successfully avoid NLRA preemption under the market participant exception, a state's policy can *either* ensure

158. See id.

159. See id. at 217.

160. See id.

161. See id. at 217–18.

162. See 836 F.3d 412, 414 (3d Cir. 2016).

163. See id. at 418 ("Only if both conditions are met is a government acting as a market participant." (citing *Sage*, 390 F.3d at 216)).

164. See id. at 418 n.8 ("[T]he Seventh Circuit has held that . . . the NLRA forbids only actions that are regulatory . . . [and] the Ninth Circuit holds that a government acts as a market participant when . . . it meets either prong of our *Sage* test.").

165. See id. at 413–14. The developers who challenged New Jersey's tax policy argued that it was preempted by the NLRA and ERISA. Id. at 415–16. They also argued that the policy violated the Dormant Commerce Clause. Id.

166. See id. at 418 ("We resolve this case at the first step of the *Sage* test, for we conclude that the City lacks a proprietary interest . . . ."). The court narrowed its holding to the question of whether the policy could be protected by the market participant exception. See id. at 421 ("We offer no comment on, much less do we decide, whether the challenged Ordinance is in fact preempted by the NLRA or ERISA, or whether it runs afoul of the dormant Commerce Clause.").

167. See id. at 420.

the efficient procurement of goods *or* address a specific proprietary problem with a narrow scope.[168]

The Ninth Circuit first articulated its rule in *Chamber of Commerce v. Lockyer*.[169] There, the court induced that the first *Cardinal Towing* inquiry concerned the *nature* of the state action while the second concerned the *scope*.[170] The first category, the court said, "protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary."[171] The second category "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation."[172] There, the Ninth Circuit concluded that the challenged state action was "regulatory and [thus] not protected by the market participant exception," but it upheld the state action after finding the action "not preempted under either *Machinists* or *Garmon*."[173] The Supreme Court, however, reversed and remanded *Lockyer* in *Chamber of Commerce v. Brown*, finding the state action to be preempted under *Machinists*.[174]

Thus, the Ninth Circuit had a clean slate when it considered *Johnson v. Rancho Santiago Community College District*.[175] While *Lockyer* had lost its precedential effect, it maintained its persuasiveness: The Ninth Circuit readopted *Lockyer*'s disjunctive test.[176] In doing so, the court in *Rancho Santiago* somewhat reformulated the second prong. Instead of repeating *Cardinal Towing*'s formulation of the second question (whether the action

168. See Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024–25 (9th Cir. 2010).

169. 463 F.3d 1076, 1083 (9th Cir. 2006) ("We have applied these cases in a number of contexts without formulating a general rule about when the market participant exception applies."), rev'd sub nom. Chamber of Com. v. Brown, 554 U.S. 60 (2008).

170. See id. at 1084.

171. Id. (citing N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005)). The Ninth Circuit's decision to cite *Lavin* as an example of this phenomenon is questionable since, in *Lavin*, the Seventh Circuit explicitly held that Illinois was *not* acting as a proprietor. See *Lavin*, 431 F.3d at 1006 ("Illinois is not acting as a proprietor . . . .").

172. *Lockyer*, 463 F.3d at 1084.

173. See id. at 1084–85.

174. See 554 U.S. at 66 ("Today we hold that §§ 16645.2 and 16645.7 are pre-empted under *Machinists* because they regulate within 'a zone protected and reserved for market freedom.'" (quoting *Boston Harbor*, 507 U.S. 218, 227 (1993))). For more about the Supreme Court's *Brown* decision, see supra notes 142–148 and accompanying text.

175. 623 F.3d 1011, 1024 (9th Cir. 2010) ("[W]e are not bound by our vacated decision in *Lockyer* . . . .").

176. See id. at 1024 ("[W]e find [*Lockyer*'s] reasoning persuasive and accordingly hold that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption.").

addressed a "specific proprietary problem"[177]), the court said a state could fulfill the second prong "by pointing to the narrow scope of the challenged action" to show that the action wasn't regulatory.[178] Initially, the question of whether a state's action is regulatory appears similar to the inquiry adopted by the Seventh Circuit, but unlike the bulk of the Seventh Circuit's precedent, the Ninth Circuit seems preoccupied with whether "a regulatory impulse can be safely ruled out."[179]

3. *The Seventh Circuit's Nondichotomous Approach.* — The Seventh Circuit adds to the NLRA preemption discussion in two relevant ways. First, it asserts that participating in the market as a proprietor, as was the case in *Boston Harbor*, is just one example of when a state is not regulating.[180] Second, it confronts whether regulatory intentions should matter.[181]

In *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, the Seventh Circuit considered a Milwaukee County ordinance that required LPAs for firms contracting with the County for "the provision of transportation and other services for elderly and disabled [people]."[182] One particularly contentious provision that was required in those PLAs was a prohibition on employer speech regarding the selection of a bargaining representative.[183]

Judge Richard Posner, writing for the panel, expressed concern over the ordinance's spillover effects.[184] Much of the ordinance applied to all of an employer's employees, rather than just those who worked on county

177. See Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

178. *Rancho Santiago*, 623 F.3d at 1024.

179. See id. (internal quotation marks omitted) (quoting *Cardinal Towing*, 180 F.3d at 693). For discussion of the Seventh Circuit's stance on whether a regulatory purpose disqualifies an action from market participant protection, see infra notes 190–192 and accompanying text.

180. N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005) ("*Boston Harbor* is just one illustration of the proposition that states may act in commerce without regulating commerce.").

181. Compare id. (noting that federal preemption doctrine doesn't evaluate legislation on what motivations led to its enactment), with Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty., 431 F.3d 277, 279 (7th Cir. 2005) ("[T]he spending power may not be used as a pretext for regulating labor relations.").

182. 431 F.3d at 277–78.

183. See id. (noting the ordinance's requirement for "language and procedures prohibiting the employer or the labor organization from coercing or intimidating employees, explicitly or implicitly, in selecting or not selecting a bargaining representative" (internal quotation marks omitted) (quoting Milwaukee, Wis., Code of Ordinances § 31.02(f)(7) (2024))).

184. See id. at 279 ("Any doubt that the agreements have a spillover effect on labor disputes arising out of the contractors' non-County contracts is dispelled by the language of the ordinance.").

projects.[185] Posner feared that the requirement thus regulated "employees who may never work on a County contract."[186] That the obligation to negotiate a PLA only kicked in once a union sought to represent employees working on County projects didn't matter.[187]

The court also noted that the agreements at issue were "labor-peace" agreements rather than "pre-hire" agreements.[188] That distinction matters because labor-peace agreements, unlike construction prehire agreements, are not "tried and true" in Posner's view.[189] Posner also claimed to extract a deeper principle from *Gould*: NLRA preemption prohibits states from using state spending powers as pretext for regulating labor relations.[190] That inference was not supported by the Seventh Circuit's precedents at the time[191] and has not been supported since.[192]

The Seventh Circuit again considered NLRA preemption in *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*.[193] There, the court considered whether Illinois could attach a PLA requirement to its subsidies for the construction or renovation of renewable-fuel plants.[194] The district court below held that Illinois could because it acted as a proprietor.[195] Judge Frank Easterbrook identified a problem with that reasoning: Illinois didn't own anything before or after the subsidies were

185. Id. (noting that "all but one of the terms that the agreement must contain" apply to all of an employer's employees).

186. See id. (internal quotation marks omitted).

187. See id.

188. See id. at 281–82.

189. See id. at 282.

190. See id. ("But the principle of [*Gould*] goes deeper; it is that the spending power may not be used as a pretext for regulating labor relations." (citing Wis. Dep't of Indus., Lab., & Hum. Rels., 475 U.S. 282 (1986))).

191. The Seventh Circuit rejected the premise that pretextual motivation could disqualify a state from asserting the market participant exception in Colfax Corp. v. Illinois State Toll Highway Authority, 79 F.3d 631, 634–35 (7th Cir. 1996). There, the court explained, "[W]e will not go behind the contract to determine whether the Authority's real, but secret, motive was to regulate labor." Id. at 635.

192. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment."). The Second Circuit has also rejected Posner's reasoning regarding pretext. In *Building Industry Electrical Contractors Ass'n v. City of New York*, contractors challenged New York PLA requirements on two grounds—the second being impermissible political cronyism. 678 F.3d 184, 188 (2d Cir. 2012). Judge Gerard Lynch dismissed that argument, explaining, "We will not search for an impermissible motive where a permissible purpose is apparent, because '[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.'" See id. at 191 (alteration in original) (quoting *Lavin*, 431 F.3d at 1007).

193. 431 F.3d 1004.

194. See id. at 1005.

195. Id.

granted.[196] In the Third Circuit, that would have negated a necessary condition and resolved the ultimate question.[197]

Easterbrook, however, read *Boston Harbor* as holding that "*if* a state acts as a proprietor, then it may insist on the sort of prehire agreements that federal labor law permits private owners to adopt. It does not hold that *only if* a state acts in this capacity is its decision compatible with federal law."[198] In *Boston Harbor*, the Court established a market participant exception since the factual record before it featured a state that acted as a market participant.[199] But the Court's theme in *Boston Harbor* was the "need to distinguish regulation from other governmental activity."[200]

The question thus became whether a "conditional offer of a subsidy for renewable-fuels plants [is] a form of regulation."[201] In answering that, Easterbrook noted that this question arises frequently in other areas of the law, like the conditional spending exception to the anticommandeering doctrine and the unconstitutional conditions cases.[202] A condition on the receipt of funding can merely be an incentive, which would be permissible under the Court's precedent.[203] From that benchmark, he concluded that the Illinois policy is permissible because firms are free to "spurn the state's largesse" and complete projects without PLAs—and the state's subsidies.[204]

4. *The Lack of a Clear Test in the D.C. Circuit.* — Over the last six presidential administrations, the executive has flipped its position on labor, and project labor agreements in particular, numerous times via executive orders.[205] Most recently, in February 2022, Biden signed an executive order to require PLAs for all federal construction projects for

196. See id. at 1006. Easterbrook contrasts this with the bond investments in *Sage*. Id. (citing Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206 (3d Cir. 2004)).

197. Cf. Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("We resolve this case at the first step of the *Sage* test, for we conclude that the City lacks a proprietary interest . . . .").

198. *Lavin*, 431 F.3d at 1006.

199. See Roger C. Hartley, Preemption's Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies, 5 U. Pa. J. Lab. & Emp. L. 229, 232 (2003) ("*Boston Harbor* was an ideal litigation vehicle for establishing labor preemption's market participant immunity.").

200. *Lavin*, 431 F.3d at 1006.

201. Id.

202. See id. ("The question 'is a condition on the receipt of a grant a form of regulation?' comes up frequently . . . .").

203. See id. at 1007 ("[Subsidies] may lead firms at the margin to reach labor agreements that they would not otherwise have signed, but if an incentive to change one's conduct is a form of 'regulation' then *South Dakota v. Dole*, *Rust v. Sullivan*, and many other cases were wrongly decided.").

204. Id.

205. See Button, supra note 15, at 543.

which the federal government spends $35 million or more.[206] Shortly after the rule effectuating the executive order was finalized, the Associated Builders and Contractors announced it would challenge the rule.[207] This section discusses the D.C. Circuit's previous decisions involving NLRA preemption of executive orders. The discussion reveals the D.C. Circuit's piecemeal approach to the market participant exception.

In 1995, President Clinton attempted to prohibit the federal government from contracting with employers who hired permanent replacements during strikes through Executive Order 12,954.[208] The government tried to defend the order by arguing that the President's authority to pursue "efficient and economic" procurement trumped NLRA preemption.[209] The D.C. Circuit struck the order down, however, in *Chamber of Commerce v. Reich*.[210] In doing so, the court first relied on *NLRB v. Mackay Radio & Telephone Co.*,[211] which held employers have the right to hire and retain replacement workers during strikes.[212]

The court noted that *Boston Harbor* was decided because Boston was a market participant rather than a regulator but refused to adopt a dichotomous view of the government as either a market participant or regulator.[213] Although the court declined to define a doctrinal test, it found that the effect of the executive order was inevitably regulatory due to its overreaching effects.[214] After all, the Order applied to all contracts over $100,000 and would affect twenty-six million workers.[215] Thus,

206. Executive Order on Use of Project Labor Agreements for Federal Construction Projects, Exec. Order No. 14,063, 87 Fed. Reg. 7363, 7363 (Feb. 9, 2022).

207. Press Release, Associated Builders & Contractors, President Biden's Final Rule Forcing Corrupt Project Labor Agreements Will Face Legal Challenges (Dec. 18, 2022), https://www.abc.org/News-Media/News-Releases/abc-president-bidens-final-rule-forcing-corrupt-project-labor-agreements-will-face-legal-challenges [https://perma.cc/SW57-VYHL] ("ABC plans to challenge this Biden administration scheme in the courts . . . ." (internal quotation marks omitted) (quoting Ben Brubeck, Vice President of Regulatory, Labor, and State Affairs, Associated Builders & Contractors)).

208. Exec. Order No. 12,954, 60 Fed. Reg. 13023 (1995), invalidated by Chamber of Com. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

209. See *Reich*, 74 F.3d at 1333 ("The government explains '[t]here can be no conflict between the President's legitimate exercise of authority under the Procurement Act and [the NLRA rights] relied on by appellants [sic].'" (alterations in original) (quoting Appellee's Brief at 38, *Reich*, 74 F.3d 1322) (misquotation)).

210. Id. at 1324.

211. 304 U.S. 333 (1938).

212. See *Reich*, 74 F.3d at 1332.

213. See id. at 1335–36 ("We do not think we are bound to that dichotomy . . . .").

214. See id. at 1338.

215. Id. ("Not only do the Executive Order and the Secretary's regulations have a substantial impact on American corporations, it appears that the Secretary's regulations promise a direct conflict with the NLRA . . . .").

because the Order was regulatory in nature and conflicted with the NLRA, it was preempted.[216]

In *Building & Construction Trades Department v. Allbaugh*,[217] the D.C. Circuit considered the validity of George Bush's executive order[218] that provided, "to the extent permitted by law, no federal agency, and no entity that receives federal assistance for a construction project, may either require bidders or contractors to enter, or prohibit them from entering, into a project labor agreement."[219] The court upheld the order because it constituted proprietary rather than regulatory action.[220]

In rebutting the plaintiff's claim that the Order was regulatory rather than proprietary, the D.C. Circuit made two interesting observations. "First, the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity."[221] Second, an actor's status as a lender to, "rather than the owner of, a project is not inconsistent with its acting just as would a private entity," who would also have an interest in ensuring the efficient use of its resources.[222] Thus, the court reaffirmed *Boston Harbor*'s core principle: "A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'"[223] This decision was surprising. In *Reich*, just six years earlier, the D.C. Circuit said it "very much doubt[ed] the legality" of President George H.W. Bush's similar order.[224]

III. WHY THE SEVENTH CIRCUIT'S APPROACH PROVIDES THE BEST ANSWER

The Seventh Circuit offers the best answer for doctrinal, principled, and pragmatic reasons. The Seventh Circuit's inquiry is consistent with binding precedent, upholds balanced federalism, and is administrable. Section III.A explains how the Seventh Circuit's test is consistent with the Supreme Court's inconclusive case law on the NLRA market participant

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216. Id.

217. 295 F.3d 28 (D.C. Cir. 2002).

218. Exec. Order No. 13,202, 66 Fed. Reg. 11225 (Feb. 2, 2001).

219. See *Allbaugh*, 295 F.3d at 29.

220. See id. at 34.

221. Id. at 35. The Supreme Court's reasoning in *Brown* supports the idea that states have a proprietary interest in the use of their funds but seems to limit the extent of a state's proprietary interest to "ensuring that state funds are spent in accordance with the purpose for which they are appropriated." Chamber of Com. v. Brown, 554 U.S. 60, 70 (2008).

222. *Allbaugh*, 295 F.3d at 35.

223. See id. at 36 (alterations in original) (quoting *Boston Harbor*, 507 U.S. 218, 228–29 (1993)).

224. Chamber of Com. v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

exception. Section III.B looks to three other doctrinal fields that consider whether government conditions constitute impermissible regulation.

A. *The Seventh Circuit's Test Is Consistent With Supreme Court Precedent*

As discussed in section II.B, the Supreme Court has considered the market participant exception to NLRA preemption on three occasions: *Gould*,[225] *Boston Harbor*,[226] and *Brown*.[227] The Seventh Circuit's *Lavin* decision is literally and logically consistent with those decisions. Like the Seventh Circuit—and unlike the Third and Ninth Circuits—the Supreme Court has consistently relied on functional rather than formalistic logic.

First, *Gould* only ruled against Wisconsin's disbarment law because it was functionally equivalent to regulation. Scholars have quoted *Gould* as saying that, for the purposes of NLRA preemption, the exercise of spending powers versus the exercise of regulatory powers is a "distinction without a difference."[228] While that phrase does appear in the opinion, the full sentence in which it appears provides vital context:

> [Wisconsin] contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, *because on its face the debarment statute serves plainly as a means of enforcing the NLRA*.[229]

The text of the opinion shows that Blackmun qualifies the holding by explaining why, in this particular situation, the exercise of Wisconsin's spending power amounted to regulation.

Gould did not hold that all spending is necessarily equivalent to regulation. If Blackmun intended that, he would not have also decided that the state spending in *Boston Harbor* wasn't preempted for the reason that it was nonregulatory. Rather, *Gould* stands for the proposition that reliance on spending power doesn't automatically exempt a state from preemption analysis.[230]

Boston Harbor built on *Gould*'s functional reasoning and held that if a state acts as a market participant, then it is not preempted because it is not regulating.[231] But crucially, *Boston Harbor* only recognized market

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225. Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282 (1986).

226. 507 U.S. 218.

227. Chamber of Com. v. Brown, 554 U.S. 60 (2008).

228. See Sachs, Despite Preemption, supra note 118, at 1168 (internal quotation marks omitted) (quoting *Gould*, 475 U.S. at 287).

229. *Gould*, 475 U.S. at 287 (emphasis added).

230. See id.

231. See *Boston Harbor*, 507 U.S. at 227 ("A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace.").

participant behavior as *an* example—not the *only* example—of state action that didn't constitute regulation.[232]

Brown, like *Gould*, has been cited for the proposition that reliance on spending powers is a "distinction without a difference."[233] *Brown* quoted that exact language from *Gould*, but it once again contextualized that the exercise of the spending power in *Gould* was regulatory because it was "tantamount to regulation."[234] The spending conditions at issue in *Brown* can easily be distinguished from most LPAs. In *Brown*, the private actors had extensive, ongoing obligations to the state.[235]

Even if the average LPA imposes extensive obligations,[236] states, localities, and the executive could present a more compelling case by crafting conditions that are more limited in scope than those in *Brown*. The Court in *Brown* criticized the California statute for making it "exceedingly difficult for employers to demonstrate that they have not used state funds and by imposing punitive sanctions for noncompliance."[237] That observation was relevant to the Court's finding that the statute reached beyond California's proprietary interest.[238] The statute in *Brown* also caused issues because it selectively restricted employer speech about regulation.[239]

B. *Other Doctrinal Fields Support the Seventh Circuit's Conclusion*

NLRA preemption isn't the only constitutional context that requires the inquiry of whether a government-imposed condition is regulatory, nor is it the only doctrine with a market participant exception. Section III.B.1 identifies the Supreme Court's distinction between reasonable conditional spending and regulation (or coercive spending) in anticommandeering cases such as *South Dakota v. Dole*[240] and *National Federation of Independent Businesses v. Sebelius*.[241] Section III.B.2 considers a couple of the Court's unconstitutional conditions cases. Section III.B.3 looks at the market participant doctrine in the context of the Dormant Commerce Clause. The analysis in this section identifies a throughline in the relevant

232. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005) ("[*Boston Harbor*] does not hold that *only if* a state acts in this capacity is its decision compatible with federal law.").

233. See, e.g., Sachs, Despite Preemption, supra note 118, at 1168 & n.71.

234. Chamber of Com. v. Brown, 554 U.S. 60, 70 (2008) (internal quotation marks omitted) (quoting *Gould*, 475 U.S. at 287).

235. See id.

236. Those who disagree would argue that LPA requirements do result in ongoing obligations because the LPA is a binding contract.

237. *Brown*, 554 U.S. at 71.

238. See id.

239. Id.

240. 483 U.S. 203 (1987).

241. 567 U.S. 519 (2012).

Supreme Court doctrines: Conditions that leave room for a meaningful choice are generally considered constitutional.

1. *Conditional Spending Exception to Anticommandeering.* — *Lavin*'s analysis mirrors the Supreme Court's approach to the anticommandeering doctrine. The anticommandeering doctrine, rooted in the Tenth Amendment, proscribes the federal government from forcing states to make, or enforce, regulations[242]—and from prohibiting states from doing so.[243] In *Printz v. United States*, for example, the Supreme Court struck down provisions of the Brady Act[244] that required state law enforcement officials to execute handgun regulations by performing background checks.[245]

The federal government can, however, leverage Congress's spending power to encourage states to act in regulatory-adjacent ways. That is, Congress can condition funds on the states' fulfillment of certain requirements. In *South Dakota v. Dole*, for example, the Court upheld the National Minimum Drinking Age Act of 1984, which withheld a small portion of federal highway funds from states that didn't implement a minimum legal drinking age of at least twenty-one.[246]

Just like in the NLRA preemption context, however, reliance on spending powers doesn't automatically ensure that a governmental act will survive anticommandeering analysis. In *Dole*, the Court outlined five requirements that a federal conditional spending program must satisfy to avoid violating the anticommandeering doctrine: (1) "the exercise of the spending power must be in pursuit of 'the general welfare,'" (2) the condition must be expressed unambiguously, (3) conditions must be related to a particular government interest, (4) there can be no separate constitutional prohibition, and (5) the financial inducement cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.'"[247]

For decades, many scholars thought that the conditional spending exception "represented a virtual blank check to Congress."[248] The

242. New York v. United States, 505 U.S. 144 (1992).

243. Murphy v. NCAA, 138 S. Ct. 1461 (2018).

244. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536.

245. 521 U.S. 898, 902–04, 933–35 (1997) (holding that the Brady Act's "mandatory obligation imposed on [state law enforcement officers] to perform background checks on prospective handgun purchasers runs afoul" of the anticommandeering principle (citing *New York*, 505 U.S. at 188)).

246. See 483 U.S. 203, 206 (1987) ("Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.").

247. Id. at 207–08, 210–11 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

248. See, e.g., Andrew B. Coan, Commandeering, Coercion, and the Deep Structure of American Federalism, 95 B.U. L. Rev. 1, 11 (2015).

Supreme Court dismissed that notion in *NFIB v. Sebelius* by invalidating the conditional spending provision of the Affordable Care Act[249] concerning Medicaid expansion.[250] Chief Justice John Roberts explained that the conditional spending provision failed the fifth requirement—noncoercion. The sum of money at issue was massive.[251] Unlike the law in *Dole*, in which only five percent of federal highway funds were to be withheld,[252] states stood to lose forty percent of all Medicaid funding—which Roberts estimated constitutes over ten percent of most states' *total* revenue.[253] Roberts characterized this incentive structure as "a gun to the head" that exceeded the point at which pressure became compulsion.[254]

These conditional spending cases demonstrate that the federal government can, with conditional funding, incentivize states to regulate. But that power isn't without limitation. Once the pressure from the incentives reaches *compulsion*, the conditional spending amounts to impermissible commandeering.

2. *Constitutional Conditions: Speech and Funding*. — The doctrine of unconstitutional conditions prevents the government from using its coercive power to condition benefits on the forfeiture of constitutional rights in certain circumstances.[255] Some commentators take positions at the extremes of this doctrine, arguing that conditioning benefits on the forfeiture of constitutional rights is either always or never permissible.[256] But the resolution of that debate is beyond the scope of this Note. What is relevant is that, in practice, the Court has upheld funding conditioned on

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249. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119.

250. 567 U.S. 519, 530–31 (2012) ("Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, . . . and the Medicaid expansion . . . .").

251. Id. at 542 ("Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.").

252. National Minimum Drinking Age Amendment of 1984, 23 U.S.C. § 158 (2018); *Dole*, 483 U.S. at 211.

253. See *Sebelius*, 567 U.S. at 523, 582 ("The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); Kenneth R. Thomas, Cong. Rsch. Serv., R42367, Medicaid and Federal Grant Conditions After *NFIB v. Sebelius*: Constitutional Issues and Analysis 2 (Feb. 21, 2012), https://crsreports.congress.gov/product/pdf/R/R42367 (on file with the *Columbia Law Review*) (last updated July 17, 2012) ("Medicaid represents 40% of all federal funds that states receive . . . .").

254. See *Sebelius*, 567 U.S. at 581.

255. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right . . . .").

256. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, Protecting State Constitutional Rights From Unconstitutional Conditions, 56 U.C. Davis L. Rev. 247, 259 (2022) (citing Justice Oliver Wendell Holmes as a proponent of the "always permissible" position and Professor Philip Hamburger for the "never permissible" position).

the loss of rights in some circumstances.[257] This section considers *Rust v. Sullivan*[258] and *National Endowment for the Arts v. Finley*,[259] two examples of that phenomenon.

In *Rust v. Sullivan*, the Supreme Court considered an HHS regulation that prevented recipients of Title X funding from engaging in abortion-related counseling.[260] The petitioners challenged that regulation, claiming the forfeiture of a healthcare professional's right to discuss abortion was an unconstitutional condition.[261] Chief Justice Rehnquist, writing for the Court, disagreed.[262] Rehnquist dismissed the First Amendment concerns raised by the petitioners by explaining that the regulation didn't force Title X recipients to outright forfeit abortion-related speech or conduct, rather, it didn't allow that speech in relation to Title X projects.[263]

First Amendment concerns were also present in *National Endowment for the Arts v. Finley*.[264] There, the Court considered a National Endowment for the Arts policy that required recipients to conform to "general standards of decency and respect."[265] The Court upheld this provision, finding that funding one kind of activity didn't bind the government to funding all kinds of activities.[266]

Two principles connect *Rust* and *Finley* to this Note. First, governments have latitude to choose what they spend their money on. Second, if those affected by the conditions for funding aren't *coerced* into their decision, the condition is permissible.

3. *Dormant Commerce Clause.* — Before the Court endorsed the market participant exception to NLRA preemption, it recognized a market participant exception in the context of the Dormant Commerce Clause (DCC).[267] The DCC generally prohibits states from discriminating against interstate commerce.[268] That is, states and cities can't favor their own

257. For a nonexhaustive list of cases, see id. at 250 n.6.

258. 500 U.S. 173 (1991).

259. 524 U.S. 569 (1998).

260. See *Rust*, 500 U.S. at 180.

261. See id. at 196 ("Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.").

262. See id. at 178.

263. Id. at 196 ("The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.").

264. 524 U.S. 569.

265. See id. at 576–77.

266. See id. at 588.

267. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

268. See Note, The Dormant Commerce Clause and Moral Complicity in a National Marketplace, 137 Harv. L. Rev. 980, 983 (2024).

citizens over citizens from elsewhere. For example, in *Dean Milk Co. v. City of Madison*, the Supreme Court struck down an ordinance that required all milk sold in the city of Madison to be from a plant within five miles of the city.[269] A state doesn't, however, violate the DCC when it acts as a market participant—even if it prefers its citizens.[270] For example, in *Reeves, Inc. v. Stake*, the Supreme Court upheld a South Dakota policy of selling state-produced cement that preferred its own citizens.[271]

The market participant doctrine for purposes of the DCC can be deemed messy or unpredictable due to the Court's lack of an "overarching theory of the market-participant rule."[272] Professor Donald H. Regan identified a unifying principle in the seemingly scattered decisions, stating "[t]here is an obvious feature that is common to all these instances of permissible discrimination in favor of locals: The state is spending money."[273] Regan offers a few possible explanations for this.[274] The most relevant explanation to this Note is that state spending has the capacity to be less coercive than other forms of discriminatory regulations.[275]

* * *

These doctrinal areas all support the principle at the heart of *Lavin*'s decision: Governments cannot *compel* private action through spending that they couldn't require by regulation, but they may *incentivize* that action.[276] One may argue that this principle isn't that administrable in practice.[277] It's true there isn't much precedent, even in the Seventh Circuit, to provide lower courts with guidance. Thus, this Note argues that lower courts should begin with a true presumption against preemption and then apply the fifth prong of the conditional spending test (i.e., determine whether the incentive is impermissibly coercive) when considering whether the NLRA preempts a conditional spending policy.

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269. See 340 U.S. 349, 354 (1951).

270. See Daniel Francis, The Decline of the Dormant Commerce Clause, 94 Denv. L. Rev. 255, 303–06 (2017) (discussing canonical market participant exception cases).

271. See 447 U.S. 429, 446–47 (1980).

272. Dan T. Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395, 405 (1989).

273. Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1193 (1986).

274. Id. at 1194.

275. See id. ("For the most part, state spending programs are less coercive than regulatory programs or taxes with similar purposes.").

276. See supra note 203 and accompanying text.

277. Though surely the alternatives aren't better—especially not a subjective inquiry that ferrets out so-called "regulatory intent."

IV. APPLYING THE SEVENTH CIRCUIT'S TEST TO LPAS IN EMERGING INDUSTRIES

A. *Utilizing LPAs to Implement the IRA*

A broad application of *Lavin*'s test unlocks the implementation of the IRA in two crucial ways. First, it shows that the federal executive can require PLAs and incentivize other labor-peace agreements. Second, it shows that states and localities that receive IRA funds—or seek to complement IRA investment—can condition spending on the inclusion of PLAs and other labor-peace agreements.

1. *Implementing the IRA Through Executive Order.* — Under Supreme Court precedent and *Lavin*, Biden's executive order should be upheld as permissible. On March 28, 2024, the Associated Builders and Contractors filed suit to enjoin Executive Order 14,063 and the PLA Rule.[278] Among other grounds,[279] the plaintiffs claim that the executive order and the rule violate the NLRA.[280] As opponents note, it only reaches 120 construction projects,[281] so the order doesn't capture an entire industry. Contractors who don't wish to use PLAs are free not to in the vast majority of projects that they complete. The presence of a real choice means that the executive order is not coercive under the test explained in Part III.

2. *Implementing the IRA Through Local Investment and Complementary LPAs.* — But even if a court strikes down Biden's executive order and the complementary regulation, the purpose of the IRA can be realized by state and local action.[282] There are two relevant actions that states and localities can take to ensure the IRA's success. State and local governments can first use funds they receive from the IRA to negotiate and require PLAs. Second, state and local governments can use their own funds to complement IRA investment.

Several provisions in the IRA incentivize development of electricity-transmission infrastructure, which stakeholders believe can play a vital role in enabling increased reliance on wind and solar energy.[283] Section 50152,

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278. *Clark* Complaint, supra note 86, at 47.

279. Plaintiffs also argue that the order and rule exceed executive authority under the Major Questions Doctrine, violate competitive bidding laws, and that the rule violates the Administrative Procedure Act. See Plaintiffs' Motion for Expedited Summary Judgment and Preliminary Injunction, and Memorandum of Law in Support at 2, 11, 15, *Clark*, No. 3:24-cv-318-WWB-MCR (M.D. Fla. filed Sept. 9, 2024). This Note limits its analysis of the NLRA claim. Because the plaintiffs assert so many theories, they devote only two paragraphs in their motion for summary judgment to their NLRA claim. See id. at 22–23.

280. See id. at 2, 22.

281. See Letter from Am. Concrete Pumping Ass'n et al., to U.S. Cong., supra note 84.

282. See Chyung et al., supra note 3.

283. Ashley J. Lawson, Cong. Rsch. Serv., IN11981, Electricity Transmission Provisions in the Inflation Reduction Act of 2022 (Aug. 23, 2022), https://crsreports.congress.gov/

for example, directly makes $760,000,000 available for state and local governments who facilitate the siting of transmission lines.[284] One approved use of these funds is particularly relevant to this Note; section 50152 authorizes grants for "measures and actions that may improve the chances of, and shorten the time required for, approval by the siting authority of the application relating to the siting or permitting of the covered transmission project, as the Secretary determines appropriate."[285]

If the Seventh Circuit's understanding of the market participant exception is correct, states and localities could thus use IRA funds to negotiate LPAs for electric transmission line projects. That would not be the case under the Third Circuit's interpretation. States don't have a proprietary interest in federal funds, so that application would fail the first prong.

The IRA also makes billions of dollars available for energy-efficiency and electrification rebate programs, but the IRA depends on state and tribal agencies to disburse those funds.[286] The relevant section of the IRA subsidizes entities that carry out "qualified electrification projects" for low- or moderate-income households and multifamily buildings with at least half low- or moderate-income housing residents.[287] Qualified electrification projects under that section include the purchases and installations of electric heat pumps, electric stoves and ovens, and insulation.[288]

The huge influx of investment in electrification projects will presumably involve the coordination of hundreds of contractors and subcontractors in each state. State environmental agencies could condition contractors' participation in their respective rebate programs on agreement to LPAs, which once again provide a creative way to ensure efficient implementation of projects while standardizing pay and safety conditions. Using LPAs in this way is similar to how Illinois and unions used PLAs to undergo a project of asbestos abatement and building repair and to secure labor peace.[289]

Here, the states could, with the help of the federal government, bear some of the costs of any PLA provision dealing with training contractors. Section 50123 appropriates money to states to develop education and training programs for contractors seeking to install home energy efficiency and electrification improvements.[290] By providing the training,

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product/pdf/IN/IN11981 (on file with the *Columbia Law Review*) (last updated Jan. 4, 2024).

284. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 50152, 136 Stat. 1818, 2046–48.

285. Id. § 50152(b)(1)(E).

286. See id. § 50122.

287. See id.

288. See id. § 50122(d)(6)(A)(i).

289. See Colfax Corp. v. Ill. State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996).

290. See Inflation Reduction Act § 50123.

the state could help make some provisions, such as apprenticeship requirements, less burdensome on employers. The public, meanwhile, benefits in the short and long term when there is a newly skilled and cared-for workforce.

B. *Cannabis*

Contrasting the cannabis labor-peace agreement requirement in Rhode Island to that in Illinois provides a clear application of the principles articulated in this Note.

As noted in section I.B, the Rhode Island statute requires *all* cannabis-license applicants to have an LPA.[291] Since cannabis firms can only operate through state schemes, they would either have to accede to this requirement or shut down their business. Since this requirement amounts to the "gun to the head" compulsion discussed in *NFIB v. Sebelius*,[292] Greenleaf's merits challenge has force.

In the Third or Ninth Circuit, a challenge to Illinois law would succeed. Illinois doesn't have a proprietary interest in the cannabis firms its policy affects nor is the policy aimed at solving a proprietary problem. But, as a conditional benefit, it survives *Lavin*. Unlike Rhode Island's policy, Illinois's incentive lacks coercive force. The five points awarded to firms with an LPA gives a small boost in their application for a license, but those five points constitute only two percent of available points.[293]

Thus, Illinois's conditioning is not coercive and is permissible. States looking to implement a labor-peace condition in their cannabis licensing schemes should follow Illinois's lead to avoid NLRA preemption.

CONCLUSION

As billions of public dollars are invested in clean energy infrastructure and cannabis, the American public stands to benefit from the efficient completion of development projects. LPAs not only attract a skilled labor force but also ensure stability by relieving labor tensions and increasing worker retention. While the federal government has required PLAs for some specific situations, state and local governments need to also be equipped with these tools as they execute the disbursement of funds that have been allocated to them in the Inflation Reduction Act. Some of these government entities may fear NLRA preemption. This Note has established, however, that conditioning spending on the inclusion of LPAs is not regulation—so long as it's not coercive—and thus is not preempted by the NLRA.

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291. See Rhode Island Cannabis Act, 21 R.I. Gen. Laws § 21-28.11-12.2 (2024).

292. 567 U.S. 519, 581 (2012).

293. See Cannabis Regulation and Tax Act, 410 Ill. Comp. Stat. Ann. 705 / 15-30(c)(6) (West 2024).

ESSAY

THE IMPOSSIBILITY OF RELIGIOUS EQUALITY

*Zalman Rothschild**

The Supreme Court has recently adopted a new rule of religious equality: Laws unconstitutionally discriminate against religion when they deny religious exemptions but provide secular exemptions that undermine the law's interests to the same degree as would a religious exemption. All the Justices and a cadre of scholars have agreed in principle with this approach to religious equality. This Essay argues that this new rule of religious equality is inherently unworkable, in part because it turns on treating that which is religious the same as its secular "comparators." But religion is not comparable to anything—neither in terms of its essence nor its value. The current doctrine assumes that "religion" is always at least as valuable as all that is "secular"—that is, that religion qua religion is as valuable as, and thus must always be treated as well as, all that is simply "not religion." This assumption lacks both conceptual coherence and a normative basis. It also renders religious "equality" a contradiction in terms as it establishes not religious equality, but religious superiority.

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INTRODUCTION

The Supreme Court has recently adopted a new rule of religious equality. Stated simply, whenever the government grants an exemption from a general law for a "secular" entity, activity, or motivation, it unconstitutionally discriminates against religion if it does not also offer an exemption to all "comparable" religious entities, activities, and motivations.[1] This doctrine has already had profound effects. Under the new rule, federal courts have held that local governments may not require religious objectors to comply with vaccine mandates if the mandates exempt those who are medically contraindicated;[2] that states may restrict gun-carrying in churches (as "sensitive places") only if the restriction also deems practically every secular place "sensitive";[3] and that Title VII is unconstitutional as applied to religious objectors because Title VII exempts businesses that employ fewer than fifteen employees.[4] More broadly, in part thanks to the valence of free exercise as an equality right that casts religious plaintiffs as a vulnerable group in need of protection, religious plaintiffs have prevailed—and will continue to prevail—in previously unsuccessful challenges to a range of antidiscrimination laws.[5]

1. See Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (granting injunctive relief from a California lockdown order because it treated some secular activities more favorably than home-based Bible study).

2. See infra section II.A.

3. See Antonyuk v. Chiumento, 89 F.4th 271, 350 (2d Cir. 2023), vacated sub nom. Antonyuk v. James, 144 S. Ct. 2709 (2024); Spencer v. Nigrelli, 648 F. Supp. 3d 451, 463–64 (W.D.N.Y. 2022).

4. See Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021) ("Title VII is not a generally applicable statute . . . ."), aff'd in part, rev'd in part, and vacated in part sub. nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

5. See infra notes 203–205 and accompanying text. In a 2022 speech, for example, Justice Samuel Alito had this to say: "There's also growing hostility to religion, or at least the

Moving forward, the Court's new rule of religious equality is poised to reshape laws touching the workforce, healthcare, education, housing, and beyond.[6]

The expansive nature of this new constitutional rule is ironic, considering it stems from the Court's earlier efforts to *limit* free exercise rights.[7] For much of the twentieth century, the Court approached free exercise through a liberty paradigm: Any law that burdened the practice of religion even incidentally was held presumptively unconstitutional unless the government showed that it was narrowly tailored to achieve a compelling government interest.[8] But the 1990 case of *Employment Division v. Smith*, in which the Court upheld a federal drug law outlawing peyote, marked a doctrinal sea change.[9] The liberty paradigm was unworkable, the Court explained, because it required judges to conduct problematic metaphysical inquiries into the nature of religion and inappropriate assessments of the value of religious practices relative to other governmental interests.[10] Instead of treating the free exercise of religion as a liberty interest, the Court opted to reinterpret it as a right that protects only against the unequal treatment of religion.[11]

Smith sowed the seeds of a new constitutional rule against religious discrimination, but it took three decades for this rule to reach maturity and take on precise meaning.[12] To be sure, *Smith* announced in no uncertain terms that free exercise does not require special religious exemptions from neutral and generally applicable laws and rather requires only that the government not wrongfully discriminate against religion.[13] But there is nothing that wrongful discrimination just *is*. Every

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traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors." See Josh Blackman, Justice Alito Speaks on Religious Liberty, Reason (July 28, 2022), https://reason.com/volokh/2022/07/28/justice-alito-speaks-on-religious-liberty [https://perma.cc/EPX7-6PCZ]; see also Leah M. Litman, Disparate Discrimination, 121 Mich. L. Rev. 1, 11–12 (2022) ("[Courts] view remedial policies or antidiscrimination measures as evidence that white people, or conservative Christian groups, are now groups in need of judicial protection from laws that seek to include other groups in society and democracy.").

6. For a few examples, see infra section II.B.

7. See infra section I.A.

8. See infra notes 38–40 and accompanying text.

9. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 872 (1990). This sea change was more nominal than real, considering the Court's pre-*Smith* habit of deferring to the government. But it is referred to here as a "sea change" because at least as a formal matter—and optically—the Court did change the doctrine. See infra section I.A.

10. See *Smith*, 494 U.S. at 886–88.

11. See id. at 879–82.

12. See infra Part I.

13. *Smith*, 494 U.S. at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious

law—indeed, every choice—discriminates; deciding which discriminations are wrongful and which are not (itself an act of discrimination) involves choices premised on (at times fraught) normative judgments.[14]

After three decades and a transformed bench, the Supreme Court finally settled on the following definition: When a law bestows the benefit of an exception according to a classification that does not include all "comparable" religious entities, activities, and motivations, the government has impermissibly treated "religion" unequally.[15] According to this rule, no law may pursue its objectives in a way that even incidentally denies to religious entities, activities, or motives exemptions that are conferred upon the "secular"—even if regulating religion is entirely unrelated to the law's purpose.

A diverse cadre of scholars has expressed support for some version of this principle of religious equality—that religion should not be treated worse than that which is secular—even while criticizing the results the Court has reached in its application.[16] This Essay takes a different view. It

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objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))).

14. See, e.g., Deborah Hellman, When Is Discrimination Wrong 4–9 (2008) ("The fact that we often need to distinguish among people forces us to ask when discrimination is morally permissible and when it is not.").

15. See, e.g., Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam))); *Roman Cath. Diocese*, 141 S. Ct. at 74 (Kavanaugh J., concurring) ("New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.").

16. See Douglas Laycock & Thomas C. Berg, Protecting Free Exercise Under *Smith* and After *Smith*, 2020–2021 Cato Sup. Ct. Rev. 33, 34, 61 (concluding that "*Smith*'s protective rule" that "if a law is not neutral, or not generally applicable, any burden it imposes on religion must be necessary to serve a compelling government interest" can do much to shield free exercise of religion); Christopher C. Lund, Second-Best Free Exercise, 91 Fordham L. Rev. 843, 875 (2022) ("The Court's recent attempts to retcon *Smith* into something that can protect religious exercise are noble; they are certainly better than nothing."); Laura Portuondo, Effecting Free Exercise and Equal Protection, 72 Duke L.J. 1493, 1499 (2023) ("Recent free exercise decisions have . . . set forth a positive theory for considering effects [in the equal protection context]. Specifically, the Court has embraced the theory that a law should trigger heightened scrutiny where it 'devalues' protected interests."); Mark Storslee, The COVID-19 Church-Closure Cases and the Free Exercise of Religion, 37 J.L. & Religion 72, 75 (2022) ("Where government creates carve-outs . . . one of those things must be religion . . . ."); Cass R. Sunstein, Our Anti-*Korematsu*, 2021 Am. J.L. & Equal. 221, 222 (2021) (applauding the Court in *Roman Catholic Diocese* for protecting free exercise during a national emergency); Nelson Tebbe, The Principle and Politics of Equal Value, 121 Colum. L. Rev. 2397, 2403–04 (2021) [hereinafter Tebbe, Equal Value] (endorsing the "new equality" as "a matter of ideal theory"). For a more qualified endorsement, see Andrew Koppelman, The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, 108 Iowa L. Rev. 2237, 2240 (2023) (critiquing "the proliferation of new variants" of the doctrine while endorsing Professor Douglas Laycock's and then-Judge Alito's "earlier" version of the doctrine). Professors Alan

critiques the underlying principle rather than specific applications by arguing that such a principle is practically unworkable and conceptually incoherent.[17] The problem with any kind of religious equality principle of the sort set out by the Court's recent case law is that it turns on treating the religious the same as its secular comparators. Yet religion is not comparable to anything—not in terms of its essence, or, possibly even more importantly, its value.[18] Perhaps in an attempt to overcome this problem, the new doctrine presents itself as avoiding assessing and comparing religion's value.[19] But, as this Essay will show, it does so by ascribing to it practically infinite value. It assumes that religion is at least as valuable as—and, thus, must always be treated at least as well as—*anything* that is not religion.[20] Yet, as this Essay argues, there is no theoretical or normative basis for this assumption. And although its defenders and the entire Supreme Court characterize this new free exercise doctrine as a rule of equality[21] and justify it on that basis, it is nothing of the sort. For requiring that religion always be treated at least as well as everything else "comparable"—but not the reverse—establishes superiority of religion. Finally, accepting this premise would—and has begun to—jeopardize the viability of basic governance.

Before proceeding, a clarifying note is in order. This Essay does not object to rules of equality *among* religions—that is, that no religion or select religions may be singled out for adverse or beneficial treatment—or to a rule that the government may not intentionally discriminate against or in favor of religion as such (e.g., by making a benefit or detriment conditional on whether something or someone is religious or secular). These constitute intentional discrimination on the basis of religion and are distinguishable from governmental treatment of some interest (that

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Brownstein and Vikram Amar are mostly critical, but they too tacitly support what Professor Andrew Koppelman refers to as the "old" most-favored nation doctrine. See Alan E. Brownstein & Vikram David Amar, Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context, 54 Loy. U. Chi. L.J. 777, 789 (2023) (explaining how *Fraternal Order*'s "focus on underinclusivity has some validity" and how the case serves as an "early and classic example" of the doctrine's ability to distinguish between discriminatory and nondiscriminatory underinclusivity).

17. It is worth emphasizing, as this Essay does below, that this Essay distinguishes between intentional discrimination and free-floating equality and takes issue specifically with the latter. See infra Part IV (suggesting an alternative—namely, an anti-intentional-discrimination rule premised on a principle of anti-religious-persecution). See infra note 228.

18. See infra Part III (critiquing arguments for and assumptions underlying the principle of religious equality).

19. See infra note 362.

20. See infra section II.A. Adding "comparable" does not change this assumption. See infra section III.D (showing how the doctrine requires this of "practically infinite value" assumption regardless of any comparability analysis).

21. See infra notes 218–220 and accompanying text.

happens to not be religious and is thus "secular") better than "religion."[22] It is strictly this latter conception of religious equality, which has now been captured by free exercise doctrine, that is the subject of this Essay.

The Essay develops its critique of the new rule of religious equality in three parts. Part I recounts the doctrine's history, tracking how the normative and doctrinal foundations of free exercise have shifted over time, with equality ultimately supplanting liberty as free exercise's organizing principle. This shift was initially contested by practically every free exercise scholar based on fears that an equality standard would prove insufficiently protective of religious freedom. But even as *Smith*'s critics continued to castigate the Court for abandoning its religious liberty doctrine, some simultaneously began to advance an interpretation of religious equality that could—and eventually would—be even more deferential to religion than religious liberty had been.[23] According to this interpretation, religious equality "require[s] that religion get something analogous to most-favored nation status."[24] Just months after President Donald Trump's third Supreme Court appointee, Justice Amy Coney Barrett, joined the Court in 2020, the Court formally adopted this most-favored nation (MFN) definition of religious equality.[25]

Part II takes stock of the Court's new doctrine. It illustrates the doctrine's boundlessness by analyzing free exercise cases involving vaccine mandates during the COVID-19 pandemic, gun control regulations, medication restrictions, and laws prohibiting workplace discrimination.[26] This Part also situates religious equality among free exercise's three potential interpretations: as a liberty right, as a right against intentional discrimination, and as a broader equality right. It shows how the new religious equality theory is fundamentally different from, and more sweeping than, disparate impact theory, although on its face it may appear to be just that.[27] This Part argues that a key component of religious equality's novelty is the fact that it differs from other equality norms—which call for equal treatment *within* a protected category (e.g., among races)—by requiring parity between the protected class (religion) and all that is simply not in the class (i.e., all that is "not religion").

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22. See infra note 228.

23. See Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 31 [hereinafter Laycock, Remnants] ("There is little reason to believe that *Smith* heralds a serious renunciation of balancing . . . .").

24. Id. at 49.

25. See infra notes 129–130 and accompanying text.

26. See infra Part II.

27. Some scholars view the new doctrine as effectively a disparate impact test. See Litman, supra note 5, at 19, 22–23 (comparing the new doctrine to disparate impact analysis); Portuondo, supra note 16, at 1499 ("Whereas previous doctrine required an exclusive or nearly exclusive effect on protected interests, recent doctrine only requires a minor disparate effect.").

Part III focuses on this key distinction and argues that religious equality rests upon unstable conceptual foundations. While most commentators troubled by the new doctrine have restricted their criticism to select applications of it, this Part contends that the doctrine is defective in principle. That is so because religious equality requires attributing a specified value to religion when religion does not have an objectively identifiable value. The doctrine is also defective because requiring the government to treat religion equally with that which is secular, but not vice versa, translates into religious superiority—the very opposite of equality.[28] It is this amalgam of conceptual problems that makes religious equality impossible both in practice and in theory.[29]

Finally, Part IV gestures toward an alternative to the new rule of religious equality: a rule proscribing intentional discrimination premised on the principle of anti-religious persecution.

I. RELIGIOUS EQUALITY: A NEW FREE EXERCISE DOCTRINE EMERGES

The First Amendment guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[30] This Free Exercise Clause mentions neither liberty nor equality, yet the evolution of free exercise doctrine has been driven, dialectically, by those two values.[31] In the current chapter of free exercise jurisprudence, equality has supplanted liberty as the Clause's controlling principle.[32]

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28. The Court's treatment of religion as superior is not limited to its new religious equality doctrine—in fact, the latter is of a piece with the Court's general preferential treatment of religion. To provide one example, the Court has held that religious institutions are insulated from employment discrimination suits brought by "ministers," a term the Court interprets very broadly. See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2081 (2020) (holding that teachers of secular subjects at religious schools are qualified for the ministerial exception); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190–95 (2012) (applying the ministerial exception to a teacher providing religious instruction). At least four Justices seem poised to adopt an even broader "church autonomy" doctrine that would immunize religious institutions from all kinds of challenges. See, e.g., Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting) ("The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith.").

29. Another clarification is in order: "Impossible" here refers specifically to courts determining on an *objective* basis that the government has *incorrectly* valued religion in comparison with some secular interest. See infra note 354.

30. U.S. Const. amend. I.

31. See infra sections I.A–.D.

32. See Zalman Rothschild, Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause, 131 Yale L.J. Forum 1106, 1115 (2022), https://www.yalelawjournal.org/pdf/F9.RothschildFinalDraftWEB_rmo9um7h.pdf [https://perma.cc/8QTZ-RFLT] [hereinafter Rothschild, Individualized Exemptions] (explaining that the doctrine has "converted free exercise, which had previously provided protection against even incidental burdens on religious practice, from a liberty right into an equality right").

This shift emerged from *Smith*, the foundation of modern free exercise jurisprudence, in which the Court squarely rejected the liberty paradigm of free exercise—holding that Oregon may proscribe the use of peyote even when it is to be used in religious ceremonies.[33] While the *Smith* Court rejected the liberty paradigm of free exercise, it declined to clearly articulate its replacement.[34] Indeed, *Smith* permits two competing interpretations, though one is more convincing than the other. According to the first, more natural interpretation, *Smith* construed the Free Exercise Clause as prohibiting intentional discrimination against religion—that is, targeting religion for adverse treatment.[35] According to the second, broader interpretation, *Smith* signaled that the government offends the Free Exercise Clause whenever it denies equality to religion (i.e., religious entities, activities, or motivations) by conferring a benefit (or declining to impose a cost) upon some secular subjects but not upon all comparable religious subjects.[36] Three decades after *Smith*, the broad equality principle has won out as the normative and doctrinal touchstone of free exercise.[37]

A. *The* Smith *Paradigm Shift*

For several decades, beginning in the 1940s[38] and ending in 1990, the Supreme Court interpreted the Free Exercise Clause to confer upon

33. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

34. See id. at 889–90.

35. See Zalman Rothschild, Free Exercise's Lingering Ambiguity, 11 Calif. L. Rev. Online 282, 283–84 (2020), https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/643f7f7f278fcc3a69d000e0/1681883008032/Rothschild_FreeExercise_11CalifLRev282.pdf [https://perma.cc/Z9EY-9BUM] [hereinafter Rothschild, Lingering Ambiguity] ("On this narrow view [of *Smith*], asking whether a law is generally applied is a method for smoking out discriminatory intent.").

36. See id.

37. Some have expressed the view that the new MFN doctrine is merely episodic, that there is no reason to think it will take hold because it first emerged in emergency docket orders and the Court's subsequent decision in *Fulton v. City of Philadelphia* was "narrow." See, e.g., Ira C. Lupu & Robert W. Tuttle, The Radical Uncertainty of Free Exercise Principles: A Comment on *Fulton v. City of Philadelphia*, 2020–2021 Am. Const. Soc'y Sup. Ct. Rev. 221, 228; see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1913 (2021). This author took the opposite position in previous work and here reaffirms that position. See Rothschild, Individualized Exemptions, supra note 32.

38. In most academic literature, it is assumed that religious liberty took root only in 1963 with Sherbert v. Verner, 374 U.S. 398 (1963). Indeed, this assumption is held by at least some current Justices (probably due to the prevailing consensus in religion clauses scholarship). For example, Justice Alito—one of religious liberty's most enthusiastic proponents—lamented how *Smith* had "overturned" twenty-seven years of religious liberty jurisprudence in a seventy-seven page impassioned concurrence in *Fulton* (joined by Justices Neil Gorsuch and Clarence Thomas). See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1913 (2021) (Alito, J., concurring in the judgment). Justice Alito's concurrence is problematic for a host of reasons, but, somewhat ironically, it also missed an opportunity to tack on an additional twenty years to the religious liberty era it claimed was cut short by the

religious exercise a "preferred position."[39] Burdens placed on religion would not be tolerated if they were merely reasonable, but only if they were necessary to achieve a compelling governmental interest.[40] Still, even after (re)committing to this constitutional rule in 1963 in *Sherbert v. Verner*,[41] the Court repeatedly declined to apply it in earnest,[42] effectively siding with religious plaintiffs in only two cases over the ensuing twenty-seven years.[43]

In 1990, demanding more consistency of the doctrine, Justice Antonin Scalia announced on behalf of the Court that the liberty paradigm of free exercise could not stand.[44] Justice Scalia's majority

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Court in *Smith*. This Essay saves for later work a more fulsome argument that, though short-lived, religious liberty actually briefly took hold in the mid-1940s.

39. See Follett v. Town of McCormick, 321 U.S. 573, 575 (1944) (internal quotation marks omitted) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)); see also Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1288 (2007) (discussing how in the 1940s "the First Amendment rights of speech, association, and religion . . . enjoyed a 'preferred position' and thus merited solicitous judicial protection"). This Essay uses "preferred position" in its technical, liberty-granting sense. Religion is certainly still privileged after 1990; if anything, under the Roberts Court, it is *more* privileged. See supra note 28.

40. See *Murdock*, 319 U.S. at 112–117 (striking down a license fee as applied to religious peddlers while emphasizing that religious groups are not free from all burdens placed on them by the government). In other words, while religious liberty need not be the state's *most* important value, it must be valued at least as the state's second to most important. See id. at 111 ("The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.").

41. 374 U.S. 398 (1963).

42. See William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545, 548–49 (1983) (canvassing cases in which the Court found government interests compelling, denying relief); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1109–10 (1990) [hereinafter McConnell, Revisionism] ("In its language, it was highly protective of religious liberty. . . . In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling.").

43. The two cases were Sherbert v. Verner, 374 U.S 398, and Wisconsin v. Yoder, 406 U.S. 205 (1972). While there were three progeny cases that emerged from *Sherbert*, they, like *Sherbert*, dealt with unemployment benefits and served only to tweak *Sherbert*'s holding. See Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 830 (1989) (reversing denial of unemployment benefits for one who "refused a temporary retail position . . . because the job would have required him to work on Sunday"); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 137–38 (1987) (reversing denial of unemployment benefits for plaintiff who refused to work on Sabbath); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 709, 720 (1981) (reversing denial of unemployment benefits for a plaintiff who refused to build weapons because it was contrary to his religious convictions). And even *Sherbert* and its progeny did not last long as religious *liberty* cases; with time, they were interpreted as special antidiscretion, antidiscrimination cases. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990) (describing *Sherbert* as limited to the unemployment compensation context); Bowen v. Roy, 476 U.S. 693, 708 (1986) (describing *Sherbert* as a discriminatory intent case).

44. See *Smith*, 494 U.S. at 872; see also McConnell, Revisionism, supra note 42, at 1137.

opinion in *Smith* underscored a core defect of religious liberty. To declare that any law burdening religious practice is presumptively unconstitutional is to "court[] anarchy," as such a declaration all but grants religious observers "a private right to ignore generally applicable laws"[45] and threatens to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[46] The only way courts could avoid lawlessness is by balancing (on a case-by-case basis) a law's burdens on religious practices against the government's interests.[47] But far from saving the doctrine, such balancing only doomed it. It was "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice,"[48] as doing so requires courts to verify both the sincerity and "religiousness" of the beliefs in question and to assess the precise nature and degree of the religious "burden" at issue.[49] As Justice Scalia noted, none of these inquiries falls "within the judicial ken."[50]

Rejecting religious liberty as the controlling framework of free exercise, the *Smith* Court announced that rather than "reliev[ing] an individual of the obligation to comply with a 'valid and neutral law of general applicability[,]'"[51] the right to free exercise merely provides negative protection against wrongful discrimination.[52] Under such a framework, courts would no longer be forced to choose between blindly deferring to plaintiffs' invocations of their beliefs and becoming inquisitors of them. While a religious plaintiff might still need to demonstrate a religious objection for standing purposes, a court's analysis of whether the government had discriminated on the basis of religion would not turn on whether the plaintiff's objection was truly "religious" in

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45. *Smith*, 494 U.S. at 886, 888.

46. Id. at 879 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)). *Smith* echoed the Court's warning in its very first free exercise decision from 1879, which it liberally quoted. See id.

47. Id. at 883.

48. Id. at 889 n.5.

49. Id. at 887.

50. See id. (internal quotation marks omitted) (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)). Put slightly differently, a court would need to ask whether the plaintiff's religious convictions are "sincere," whether what they claim to be religious is really a feature of a "religion," and whether, assuming it is, the religious burden is "substantial." Whether the religious burden is substantial would be determined by asking whether a religious belief or practice that is implicated is "central" to the religion in question. See Wisconsin v. Yoder, 406 U.S. 205, 210 (1972); Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 937–42 (1989) ("One approach, operating at the level of claim definition, has been to distinguish among claimant behaviors, affording constitutional protection to some but not others.").

51. See *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

52. See id. at 890 (explaining that while the First Amendment provides negative protection, it does not require affirmative exemptions).

some metaphysical sense,[53] whether their beliefs were "sincere,"[54] or whether the burden on the beliefs was "substantial" (e.g., whether the beliefs were "central" to the plaintiff's religion).[55] Nor would the Court be placed in the position of balancing the value of religion against competing governmental interests. Instead, courts' inquiries would turn on "neutral"—one might say factual—assessments of the evenhandedness of the government's laws.[56]

While the critical component of *Smith* was clear enough, the decision's constructive component was severely lacking. Even as the Court explicitly rejected liberty as the normative foundation of free exercise, it was opaque about which precise organizing principle(s) it was adopting in liberty's stead. To be sure, *Smith* was not completely barren of constructive content:

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53. The question "what is religion?" has no answer, which explains why the Court has repeatedly dodged answering it and has been willing to address it only in the context of statutory interpretation. See John Sexton, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1064–78 (1978) (discussing how "[t]he search for a definition [of religion] is inherently problematic" and the Court has "couched the issue narrowly as one of statutory construction").

54. The sincerity inquiry has its defenders, who believe testing for sincerity is similar to other fact-based court inquiries. See, e.g., Ramirez v. Collier, 142 S. Ct. 1264, 1298 (2022) (Thomas, J., dissenting) (arguing that the "relevant evidence in this case cuts strongly in favor of finding that Ramirez is insincere"); Nathan S. Chapman, Adjudicating Religious Sincerity, 92 Wash. L. Rev. 1185, 1191 (2017) ("Courts can, and should, carefully distinguish between three concepts: whether a claimant is *sincere*, whether the claimant's acts or omissions are *religious*, and whether the government's regulation imposes a 'substantial burden' on that 'religious exercise.'"); Linda Greenhouse, Should Courts Assess the Sincerity of Religious Beliefs?, The Atlantic (May 5, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-sincere-religious-belief-coach-kennedy/629737/ (on file with the *Columbia Law Review*) ("Justice Thomas [in *Ramirez*] got it right."). Contra these defenders, Justice Robert Jackson put it best in 1944 in *United States v. Ballard*, in which he concluded that assessing religious sincerity is hardly like other fact-based questions courts routinely explore. See 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) ("I do not see how we can separate an issue as to what is believed from considerations as to what is believable.").

55. Some have argued that the "substantial" requirement under the Religious Freedom Restoration Act (RFRA), which adopted the pre-*Smith* religious liberty model, is solely about the burden imposed by the *government* in the event the religious objector violates the law in question. See Michael A. Helfand, Identifying Substantial Burdens, 2016 U. Ill. L. Rev. 1771, 1794 n.135, 1808. But taking such a position would require treating all "sincere" claims of religious objection the same. It would require treating "the practice of throwing rice at church weddings" the same as "getting married in church." *Smith*, 494 U.S. at 888 n.4.

56. See, e.g., Ronald J. Krotoszynski Jr., If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of *Smith*, 102 Nw. U. L. Rev. 1189, 1198 (2008) (explaining how equality assessments require assessing only the government's "evenhanded[ness]"). Though, in theory, to adjudicate religious discrimination, a court would still need a definition of religion. See, e.g., D. Wendy Greene, Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection, 47 U. Mich. J.L. Reform 87, 90 (2013) (discussing courts that hold that "only intentional discrimination claims based upon an individual's *actual* protected status are cognizable under Title VII" (emphasis added)).

The Court gestured toward the relatively modest and familiar principle of anti-intentional discrimination as the new governing interpretation of free exercise. For example, *Smith* emphasized that "generally applicable, *religion-neutral* laws that [merely] have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[57] Based on this and similar language—including Justice Scalia's comparison of the Court's new approach to free exercise to equal protection's focus on classifications and discriminatory intent, stressing how after *Smith*, the former will be in sync with the latter—it seems the Court envisioned the negative treatment of religious subjects because they are religious as the paradigm case of a free exercise violation.[58] But despite such indications, the Court never explicitly provided a test for wrongful religious discrimination.

To make matters worse, the Court passingly referred to the drug law it upheld in *Smith* as an "across-the-board criminal prohibition," lending support (for anyone wishing to read this dictum literally) to the notion that only laws that include no exceptions whatsoever are not

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57. See *Smith*, 494 U.S. at 886 n.3 (emphasis added).

58. Responding to Justice Sandra Day O'Connor's concurrence accusing the Court of treating free exercise differently than other constitutional rights—including "race discrimination and freedom of speech"—the Court explained in a footnote how stripping free exercise of its liberty gloss would actually *align* it with other constitutional rights. See id. (internal quotation marks omitted) (quoting id. at 901 (O'Connor, J., concurring in the judgment)). Just as "classifications based on race . . . or on the content of speech" trigger constitutional review while "race-neutral laws that have [only] the *effect* of disproportionately disadvantaging a particular racial group" do not, and just as "generally applicable laws unconcerned with regulating speech that have [only] the *effect* of interfering with speech" do not call for heightened constitutional scrutiny, the same would now go for religion: Courts would "strictly scrutinize governmental classifications based on religion" and defer to the government when it comes to laws that merely "have the effect of burdening a particular religious practice." Id. It should be noted that while this language indicates that *Smith* forbids only intentional discrimination, the Court's comparison to other rights with respect to mere effects is not entirely equivalent to the Court saying the new doctrine covers only intentional discrimination. The Court provided one other tea leaf. At one point, the Court explained that "[i]t would be true, we think (though no case of ours has involved the point)," that if the government "sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"—if, say, a state "ban[ned] the casting of 'statues that are to be used for worship purposes,' or . . . prohibit[ed] bowing down before a golden calf"—that "would doubtless be unconstitutional." Id. at 877–78. Conversely, when the government passes "religion-neutral laws" that are "not aimed at the promotion or restriction of religious beliefs," and it "is not the object of the [laws] but [is] merely [their] incidental effect" to "prohibit[] the exercise of religion," then "the First Amendment has not been offended." Id. at 886 n.3., 878–79. Such language suggests a rule of anti-*intentional* discrimination. But here too, it should be noted that one could argue the Court was just providing an *obvious* example of religious inequality, not a comprehensive account of what it entails. At the end of the day, though this Essay takes the view that anti-intentional discrimination is what *Smith* had in mind, the Court was not very specific about the content of its new doctrine.

discriminatory toward religion.[59] Leveraging this ambiguity, the aftermath of *Smith* saw advocates of broad free exercise rights—both in the academy and on the bench—engage in (eventually) successful efforts to extract from the decision an expansive rule of religious equality that is far broader than merely proscribing intentional discrimination on the basis of religion.

B. *Extracting a Rule of Religious Equality From* Smith

These efforts began immediately. Writing in the *Supreme Court Review* just months after *Smith* was decided, Professor Douglas Laycock argued that *Smith*'s ruling that "generally applicable" laws need not exempt religion implied an important inverse rule: that *non*-generally applicable laws are *required* to exempt religion.[60] *Smith* gave scant indication as to what "generally applicable" meant, permitting various interpretations. Although a narrow interpretation—that general applicability serves to smoke out discriminatory intent, which becomes more likely as a law exclusively or almost exclusively applies to religious subjects[61]—is more plausible, Professor Laycock advanced the most expansive, absolutist reading of *Smith* possible. He read "generally" literally—that is, without any exception—to posit that even a single exemption for nonreligious activity could render a law not generally applicable.[62]

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59. The law in fact was not an "across-the-board . . . prohibition." See id. at 884–86; infra note 62. But be that as it may, the Court did use the *language* of "across the board," which could be interpreted literally, as Professor Laycock and then-Judge Alito went on to read it. See id.; see also infra notes 83–96 and accompanying text.

60. See Laycock, Remnants, supra note 23, at 41 (arguing that under *Smith* free exercise "never requires exemptions from formally neutral regulations of conduct," except for when "laws . . . are *not* formally neutral and generally applicable" (emphasis added)).

61. See Rothschild, Lingering Ambiguity, supra note 35, at 283–84.

62. See Laycock, Remnants, supra note 23, at 50–52 ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons. . . . [T]his is part of the requirement of . . . general applicability . . . ."). Professor Laycock's reading of *Smith* is unconvincing. For one, it is hard to read a decision explicitly designed to limit free exercise as expanding it. Further, it is at least plausible that the statute in *Smith* itself included secular exceptions, yet the Court concluded it was perfectly constitutional. The statute made it "unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of professional practice." Or. Rev. Stat. § 475.752(3) (2023) (retaining the phrasing of the 1985 statute). One might argue this exception did not apply to Schedule I drugs (including peyote), as such drugs by definition have no medical use. But while a doctor *should* not be prescribing Schedule I drugs, that does not mean a doctor never *would*—and it seems the whole point of the exception is to exempt those who are not culpable, such as those who were prescribed the drug in the normal course of medical practice, with no reason to suspect the prescription was unlawful. While one might read "valid" to mean "legally valid" (i.e., that the prescription in question must have been actually, and not just perceptually, "valid" for the exception to take hold), such a reading makes little sense. If the statute were referring

Thus, even as he continued to castigate the Court for stripping religious liberty of its preferred position (as did virtually every scholar in the field[63]), Professor Laycock pioneered the argument that *Smith* introduced a new definition of religious equality that was no less protective of religion than the liberty paradigm the Court had just emphatically rejected—a point he readily acknowledged and promoted.[64] As he framed it in 1990, the new equality model "require[d] that religion get something analogous to most-favored nation status."[65] If any secular activity, reason to engage or not engage in an activity, or entity is "favored" by being exempted from a law, comparable religious activities, reasons to engage or not engage in the activity, and entities must receive the same favorable treatment. Otherwise, the law treats religion unconstitutionally unequally.[66]

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to only actually valid (i.e., lawful) prescriptions, why the need for an exception in the first place? What is lawful is not in need of an exception.

Indeed, there were several unique requirements for Schedule II drugs—for example, that prescriptions must be written on a specific form. See Or. Rev. Stat. § 475.185. Yet no one suggests that the prescription exception is inapplicable when a Schedule II drug is prescribed incorrectly. Any "invalidity" with respect to *how* (when it comes to Schedule II) or *that* (when it comes to Schedule I) the drug was prescribed does not render either excluded from the statute's prescription exemption; they are the precise (and *only*) occasions in which the exception obtains.

But even accepting arguendo that the medical exception did not apply to peyote, the statute still contained a wholly separate exception for participants in research studies. See Or. Rev. Stat. § 475.125(2). Surely the government's interest in protecting individuals from the harms of Schedule I drugs was applicable to those participating in research activities no less than it was for those participating in religious activities. One might argue that there wasn't a competing interest underwriting the research exception, and rather the exception stemmed from the *same* interest as the interest driving the law itself: "public health." But research on Schedule I drugs need not be, and is not always, related to researching the health risks or benefits associated with the drug in question. See, e.g., Carli Domenico, Daniel Haggerty, Xiang Mou, Daoyun Ji, LSD Degrades Hippocampal Spatial Representations and Suppresses Hippocampal-Visual Cortical Interactions, Cell Rep., Sept. 2021, at 1–2 (discussing neuroscientific, epistemological research on psychedelic Schedule I drugs focused exclusively on mapping previously unknown neural pathways involved in subjective internal visual perception of external reality). Rather, the research exception—like most exceptions—was driven by a competing, *overriding* interest. See infra notes 340–348 and accompanying text.

63. See infra note 151.

64. See Douglas Laycock, Conceptual Gulfs in *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 772 (1998) [hereinafter Laycock, Conceptual Gulfs] (noting that under the MFN "standard [of] lack of general applicability . . . many statutes violate *Smith*"); Laycock, Remnants, supra note 23, at 31 ("There is little reason to believe that *Smith* heralds a serious renunciation of balancing . . . .").

65. See Laycock, Remnants, supra note 23, at 49.

66. Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22–23 (2016) ("The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.").

Professor Laycock did not limit his advocacy to the pages of law reviews. Three years after *Smith* was decided, he presented his theory to the Supreme Court on behalf of petitioners in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[67] As he framed the issue, *Lukumi* concerned whether Hialeah's citywide bans on animal sacrifices violated *Smith*'s general applicability rule, considering they applied to religious animal sacrifice but not to all "secular" animal killings.[68] When Justice Scalia asked at oral argument whether a city "couldn't say you may kill animals for food but not for other purposes—not for sport, not for sacrifice, not for anything but food," because "once they make any exception at all, [the law is] no longer a law of general applicability," Professor Laycock had a ready response: "[T]hey can't make any exceptions . . . ."[69] And, according to "your opinion in *Smith*," Professor Laycock clarified to the decision's author, when a law is not generally applicable, officials "have to treat religion at least as well as they treat favored secular activities."[70] (As it happens, Justice Scalia in *Smith* included the district court's 1989 *Lukumi* decision in a "parade of horribles," suggesting it was horrible to contemplate the Court granting a "religious exemption" from—of all things—the ordinances and animal cruelty law at issue in *Lukumi*.[71])

Ruling for the religious plaintiffs, the Court neither fully embraced nor rejected Professor Laycock's theory of religious equality.[72] On one hand, Justice Anthony Kennedy's opinion for the Court endorsed the view that whenever a law "fail[s] to prohibit nonreligious conduct that endangers [its] interests[,]" its "underinclus[ivity]" renders it not generally applicable such that denying exemptions for religious activities constitutes unlawful religious discrimination.[73] On the other hand, Justice

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67. 508 U.S. 520 (1993).

68. See id. at 542.

69. Transcript of Oral Argument at 12–13, *Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 687913 [hereinafter *Lukumi* Transcript of Oral Argument].

70. Id. (emphasis added).

71. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888–89 (1990).

72. See *Lukumi*, 508 U.S. at 524.

73. See id. at 543. To be sure, this sentence was followed by: "The underinclusion is substantial, not inconsequential." Id. But that sentence is hardly a beacon of clarity. And, in any event, and perhaps most importantly, Hialeah had *conceded* that its ordinances targeted the roughly fifty-thousand-member Santeria community's practice of religious animal sacrifices, conducted mostly in its members' kitchens. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1470 (S.D. Fla. 1989). As the district court discovered over a nine-day trial, carcasses had been strewn throughout the city; before being slaughtered, the animals were not maintained in sanitary conditions; and the "method of [the sacrificial] killing [was] unreliable and not humane." Id. at 1486. The city explained that Santeria's animal slaughter ritual posed *unique* problems and that the only way to successfully regulate it was to explicitly outlaw the practice itself. See id. at 1487. The correct question would have been whether the city targeted a (problematic) *practice* that happened to be religious or if it targeted a specific *religion* that happened to engage in a (problematic) practice. Had the Court utilized ordinary intentional discrimination analysis, it would have

Kennedy explained that unconstitutional "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation."[74] Applying this rule, the Court concluded that the petitioners prevailed because "Hialeah's ordinances pursue[d] the city's governmental interests only against conduct motivated by religious belief."[75] In these parts of the opinion, the Court appeared to consider a law's lack of general applicability to be evidence of discriminatory intent. Given this and other language in *Lukumi*, practically all commentators foregrounded—and continue to foreground—discriminatory intent as the basis of the Court's first post-*Smith* free exercise decision.[76]

All except one. Pointing to the Court's conflicting reasoning, Professor Laycock—quickly becoming religious equality's greatest advocate—argued that *Lukumi* had nothing to do with "antireligious motive[s]."[77] Rather, he maintained, "[t]he ordinances in *Lukumi* were invalid because they gave less favorable treatment to religious killings of animals than to secular killings of animals."[78] To support this view, Professor Laycock highlighted the *Lukumi* Court's comparison of carcasses (from sacrifices) strewn throughout the city with a lack of a ban on hunting (outside the city) and uncollected garbage, and the Court's conclusion that, if the city's "public health" concerns were not strong enough to proscribe or remedy the latter two, the city could not regulate the former under the banner of public health.[79] To some, giving *Lukumi* this MFN-style religious equality gloss was outright "dishonest."[80] But in truth, much

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been hard to conclude that *religion* was the but-for cause of the ordinances. Thus, this author sympathizes with Professor Laycock's rejection of the common wisdom that *Lukumi* was decided on the basis of religious animosity. Only, unlike Professor Laycock, this author believes that *Lukumi* was *wrongly* decided—a position certainly not shared by Professor Laycock, and, potentially, no other law and religion scholar.

74. See *Lukumi*, 508 U.S. at 542–43 (emphasis added).

75. See id. at 545.

76. See, e.g., Koppelman, supra note 16, at 2254–55 ("Under *Lukumi*, strict scrutiny is triggered because the law is gerrymandered to target religion, which is treated worse than any secular activity.").

77. See Laycock, Conceptual Gulfs, supra note 64, at 771–72 ("Part of the *Lukumi* opinion was based on the City's motive, but that part received only two votes.").

78. Id. at 772.

79. *Lukumi* Transcript of Oral Argument, supra note 69, at 52 ("[T]he sources of supply of organic garbage are much greater from all of the secular food consumption in the city than they are from these sacrifices."); see also Laycock & Collis, supra note 66, at 11 (arguing that, in *Lukumi*, the city's appeal to public health purposes was undermined by the fact that garbage from restaurants posed a greater hazard to public health).

80. James M. Oleske, Jr., Free Exercise (Dis)Honesty, 2019 Wis. L. Rev. 689, 726–39 [hereinafter Oleske, (Dis)Honesty] (describing the "effort to convert *Smith*'s requirement of general applicability into a requirement of uniform or near-uniform applicability" as "fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause").

of the Court's reasoning—including its comparison of religious sacrifices to, of all things, garbage collection—is hard to understand except as an application of the rule that Professor Laycock had proposed to the Court, namely, that whenever "there are exceptions for secular interests, the religious claimant has to be treated as favorably as those who benefit from the secular exceptions."[81]

In the years following *Smith* and *Lukumi*, the Supreme Court seemed to assume—including, for example, in *Ashcroft v. Iqbal*—that free exercise prohibits only intentional discrimination against religion.[82] Similarly, despite claims by Professor Laycock to the contrary,[83] the vast majority of federal lower courts declined to interpret *Smith* and *Lukumi* as establishing an MFN-style rule of religious equality.[84] However, two decisions served as exceptions and merit brief discussion because they prove the rule; because they played a formative role in the new rule's development; because they were penned by then-Third Circuit Judge Samuel Alito, one of free

81. Douglas Laycock, The Supreme Court and Religious Liberty, 40 Cath. Law. 25, 35–36 (2000).

82. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments [—as it is here—] our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993) (First Amendment); Washington v. Davis, 426 U.S. 229, 240 (1976) (Fifth Amendment))). "Under extant precedent purposeful discrimination requires" that the state "undertak[e] a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group'" so that plaintiffs must plead that the state "adopted and implemented the detention policies . . . for the purpose of discriminating on account of race, religion, or national origin." *Iqbal*, 556 U.S. at 676–77 (second alteration in original) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

83. Professor Laycock has repeatedly exclaimed that lower federal courts were split over the MFN approach to religious equality, even suggesting that a majority of them adopted MFN. See, e.g., Douglas Laycock, The Broader Implications of *Masterpiece Cakeshop*, 2019 BYU L. Rev. 167, 176–78 [hereinafter Laycock, Implications of *Masterpiece*] ("[M]ore courts [than not] have concluded that even one or a few secular exceptions . . . show that [a] law is not generally applicable."). But that is not so. A *single* federal court adopted the MFN approach to religious equality, in two decisions authored by a single judge—Judge Alito when he was on the Third Circuit. And the Third Circuit swiftly distanced itself from those decisions in subsequent cases. See infra note 85. The other decisions Professor Laycock cites were fact-heavy decisions denying summary judgment. See Laycock & Collis, supra note 66, at 20; see also Ward v. Polite, 667 F.3d 727, 738–40 (6th Cir. 2012); Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004). The factual question at issue in these cases was whether school officials acted based on religious *animus*. See *Polite*, 667 F.3d at 738 (finding an issue of material fact as to whether the university harbored animus toward a religious student); *Johnson*, 356 F.3d at 1293 (denying summary judgment because "hostility to [the student's] faith . . . was at stake").

84. See infra note 85.

exercise's most vocal advocates; and—perhaps most importantly—because they are often held up as desirable applications of religious equality.[85]

Judge Alito's first religious equality decision, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, involved a police department's no-beard policy that included a medical exception for those with skin conditions that made it painful to shave but did not include a religious exception for those with religious convictions that made it spiritually painful to shave.[86] According to Judge Alito, "[T]he medical exemption raise[d] concern because it indicate[d] that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[87] Because "devalu[ing] [police officers'] religious reasons for wearing beards by judging them to be of lesser import than medical reasons" was all the "discriminatory intent" needed, the department was required to provide religious exceptions or abolish its no-beard policy altogether.[88] Judge Alito's opinion was immediately celebrated by scholars (including, if not especially, scholars associated with the left).[89]

Five years later, in *Blackhawk v. Pennsylvania*, a case involving black bears used in a Native American religious ritual, Judge Alito adopted an arguably even more expansive rule of religious equality.[90] While the religious plaintiff was required to pay a permit fee for keeping wildlife in captivity, nationally recognized circuses and public zoos were not so required.[91] Pennsylvania explained that it did not charge circuses and zoos because they were beholden to a different regulating scheme.[92] As a result,

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85. See infra note 96. When the question of the meaning of religious equality came up in subsequent cases, the Third Circuit walked Judge Alito's two decisions back. See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007) ("It is true that in *Blackhawk* we summarized the rule in [MFN] terms; however, this formulation is perhaps an overstatement.").

86. See 170 F.3d 359, 360 (3d Cir. 1999).

87. See id. at 366.

88. Id. at 365.

89. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 91 (2007) [hereinafter Eisgruber & Sager, Religious Freedom] ("When, as in the Newark police case[,] . . . the government has already accommodated secular needs that are plainly analogous to a religious one, it is easy to recognize a failure of equal regard."); see also Thomas C. Berg, Religious Liberty in America at the End of the Century, 16 J.L. & Religion 187, 193–96 (2001) (citing *Fraternal Order* as potentially "preserv[ing] wide protection for religious liberty").

90. See 381 F.3d 202, 211 (3d Cir. 2004) (finding that requiring the religious plaintiff to pay a permit fee violated religious equality).

91. See id. ("The Commonwealth suggests that the fee requirement serves two main interests: it brings in money and it tends to discourage the keeping of wild animals in captivity . . . .").

92. Reply Brief for Appellants/Cross-Appellees Vernon Ross, Thomas Littwin, David E. Overcash, Frederick Merluzzi and Barry Hambley at 19, *Blackhawk*, 381 F.3d 202 (No. 02-

they were "not covered under the Game Code and therefore no permit [was] required [of them] in the first place."[93] But Judge Alito was not moved. In his view, Pennsylvania treated religion unequally because the fee requirement's two interests—raising money and discouraging keeping wild animals in captivity[94]—were "undermine[d]" by not requiring circuses and zoos to pay the fee "to at least the same degree as [they] would [be by] an exemption for a person like [the religious plaintiff]."[95] In other words, as he did in *Fraternal Order*, Judge Alito resolved the lingering ambiguity left in *Smith*'s and *Lukumi*'s wake—whether free exercise cases turn on intentional discrimination or MFN-style religious equality—in favor of the latter. *Blackhawk*, like *Fraternal Order*, won wide acclaim from scholars.[96]

C. *Religious Equality's Evolution*

One year later, when Justice Alito was confirmed to the Supreme Court,[97] the MFN approach to religious equality gained its first forthright advocate on the bench. The evolution of free exercise doctrine followed, albeit gradually. Over the course of his first decade on the Court, Justice Alito wrote several important statutory religious freedom opinions drawing on MFN-style religious equality logic[98] and elaborated on his views in a substantial dissent from denial of certiorari.[99] He gained an ally when

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3947, 02-4158), 2003 WL 24300780 ("[C]ircuses and zoos are subject to independent accreditation, and employ highly trained staffs who perform the important services which protect both the public and the animals under their care from harm . . . .").

93. Id. at 19.

94. *Blackhawk*, 381 F.3d at 211.

95. Id.

96. See Eisgruber & Sager, Religious Freedom, supra note 89, at 90–93 (describing the logic of *Blackhawk* and similar cases as "an attractive and practical approach to protecting religious liberty"). The two decisions' celebrated reception can perhaps be explained in part by the fact that they involved minority religion plaintiffs (that is, Sunni Muslim and Native American plaintiffs).

97. Justice Alito replaced Justice O'Connor, who had been a moderate on free exercise issues. See Kenneth L. Karst, Justice O'Connor and the Substance of Equal Citizenship, 2003 Sup. Ct. Rev. 357, 357 (describing Justice O'Connor as someone "who tend[ed] to defend the established legal order").

98. See Holt v. Hobbs, 574 U.S. 352, 356 (2015) (holding that the prison's grooming requirements failed strict scrutiny in light of secular medical exemptions); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014) (holding that the Affordable Care Act failed strict scrutiny in light of exemptions for religious nonprofits).

99. When the Court denied certiorari in *Stormans, Inc. v. Weisman*—a Ninth Circuit religious equality case involving a requirement that pharmacies dispense contraceptives—Justice Alito, joined by Justice Thomas and Chief Justice John Roberts, voiced his vigorous discontent in dissent. See 579 U.S. 942, 943 (2016) (Alito, J., dissenting) (warning that, given the decision, "those who value religious freedom have cause for great concern"), denying cert. to 794 F.3d 1064 (9th Cir. 2015).

Justice Neil Gorsuch joined the bench in 2017.[100] Just months after Justice Gorsuch was sworn in, the Court granted certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*—a case concerning a Christian baker whose religiously motivated refusal to design a wedding cake for a same-sex marriage had been held by Colorado courts to have violated Colorado's public accommodations antidiscrimination law.[101]

The religious discrimination claim at the heart of *Masterpiece* offered the Court an opportunity to clarify the contours of its religious equality doctrine. But the Court balked, issuing yet another frustratingly ambiguous decision. Even as it explicitly rejected the MFN approach to equality with respect to pregnancy under the Pregnancy Discrimination Act in a relatively contemporaneous case,[102] the Court declined to rule out that approach when it came to religious equality in *Masterpiece*.[103] Indeed, although the *Masterpiece* Court did not openly embrace MFN religious equality, its reasoning significantly relied on it.

The baker, Jack Phillips, had argued that Colorado discriminated against religion because in separate (orchestrated) litigation, Colorado rejected discrimination claims brought by an evangelical Christian who had asked three Colorado bakers to design cakes with antigay images and messages.[104] In response, Colorado maintained that its antidiscrimination law (on the basis of religion) did not apply to refusals to design specific antigay messages a baker found offensive, but its antidiscrimination law (on the basis of sexual orientation) did cover refusing to make cakes

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100. See Adam Liptak & Matt Flegenheimer, Neil Gorsuch Confirmed by Senate as Supreme Court Justice, N.Y. Times (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html (on file with the *Columbia Law Review*) (noting that Justice Gorsuch was "receptive to claims based on religious freedom").

101. See 138 S. Ct. 1719, 1723 (2018).

102. See Young v. United Parcel Serv., Inc., 575 U.S. 206, 210 (2015) (holding that UPS engaged in pregnancy discrimination). The Court in *Young* repeatedly used the term "most-favored nation" when explaining the theory of pregnancy discrimination it was rejecting. Notably, it did so even though the relevant statute explicitly required equality separately and apart from forbidding intentional discrimination. See id. at 222 ("We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. . . . [The statute] does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' . . . nor does it otherwise specify *which* other persons Congress had in mind."). Instead, the Court adopted a hopelessly confusing rule of equality that sounds in intentional discrimination (the Court's burden-shifting test is drawn from *McDonnel Douglas*) even as it disavowed doing so.

103. See *Masterpiece Cakeshop,* 138 S. Ct. at 1729 ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

104. See id. at 1730 ("[O]n at least three other occasions the [Colorado] Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service.").

celebrating same-sex marriages.[105] In the state's view, cakes for same-sex marriages were proxies for same-sex attraction, whereas antigay messages were not proxies for religion.[106] But for Justice Kennedy, writing on behalf of the Court, such an interpretation of the law was not neutral: It targeted Phillips's religious beliefs for adverse treatment.[107]

Justice Kennedy's conclusion that disparate statutory coverage amounts to wrongful discrimination against religion is remarkably similar to MFN-style religious equality analysis. The only difference is that in *Masterpiece*, the "benefit" was not an exemption but a construction of a law regarding its coverage (a distinction that—as the Essay will later explain—is actually without a difference[108]). Yet rather than openly embrace the MFN standard, Justice Kennedy repeated his approach from twenty-five years earlier in *Lukumi*,[109] explicitly expressing a narrow view of religious discrimination and asserting that the Court was deciding in favor of the religious petitioners because the government had engaged in overt "hostility."[110]

Masterpiece is a masterpiece of confusion. Justice Kennedy's majority opinion relied on MFN-style equality reasoning while disclaiming reliance on it by emphasizing that the decision turned on the Colorado officials' "hostility."[111] Meanwhile, concurring on behalf of herself and Justice Stephen Breyer, Justice Elena Kagan (unsuccessfully, in this Essay's analysis) sought to distance the Court's majority opinion from MFN-style religious equality by underscoring the officials' "hostility."[112] In response,

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105. Id. at 1726 (determining that "Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage" (citing Appendix to Petition for Writ of Certiorari at 68a–72a, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111))).

106. See id. (holding that opposition to same-sex marriage constituted antigay discrimination).

107. See id. at 1729 ("The neutral and respectful consideration to which Phillips was entitled was compromised here, however.").

108. See infra section III.C.

109. See supra note 73 and accompanying text.

110. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1731–32. Justice Kennedy on behalf of the Court anchored much of his reasoning in "hostile" remarks toward religion made by two members of the Colorado Civil Rights Commission during its adjudication of the case. See id. at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.").

111. See id. at 1729; see also Leslie Kendrick & Micah Schwartzman, Comment, The Etiquette of Animus, 132 Harv. L. Rev. 133, 140 (2018) (stating that it was clear Commissioner Raju Jairam was only explaining "the respect owed to religious believers who must nevertheless make sacrifices and compromises as they interact with others of different beliefs in the public sphere"); Melissa Murray, Inverting Animus: *Masterpiece Cakeshop* and the New Minorities, 2018 Sup. Ct. Rev. 257, 277 (describing the commissioners' comments as "truths about the history of discrimination").

112. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732–34 (Kagan, J., concurring) ("[S]tate actors cannot show hostility to religious views . . . .").

Justice Gorsuch, in a concurrence joined by Justices Alito and Clarence Thomas, argued the opposite: It is always unconstitutional unequal treatment of religion for a state's law (or for a commissioner of the state to interpret its law) to cover certain religious-based objections to making a cake but not "secular" objections to making cakes with certain messages on them.[113] Finally, dissenting on behalf of herself and Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg tacitly disavowed a rule of religious equality premised on MFN logic, explaining that a state cannot be faulted for not exempting religious bakers who object to same-sex marriage just because it allows bakers to decline to design (religious) messages they find offensive.[114]

Scholars fiercely debated the "correct" reading of *Masterpiece*.[115] Among these scholars was Professor Laycock, who once again took to the pages of law reviews to argue that the Court had adopted MFN-style religious equality wholesale[116]—a position others adamantly rejected, claiming Professor Laycock's reading did grave injustice to precedent and would lead the way to "perverse . . . result[s]."[117] But Professor Laycock was not clearly wrong. Much like in *Lukumi*, the Court's ambivalence about the meaning of religious equality in *Masterpiece* and the decision's many ambiguities allowed for a range of readings.

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113. While Justice Gorsuch recognized the Court had not explicitly adopted a rule of MFN-style religious equality, he made clear *his* readiness to do so. See id. at 1734–49 (Gorsuch, J., concurring) ("[T]he one thing [the Commission] can't do is apply a more generous legal test to secular objections than religious ones.").

114. See id. at 1748–52 (Ginsburg, J., dissenting).

115. See, e.g., Oleske, (Dis)Honesty, supra note 80, at 731–39 (criticizing Laycock and Berg for "analogizing very dissimilar conduct" in a manner that "would render every civil rights law in the nation vulnerable to free exercise challenges"); see also Laycock, Implications of *Masterpiece*, supra note 83, at 179–87 (responding to the view that *Masterpiece* was "confined to an odd set of facts" by arguing that "the Supreme Court has gone much further than is generally recognized").

116. See Laycock, Implications of *Masterpiece*, supra note 83, at 168. For an example of an MFN argument in the briefing for *Masterpiece*, see generally Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop*, 138 S. Ct 1719 (No. 16-111), 2017 WL 4005662. For critiques of these arguments in *Masterpiece*, see generally Jim Oleske, Doubling Down on a Deeply Troubling Argument in *Masterpiece Cakeshop*, Take Care (Nov. 14, 2017), https://takecareblog.com/blog/doubling-down-on-a-deeply-troubling-argument-in-masterpiece-cakeshop [https://perma.cc/4CP5-SXWD] (discussing how Laycock and Berg's *Masterpiece* amicus brief's approach to general applicability could have troubling implications for sex and race discrimination cases); Jim Oleske, *Masterpiece Cakeshop* and the Effort to Rewrite *Smith* and Its Progeny, Take Care (Sept. 21, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-the-effort-to-rewrite-Smith-and-its-progeny [https://perma.cc/RK75-THGK] (arguing that Laycock and Berg's brief "urge[d] the Court to blur the distinction [between laws that target religion and laws that incidentally burden religion] by fundamentally reinterpreting *Smith*").

117. See Oleske, (Dis)Honesty, supra note 80, at 738.

D. *Most-Favored Nation Doctrine Finds Favor*

The Court soon dispensed with that ambiguity. Two years after *Masterpiece* was decided, the three-Justice minority that supported MFN-style religious equality in *Masterpiece* became a five-Justice majority.[118] In 2020, as the COVID-19 pandemic swept across the country, states imposed lockdown orders.[119] Those restrictions impelled a flood of claims alleging religious inequality in federal courts across the country.[120] The anatomy of these claims was simple: The government discriminated against religion by virtue of exempting from its lockdown order several "secular" entities—including, for example, barber shops and hardware stores—but not houses of worship.[121] The discrimination, in other words, was precisely the sort that the MFN theory of equality sought to prevent.

As these charges of religious discrimination began to ring out across the country, with scant guidance from the Supreme Court as to the meaning of religious equality, federal courts split almost completely along partisan lines.[122] When the question first arrived at the Court's emergency docket, the Court declined to grant relief. In *South Bay United Pentecostal Church v. Newsom*, Chief Justice John Roberts and Justice Brett Kavanaugh debuted their views on religious equality—the former in a concurrence and the latter in a dissent.[123] In explaining the Court's denial of relief, Chief Justice Roberts clarified that religion is not unconstitutionally discriminated against so long as it is not singled out for adverse treatment.[124] Because various secular entities were also not exempted from the state's stay-at-home order, the state could not be said to have intentionally discriminated against religion.[125] Justice Kavanaugh disagreed. While his predecessor, Justice Kennedy, had been ambiguous about the meaning of religious equality,[126] Justice Kavanaugh was anything but. In his view, stay-at-home orders "discriminate against places of worship" whenever they exempt *any* secular entities but not *all* religious

118. That three-Justice minority was composed of Justices Alito, Gorsuch, and Thomas. Chief Justice Roberts had joined Justice Alito's dissent from the denial of certiorari in Stormans Inc. v. Wiesman, 579 U.S. 942 (2016), but two years later he chose not to join ranks with these three and opted to not sign onto Justice Gorsuch's concurrence in *Masterpiece*.

119. See Rothschild, Lingering Ambiguity, supra note 35, at 287–91.

120. Id.

121. See S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020).

122. See Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. 1067, 1108 (2022) [hereinafter Rothschild, Partisanship] (explaining that, in early pandemic-related cases, "Republican-appointed judges sided with the religious plaintiff 94% of the time, and . . . Trump-appointed judges [did so] 100% of the time," while Democratic appointees "sided with the government 100% of the time," and partially attributing this to the Court's lack of guidance).

123. 140 S. Ct. 1613 (2020).

124. See *S. Bay United*, 140 S. Ct. at 1613.

125. Id.

126. See supra notes 72–76, 107–111 and accompanying text.

institutions[127]—which is to say, "religion" must always be treated as well as the most-favored secular entity or activity.[128]

A few months later—and thirty years after Professor Laycock first introduced his MFN approach to religious equality—Justice Amy Coney Barrett joined the bench, providing the fifth vote necessary to make MFN religious equality the operative constitutional rule of free exercise. Within months of joining the bench, the Court twice granted religious plaintiffs relief from a state's lockdown orders, first in *Roman Catholic Diocese of Brooklyn v. Cuomo*[129] and then in *Tandon v. Newsom*.[130]

Tandon, which provided the clearest articulation of the Court's new doctrine, concerned a California restriction on group events of more than three households.[131] Participants of private home-based Bible study and prayer meetings challenged the order on the ground that larger numbers of people were permitted to congregate in barber shops and city buses, for example, but such exemptions were not extended to home-based religious gatherings.[132] Agreeing with the petitioners, the Court clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[133] It then explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . . [Which is to say,] [c]omparability is concerned with the *risks* various activities pose, not the *reasons* why people gather."[134]

In other words, the Court wholly adopted Professor Laycock's MFN approach to religious equality, along with the test for comparability that

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127. See *S. Bay United*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.").

128. See id. (asserting that stricter requirements must not be imposed on religious institutions while secular institutions enjoy looser requirements).

129. 141 S. Ct. 63 (2020).

130. 141 S. Ct. 1294 (2021); see also Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.).

131. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); State Appellees' Answering Brief at 11–12, *Tandon*, 141 S. Ct. 1294 (No. 21-15228), 2021 WL 1499787.

132. *Tandon*, 141 S. Ct. at 1297.

133. Id. at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

134. Id. (emphases added). For example, in the case of a lockdown order, the risk would be COVID-19 contagion; the reasons people gather would be the types of activities exempted and why people engage in them.

he had proposed.[135] Comparability is to be measured against the stated "interest" served by the law or policy in question—the test being whether the secular exemptions undermine that interest to the same degree as would a religious exemption.[136] If the answer is yes, the government has wrongfully discriminated against religion so long as it does not also exempt all comparable religiously motivated activities.

In *Tandon*, the interest of the restriction was stemming the spread of COVID-19, which the secular exceptions "undermined" just as much as religious exceptions would.[137] The reasons why people engaged in the secular activities that were exempted were irrelevant[138]—in fact, to defend the state's distinctions on the basis of the reason one wished to ride the city bus (say, for the "important" reason of getting to work) versus gather for Bible study (say, for spiritual fulfillment) would serve only to defeat them, as doing so is precisely what religious equality forbids. It would indicate that the government values some secular interests more than religious interests and thereby "devalues" religion. That other secular interests are treated just as poorly as religious interests does not change the fact that religion has been treated unequally vis-à-vis some comparable secular interest. Thus, it was "no answer," the Court clarified, that California treated a myriad of "comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[139] Even a single secular exemption renders a law not generally applicable and thus discriminatory toward religion if it does not also provide a blanket exemption for all similar religiously motivated activities.

Two months later, in *Fulton v. City of Philadelphia*, the Court ratified its MFN interpretation of religious equality in a unanimous decision.[140] *Fulton* involved a Catholic adoption agency that sued Philadelphia for refusing to refer foster children to it after the agency confirmed it would not match children with same-sex couples.[141] Among other arguments, the agency contended that because the city had discretionary authority to grant "exemptions" from its antidiscrimination provision, it unconstitutionally

135. See Laycock, Implications of *Masterpiece*, supra note 83, at 168 (proposing the comparability test).

136. Id.

137. Id.

138. See *Tandon*, 141 S. Ct. at 1296 ("Comparability is concerned with the risks various activities pose, not the reasons why people gather." (citing *Roman Cath. Diocese*, 141 S. Ct. at 66 (Gorsuch, J., concurring))).

139. Id.

140. 141 S. Ct. 1868, 1876–77 (2021). Chief Justice Roberts seems to have won over the liberal Justices by authoring a "minimalist" free exercise decision that, in fact, is remarkably maximalist. As this author has argued elsewhere, the Justices on the left unwittingly helped the *Fulton* Court entrench a doctrine that is far more potent than the "religious liberty" doctrine *Smith* had rejected. See Rothschild, Individualized Exemptions, supra note 32, at 1108 n.6.

141. See *Fulton*, 141 S. Ct. at 1874–75.

discriminated against religion by not exercising that discretion in favor of "religion" and exempting the agency from its contractual obligation.[142]

The Court agreed. Writing for the majority, Chief Justice Roberts restated the MFN rule outlined in *Tandon*[143] and concluded that city officials had unconstitutionally discriminated against religion merely by not granting Catholic adoption agency an exception from the contract's antidiscrimination provision despite having the discretionary power to do so.[144] Thus, even nonexistent, purely hypothetical secular exceptions render failing to exempt religion presumptively unconstitutional. The most-favored nation logic then carried over to strict scrutiny, as it naturally would.[145] According to the *Fulton* Court, the government cannot have a compelling interest "in denying an exception" for religion when it generally "mak[es] them available," even if only potentially.[146] Since the

142. See Reply Brief for Petitioners at 17, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5578834.

143. Reviewing the current state of free exercise jurisprudence, the Court explained that a "law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." See *Fulton*, 141 S. Ct. at 1877. To be sure, this statement did not explicitly include *Tandon*'s "any" language (i.e., "whenever they treat *any* comparable secular activity more favorably than religious exercise," *Tandon*, 141 S. Ct. at 1296 (citing U.S. Const. amend. I)), but it also included no qualifications, stating simply "while permitting secular conduct." *Fulton,* 141 S. Ct. at 1877–78.

144. See *Fulton*, 141 S. Ct. at 1882 (holding that Philadelphia's ability to grant exemptions but not doing so for religious objectors was unconstitutional). The term for this version of most-favored nation discrimination is "individualized exemptions" discrimination. Some scholars have suggested that *Fulton*'s antidiscretion, antidiscrimination rule is of a piece with free speech's "similar" antidiscretion doctrine, usually pointing to Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). See, e.g., Oleske, (Dis)Honesty, supra note 80, at 727 (explaining how *Forsyth*'s individualized-exemption rule aligns with the Court's equal protection approach to the Free Exercise Clause); Nelson Tebbe, The Principle and Politics of Liberty of Conscience, 135 Harv. L. Rev. 267, 301–02 (2021) [hereinafter Tebbe, Liberty] (relying on *Forsyth*, among other free speech cases, to argue that the application of the antidiscretion principle made sense in *Fulton*). But the "too much discretion" rule in *Forsyth* and similar free speech cases involved the government regulating speech *as such*, not conduct in a way that incidentally burdened speech. See *Forsyth*, 505 U.S. at 133–34 (describing how a county ordinance limiting public demonstrations was a restriction on speech). These cases thus involved prior restraints on viewpoints and contents of speech which are incomparable to *Fulton*. For an argument that *Fulton* did not merely apply established doctrine and rather introduced—one might say smuggled in—a radical new rule in the tradition of MFN, see Rothschild, Individualized Exemptions, supra note 32, at 1109–10.

145. But see Koppelman, supra note 16, at 2251 ("What Laycock proposed was a triggering right, not an ultimate right.").

146. See *Fulton*, 141 S. Ct. at 1882. The government would need a "compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." Id. Meaning, first, the compelling interest cannot be the *general* interest underlying the law but must be a *particular* interest in *not* exempting religion. Id. at 1881 (explaining that Philadelphia must show it has a specific "interest in denying an exception to CSS" to prevail). Second, not exempting religion must be necessary. Id. But how can it

government cannot claim that its "non-discrimination polic[y] can brook no departures," applying the policy to the Catholic agency could not possibly be necessary or in service of an actually compelling interest.[147] Contrary to those who have described it as a narrow decision,[148] *Fulton* is both an expansion of and application of the MFN approach to religious equality the Court spelled out two months previously in *Tandon*.[149]

II. EQUALITY'S EXTENT: EXPLAINING RELIGIOUS EQUALITY

As the preceding discussion shows, free exercise as a constitutional right has metamorphosed over the past few decades, with its normative foundations shifting from liberty to equality.[150] The paradigm shift announced in *Smith* provoked immediate and widespread consternation from Congress and scholars, who worried that *Smith* was insufficiently protective of religious exercise.[151]

Yet this critique proved premature. For while *Smith* rejected the liberty paradigm, which had deemed incidental burdens on religious practice presumptively unconstitutional, it did not settle (clearly, at least) on what would come next. *Smith*'s ambiguity provided an opening for advocates and judges, and ultimately the Supreme Court, to adopt a broad principle of religious equality. As explained, this project culminated in a series of COVID-19-related free exercise cases and *Fulton*, in which the Court used

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be when a *comparable* secular activity is exempted (and, in any MFN case, a court would have already determined comparability *before* the strict scrutiny stage)?

147. See id. at 1882 (relying on the *Lukumi* Court's reasoning that underinclusivity means the governmental interests are not compelling and the ordinances are not narrowly tailored).

148. See Laycock & Berg, supra note 16, at 37, 39 ("[*Fulton*'s] general applicability holding turns [narrowly] on specific features of Philadelphia's rules. . . . Overruling *Smith*'s unprotective rule is important . . . ."); Lupu & Tuttle, supra note 37, at 8 ("[S]omewhere along the way, a deal was struck to eliminate any dissenting opinions. In exchange, the likely dissenters got a very narrow Court opinion . . . ."); Linda C. McClain, *Obergefell*, *Masterpiece Cakeshop*, *Fulton*, and Public-Private Partnerships: Unleashing v. Harnessing "Armies of Compassion" 2.0?, 60 Fam. Ct. Rev. 50, 67 (2022) (describing the majority opinion in *Fulton* as a "narrow ruling").

149. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (holding that regulations cannot treat secular activities or reasons to gather more favorably than religious ones).

150. See supra notes 46–56 and accompanying text.

151. See Frederick Mark Gedicks, The Rise and Fall of the Religion Clauses, 6 BYU J. Pub. L. 499, 505–06 (1992) (arguing that *Smith* "effectively repeal[ed]" the Free Exercise Clause); Laycock, Remnants, supra note 23, at 68 (claiming that *Smith* is too restrictive); Tebbe, Liberty, supra note 144, at 268 (discussing how scholars advocated for overturning *Smith*). Lobbying efforts, galvanized by the decision, ultimately led Congress to pass RFRA in 1993 in an attempt to nullify *Smith*'s holding. However, RFRA was struck down as applied to states by the Supreme Court a few years later. See City of Boerne v. Flores, 521 U.S. 507, 512–16, 529–36 (1997) (striking down RFRA because it was beyond Congress's power to enact "remedial, preventive legislation").

the "mere" equality framework to implement a doctrine of breathtaking scope. With these decisions, the Court forthrightly adopted what might be called a rule of "religious equality of liberty"—where "liberty" refers to exemptions granted and "equality" refers to the requirement that those exemptions be matched for religion. This Part explains how the new rule of religious equality works precisely, how it should be conceptualized, and why it is so powerful. In doing so, before turning to a closer analysis of the doctrine, it first provides several more examples that help illustrate its astonishing scope.

A. *Illustrating Religious Equality's Expansiveness*

1. *Vaccine Mandate Cases.* — Like the lockdown orders and mask-wearing mandates that preceded them, vaccine mandates prompted a flurry of free exercise challenges.[152] In one of the first free exercise challenges to a COVID-19 vaccine mandate, a (Democratic-appointed) federal district judge issued a preliminary injunction barring enforcement of a state mandate requiring healthcare workers to be vaccinated on the ground that the order was "not generally applicable."[153] Pointing to the order's "impact statement," the court observed that the mandate's objective was preventing individuals from "acquiring COVID-19 and transmitting the virus" to colleagues and patients.[154] Yet, by exempting the medically contraindicated, New York "accept[ed] this 'unacceptable' risk for a non-zero segment of healthcare workers."[155] Thus, the vaccine mandate could not be said to be absolute.[156] And because the non-absolute order did not exempt religious objectors, it unconstitutionally discriminated against religion.[157]

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152. See, e.g., Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1176–77 (9th Cir. 2021) (challenging a student vaccination mandate that did not include a religious exemption); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272–73 (2d Cir. 2021) (challenging New York's vaccine mandate for healthcare workers that did not include a religious exemption), opinion clarified, 17 F.4th 368 (2d Cir.). These challenges followed on the heels of other pandemic-related free exercise challenges. See, e.g., Resurrection Sch. v. Hertel, 35 F.4th 524, 527–28 (6th Cir. 2022) (challenging an already-repealed mask mandate on free exercise grounds), cert. denied, 143 S. Ct. 372 (2022) (mem.).

153. See Dr. A. v. Hochul, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021), vacated by No. 1:21-CV-1009, 2021 WL 12322139 (N.D.N.Y. Nov. 5, 2021); see also We The Patriots USA, Inc. v. Hochul, Nos. 21-2179, 21-2566, 2021 WL 5103443 (2d Cir. Oct. 29, 2021). Judge David N. Hurd, appointed by President Bill Clinton, granted the preliminary injunction. *Dr. A.*, 567 F. Supp. 3d at 377.

154. *Dr. A.*, 567 F. Supp. 3d at 375.

155. Id.

156. Id.

157. See id. at 377 ("Plaintiffs have established that [the vaccine mandate] conflicts with longstanding federal protections for religious beliefs . . . ." (citing Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam))).

The court considered a distinction between the two exemptions: Fewer workers had medical reasons than religious reasons to not be vaccinated, and thus the former category posed less of a threat than the latter.[158] But according to the court, such a distinction—even if proved factually sound—was constitutionally irrelevant.[159] New York's stated interest was stemming the spread of COVID-19 by ensuring maximum vaccination, and any exemption from its vaccination requirement would chip away at that interest.[160] The only basis on which an exemption could be justified is another interest of overriding proportion, such as the general health of the medically contraindicated medical workers that would be compromised if they were compelled to take the vaccine.[161] But to value these workers' health more than ensuring maximum vaccination, while not valuing other workers' religious commitments in equal proportion, is to devalue religion—precisely what the new religious equality doctrine forbids.[162]

The expansive nature of the Court's new religious equality doctrine is put into even starker relief in the next vaccine mandate example, which involved what might be called "chronological" religious inequality. In *Thoms v. Maricopa County Community College District*, religious nursing students objected to a vaccine requirement for their in-person clinical rotation.[163] The Mayo Clinic, where these students' clinical rotation was to take place, had a strict vaccine policy, and the college had a strict in-person rotations requirement.[164] The nursing students argued that the rotation requirement amounted to religious discrimination given that the college had previously waived its requirement during the early months of the pandemic when no clinics were available to provide in-person training.[165] Operating under the new religious equality logic, the court counted this prior "exception" against the college.[166] It did not matter that the college had temporarily lifted the requirement only because at the time there were no clinics for students to attend. The mere fact that the college had once

158. See id. at 375 ("[T]he number of people in need of a medical exemption [is expected] to be low . . . .").

159. See id. at 375–76 ("[T]he Supreme Court has recently emphasized that '[c]omparability is concerned with the risks various activities pose,' not the reasons for which they are undertaken." (quoting *Tandon*, 141 S. Ct. at 1297)).

160. Id.

161. Id. at 377.

162. Id.

163. See No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *3 (D. Ariz. Nov. 5, 2021).

164. Id.

165. See Verified Complaint for Declaratory and Injunctive Relief at 6, 13–4, *Thoms*, 2021 WL 5162538; see also Rothschild, Individualized Exemptions, supra note 32, at 1127–28.

166. See *Thoms*, 2021 WL 5162538, at *3 (finding it relevant that the college had "offered alternatives to in-person clinicals" by "provid[ing] simulated clinicals when in-person clinicals were not available during the COVID-19 pandemic").

countenanced an exception—regardless of its nature, timing, or the surrounding circumstances—was enough to demonstrate that the college's decision not to grant an exemption for students objecting on religious grounds amounted to religious discrimination.[167]

Under the new doctrine, the Free Exercise Clause is implicated whenever the government privileges anything secular over anything religious. When in-person clinical trainings were temporarily unavailable, the college *could* have temporarily closed its doors and put students' education on pause until in-person training was once again on offer.[168] But it did not. Instead, the college privileged the interest of timely matriculation over its interest in hands-on training, which meant the college valued something "secular" more than it valued students receiving hands-on training.[169] Yet when it came to an exemption for religion, the college determined that its interest in hands-on training was too important to compromise.[170] By treating disparately the two reasons for not partaking in in-person clinical trainings—their sheer unavailability and vaccine-related religious objections—the college demonstrated that it cared about the former more than it cared about the latter. Such disparate treatment violated the First Amendment.[171] To value the secular reason of sheer "physical unavailability" more than the religious reason of "spiritual unavailability" is to unconstitutionally devalue religion.

2. *Title VII, Guns, and Medicine*. — While the new rule of religious equality has been employed most extensively in COVID-19-related cases, it has also been applied in a variety of other contexts. For example, a federal court certified a class action brought by a seventy-plus-employee, "Christian-owned," wellness, for-profit business and other "Christian businesses" that had policies against "employ[ing] individuals who are engaged in homosexual behavior or gender non-conforming conduct of any sort."[172] The court held that Title VII violates the Constitution's command not to treat religion unequally: "Title VII does not apply to every

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167. See id. at *8 ("[C]onsidering Defendant considered simulated clinicals a sufficient academic alternative to in-person clinicals for graduating students a year ago, the Court is not convinced that they should now be considered ineffective or impractical as a religious accommodation . . . .").

168. See id. at *12 ("Defendant has available means to accommodate Plaintiffs' religious beliefs without affecting its ability to properly educate them or to provide clinical placements for future students.").

169. See id. ("Depending on how Defendant chooses to accommodate Plaintiffs, it may need to add to its employees' workload, hire additional staff, rearrange schedules, and take on other costs, all within the next seven weeks.").

170. See id. (noting the college's argument that clinical placements are essential to graduating skilled nurses).

171. Id.

172. See Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 587–89 (N.D. Tex. 2021), aff'd in part, vacated in part, rev'd in part sub nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

employer," but it "exempts businesses with fewer than fifteen employees" and "permits employers on *or near* Indian reservations to discriminate . . . in favor of Indians. These exemptions are '*secular*' in nature."[173] Once Title VII extends "exemptions to nonreligious decisions, [it] must treat requests for religious exemptions the same."[174] Other federal courts have concluded the same regarding other antidiscrimination policies.[175]

Gun control regulations have fared no better. When New York outlawed gun possession in "sensitive locations," including houses of worship and many other places where large groups congregate, the pastor and congregants of a nondenominational church challenged the law on free exercise grounds.[176] The pastor explained that because "the Bible often refers to religious leaders as 'shepherds,'" who are charged with "caring for and protecting their 'flocks,'" and "calls on the Church—as members of a single family united in Jesus Christ—to love, serve, and protect one another," they should be allowed to carry concealed weapons in church.[177]

A federal court agreed, finding that the law discriminated against religion because it was "not applied in an evenhanded, across-the-board way."[178] In the interest of protecting New York's "citizens from gun violence," the gun law covered locations that held special risks for gun violence—that is, "busy, crowded, and dense locations where individuals are often seated or moving slowly."[179] Yet some "private property owners[,]

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173. Id. at 613 (second emphasis added) (citation omitted).

174. Id.

175. See, e.g., Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 687 (9th Cir. 2023) (holding that a school district's antidiscrimination policy for student organizations is not generally applicable).

176. See Spencer v. Nigrelli, 648 F. Supp. 3d 451, 456–57 (W.D.N.Y. 2022) ("Plaintiffs allege that the place of worship exclusion 'is a compendium of constitutional infirmities' that infringes on . . . the Church's 'rights to freely engage in religious exercise . . . .'" (quoting Complaint ¶ 55, *Spencer*, 648 F. Supp. 3d 451 (No. 22-CV-6486 (JLS)))), aff'd sub nom. Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), cert. granted, judgment vacated sub nom. Antonyuk v. James, 144 S. Ct. 2709 (2024). As New York explained, other sensitive locations covered by the law "include[ed], but [were] not limited to, schools, public parks, homeless shelters, public transit, polling places, and theatres." Id. at 463 (internal quotation marks omitted) (quoting Memorandum in Opposition to Motion for Preliminary Injunction at 11, *Spencer*, 648 F. Supp 451 (No. 22-CV-6486 (JLS))).

177. Id. at 461 (quoting Declaration of Michael Spencer ¶¶ 22–23, *Spencer*, 648 F. Supp. 3d 451 (No. 22-CV-6486 (JLS))).

178. Id. at 463 (internal quotation marks omitted) (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022)). The plaintiffs also explained that hiring "outside security" was "not an adequate substitute because such individuals would be working for a paycheck—not acting pursuant to a spiritual calling." Id. at 461. And, in any event, the possibility of outside security was completely beside the point: "Pastor Spencer and Church members ha[d] a religious belief that they, *themselves*, must protect the flock." Id. (emphasis added).

179. Id. at 463 (quoting Memorandum in Opposition to Motion for Preliminary Injunction at 11, *Spencer*, 648 F. Supp 451 (No. 22-CV-6486 (JLS))).

[including] proprietors of hair salons, retail stores, shopping malls, gas stations, office buildings, [and] garages" were not covered by the regulation.[180] Since New York permitted "other private actors hosting secular activities to do what a house of worship may not[,]" the regulation's exclusion of houses of worship from its "noncoverage" category amounted to impermissible discrimination against religion.[181] The Second Circuit, in a unanimous per curiam decision[182] relying heavily on *Roman Catholic Diocese* and *Tandon*, affirmed that for New York's sensitive-places restriction to include houses of worship among a host of "other enumerated sensitive locations" is "neither neutral nor generally applicable" so long as it does not consider various other "forms of private property" sensitive places for the purposes of gun-carry.[183]

To provide one final example, in 2023 a federal district court considered a challenge from a religious clinic to a new Colorado law prohibiting an abortion-reversal medication that allegedly reverses the effects of abortion medication and that had been denounced by prominent medical groups as without scientific basis and as potentially unsafe.[184] Pointing to the lack of a prohibition on patients who simply opt not to take the second of two abortion pills,[185] the court explained that the law "treats comparable secular activity more favorably than . . . religious activity."[186]

As this sampling of cases illustrates, the Supreme Court's new religious equality doctrine has ushered in a new era of free exercise jurisprudence.[187] And these cases are harbingers of what is to come.[188]

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180. Id.

181. Id. (emphasis added). A later section of this Essay addresses the lack of any meaningful difference between exceptions and noncoverage. See infra section III.D.

182. Authored by Judges Dennis Jacobs, Gerard Lynch, and Eunice Lee—respectively, a George H. W. Bush appointee, Obama appointee, and Biden appointee.

183. See Antonyuk v. Chiumento, 89 F.4th 271, 349–50 (2d. Cir. 2023), certiorari granted, judgment vacated sub nom., Antonyuk v. James, 144 S. Ct. 2709 (2024) (mem.).

184. See Bella Health & Wellness v. Weiser, 699 F. Supp. 3d 1189, 1196–99 (D. Colo. 2023) (describing abortion reversal medication as "a dangerous and deceptive practice that is not supported by science or clinical standards, according to the American College of Obstetricians and Gynecologists, or by the United States food and drug administration" (internal quotation marks omitted) (quoting S.B. 23-190, 74th Gen. Assemb., 1st Reg. Sess. § 1(1)(d), (f) (Colo. 2023))).

185. Id. at 1212.

186. Id.

187. See Martha Minow, Walls or Bridges: Law's Role in Conflicts Over Religion and Equal Treatment, 48 BYU L. Rev. 1581, 1586–96 (2023) ("[A]cross areas of healthcare, education, employment, and social services, people can express a grievance arising from their religious beliefs . . . .").

188. For example, when the Supreme Court in 2022 prohibited Maine from disqualifying "sectarian" schools from receiving tuition assistance, see Carson v. Makin, 142 S. Ct. 1987 (2022), Professor Aaron Tang took to the pages of the *New York Times* and then the *Yale Law Journal* to express his optimism that so long as Maine conditioned funding on

There is little reason to believe that religious equality challenges to a wide assortment of laws will not meet the same fate as did many vaccine mandates, New York's sensitive locations regulation, Title VII, and a standard health law. Further, the doctrine could well migrate to other areas of constitutional law, as some scholars have argued it should.[189]

B. *Religious Equality's Edge*

It should by now be clear that religious equality has surpassed religious liberty, even though the latter is commonly perceived as the stronger right.[190] It is hard to imagine courts operating under the liberty

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compliance with a new antidiscrimination (on the basis of sexual orientation and gender identity) requirement, the sting from *Carson* would be removed as the schools would not (as they freely admitted they would not) comply with such a requirement. See Aaron Tang, Who's Afraid of *Carson v. Makin*?, 132 Yale L.J. Forum 504, 525 (2022), https://www.yalelawjournal.org/pdf/F7.TangFinalDraftWEB_uc2niseq.pdf [https://perma.cc/3LEA-WDVH] [hereinafter Tang, Who's Afraid?]; Aaron Tang, There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html (on file with the *Columbia Law Review*). Tang explained that he "underst[ood] the human instinct to worry about worst-case scenarios . . . . But fears that *Carson* will require [Maine and] every state to fund religious private education are overblown." See Tang, Who's Afraid?, supra, at 512. After all, "Maine's law treats every secular private school identically to how it treats religious schools that accept public funding with zero exceptions: no such school may discriminate against LGBTQ youth under any circumstance. So, the law should be permissible under existing free-exercise doctrine." Id. at 526. But as "sectarian" schools in several lawsuits have argued, the new requirement "do[es] not apply to private post-secondary schools . . . [which] are not covered by the Act[]." See, e.g., Complaint at 32, St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43 (D. Me. 2024) (No. 2:23-cv-00246-JAW); see also Complaint at 15, Crosspoint Church v. Makin, 719 F. Supp. 3d 99 (D. Me. 2024) (No. 1:23-cv-00146-JAW) (noting that the current Maine statute "deter[s] religious schools from participating in the tuitioning program if they hold disfavored religious beliefs"). Sure enough, the district court agreed that the law was not generally applicable. See *Crosspoint Church*, 719 F. Supp. at 116. However, it then held that the law survived strict scrutiny (representing a rare instance of such a finding). See id. at 123.

189. For example, drawing on *Tandon* and other recent religious equality cases, the Ninth Circuit has held that for a pandemic-related lockdown order to privilege "'essential' businesses" by exempting them but not gun shops and firing ranges "reflects a government-imposed devaluation of Second Amendment conduct in relation to various other non-Constitutionally protected activities," and thus violates the Second Amendment. See McDougall v. County of Ventura, 23 F.4th 1095, 1114 (9th Cir. 2022), vacated en banc by 38 F.4th 1162 (9th Cir.). And at least one federal court has lamented the lack of MFN-style free speech doctrine. See Glob. Impact Ministries v. Mecklenburg County, No. 3:20-CV-00232-GCM, 2022 WL 610183, at *8 (W.D.N.C. Mar. 1, 2022) ("There is admittedly an obvious logical incongruity in finding that the Proclamation was not content-neutral for purposes of the free exercise claim, but content-neutral for purposes of the free speech claim."); see also infra note 236 (discussing how Tebbe and others advocate extending the new doctrine to other areas of constitutional law).

190. See, e.g., Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (explaining how liberty rights are stronger than equality rights because while the former "leaves ungoverned and ungovernable conduct which many people find objectionable," the latter "merely means that the prohibition or regulation must have a

model granting a free exercise right to carry concealed guns in sensitive places or not take a mandated vaccine. Indeed, under the religious liberty model, no court in the country's history was willing to even entertain the notion that free exercise includes entitlement to an exemption from a vaccine mandate; they scoffed at the very suggestion that it might.[191] The same goes for exemptions from lockdown orders. Even if a religious plaintiff would have succeeded in showing that a lockdown order imposed a "substantial burden" on a sincerely held religious belief or practice, the plaintiff almost certainly would not have succeeded in impeaching the compelling nature of the government's interest or the necessity of the government's chosen methods just because the government provided exemptions for select activities.[192] Yet under the new equality paradigm, both Republican- and Democratic-appointed judges have repeatedly held that religious objectors to COVID-19 vaccines and lockdown orders must be carved out from both.[193]

This outcome is ironic. Recall that the core issues the Court sought to overcome in *Smith* were balancing the value of religion against the interests of the government and "courting anarchy."[194] But replacing religious liberty with religious equality has served only to exacerbate these problems rather than eliminate them. At the end of the day, both religious liberty and equality rest on essentially the same method of judicial review. Under both, courts replace the government's cost-benefit analysis with their own; both rely on assumptions regarding the (unique) value of religion;[195] and both have the capacity of requiring the government to ensure that nearly

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broader impact"); Douglas Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313, 314 (1996) [hereinafter Laycock, Religious Liberty] (describing religious liberty as determining that "the federal government was declared a permanent neutral").

191. See Rothschild, Individualized Exemptions, supra note 32, at 1108–09 (discussing the history of courts upholding vaccine mandates).

192. See, e.g., Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (expressing "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one"); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (holding that a substantial burden does not exist when the "incidental effects of government programs . . . may make it more difficult to practice certain religions").

193. See, e.g., Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1357 (M.D. Ga. 2022) (Judge Tilman E. Self III, a Trump appointee); Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *13 (D. Ariz. Nov. 5, 2021) (Judge Steven Logan, an Obama appointee); Dr. A. v. Hochul, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021) (Judge David N. Hurd, a Clinton appointee), rev'd in part, vacated in part sub nom. We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir.); Tabernacle Baptist Church, Inc. v. Beshear, 459 F. Supp. 3d 847, 856 (E.D. Ky. 2020) (Judge Gregory F. Van Tatenhove, a George W. Bush appointee).

194. See Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 888 (1990); see also supra section I.A (discussing the *Smith* paradigm shift).

195. One might prefer to call this the value of *liberty* to exercise one's religion, but there is no actual difference between the two. So long as the liberty is for religion specifically, talk of the value of "religious liberty" versus the value of "religion" devolves into a meaningless distinction.

(if not) all of its laws exempt "religion."[196] Only, the religious equality approach comes with additional deference that renders it even more sweeping and more potent than religious liberty.

Several factors explain the increased muscularity of religious equality. First, as a practical doctrinal matter, equality is a structural rather than individual right: It is concerned with the *government*'s placing burdens on religion rather than the specific burdens on *individuals*' religious practices.[197] This shift allows courts to sidestep a host of thorny questions. Under the religious equality model, courts need not inquire into the nature of an individual's religious practice or beliefs or the degree to which they are burdened. Rather, the only relevant question is whether the government has acted inappropriately by treating religion unequally.[198] If the government has granted secular exemptions but not comparable religious ones, it has devalued religion.[199] Moreover, as this Essay explains later, once a finding of wrongfulness is established, it is game over for the government.[200] Under the liberty model, it was at least theoretically possible for the government to demonstrate a compelling interest in not exempting religion and be forgiven for not doing so.[201] But it is impossible to justify *wrongfulness*, which is what even a preliminary finding of unequal treatment of religion constitutes under the new doctrine. A finding of wrongful inequality already assumes the discrimination at issue is unjustified, which, after all, is precisely what makes it wrongful.[202]

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196. Since every law could burden someone's religious beliefs or practices, in theory every law could be required to exempt religion.

197. See, e.g., *Smith*, 494 U.S. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

198. See, e.g., id. at 877 ("Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963))). An interesting question warranting further scholarship is whether a definition of religion is required to get (even) religious *equality* off the ground.

199. See Tebbe, Equal Value, supra note 16, at 2443 ("Using the government's interest to set the baseline for comparability is a device for identifying most situations where protected actors or activities have been devalued.").

200. See infra section III.A.

201. "Theoretically" because, in fact, under the current version of strict scrutiny adopted in free exercise cases dating back to *Gonzales*, see infra notes 247–251 and accompanying text, it is effectively impossible under liberty too. But rhetorically, at least, it is possible to muster strict scrutiny for a religious liberty challenge and, given that rhetorical advantage, it is possible lower courts (but highly doubtfully the Supreme Court) would indeed so hold.

202. And the result of a finding of wrongful discrimination is the annulment of the governmental action in question. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 520, 547 (1993) (holding that discriminatory laws that "were enacted contrary to these constitutional principles . . . are void"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down antimiscegenation law that rested "solely upon distinctions drawn

In the context of religious convictions conflicting with equality-based rights (such as LGBTQ rights) and laws, the valence of free exercise as an equality right offers an additional benefit.[203] So long as free exercise is construed as a liberty right, it faces the charge that liberty rights (in particular) should run out when they conflict with others' rights. That argument—that one's freedom to swing one's fist ends where another's nose begins—has an old pedigree and is often invoked in the context of free exercise.[204] But free exercise is subordinated to the equality-based rights and laws it is increasingly at odds with only so long as it is conceived of as a liberty right.[205] When free exercise is reconceptualized as an equality right, it takes on a commensurate status to more conventional equality-based rights and laws.

Religious equality's potency is compounded by the ease with which it is breached. Consider how religious equality compares with both anti-intentional religious discrimination and religious liberty. Under the religious liberty paradigm, religion must be treated better than most other interests: The government must treat religion as special by going out of its way to ensure its laws do not even inadvertently burden religious exercise.[206] A rule against intentional discrimination works the opposite way.[207] It prohibits the government from treating religion as special when

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according to race" because "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification").

203. See Rothschild, Partisanship, supra note 122, at 1100.

204. See Nigel Warburton, John Stuart Mill *On Liberty*, *in* Philosophy: The Classics 156, 156 (4th ed. 2014); Zechariah Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins." (internal quotation marks omitted)). Many free exercise claims can be seen as conflicting with others' equality-based rights, like LGBTQ rights. For a pivotal article on third-party harms and free exercise, see generally Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions From the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343 (2014).

205. See Rothschild, Partisanship, supra note 122, at 33–34. Some have lamented what they perceive to be the insufficient weight given to religious liberty in the face of ascendant recognition of equality rights in the LGBTQ and reproductive contexts. For example, while Justice Kennedy in *Obergefell* nodded at religious freedom for those opposing gay rights, two of the four dissenting opinions took issue with the decision's lack of engagement with religious liberty. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting) (declaring that the decision "creates serious questions about religious liberty"). Framing free exercise as an equality, rather than a liberty, right also provides a ready answer to the normative challenge to religion's specialness. See, e.g., Micah Schwartzman, What if Religion Is Not Special?, 79 U. Chi. L. Rev. 1351, 1377–90 (2012) (explaining "why religion is not special"). On a religious equality model, (in theory) religion need not be seen as special. All religious equality requires is that it be treated the *same* as what is secular.

206. See supra section I.A.

207. See Rothschild, Lingering Ambiguity, supra note 35, at 283 ("If a facially neutral law is applied almost exclusively to religious activity, such exclusive application suggests the law in fact has a discriminatory purpose.").

it comes to the detriment of restrictions.[208] The government may not go out of its way to burden religion.[209] While religion need not be a consideration when it comes to granting benefits, it cannot be a consideration when it comes to allocating detriments.

Ostensibly, religious equality sits somewhere between these two. It requires the government to treat religion as well as its comparators. If religious liberty requires the government to treat religion as though it has positive value, and anti-intentional religious discrimination demands that it not treat religion as though it has negative value, religious equality insists that the government treat religion as if it has *equal* value.[210]

Yet what precisely is the difference between a rule against intentional discrimination and a rule prohibiting religious inequality? It is deceptively easy to conclude that the difference lies in the word "intent"—that only the former involves "bad intent, object, or purpose[,]"[211] while the latter "constrains outcomes, not processes."[212] But that is not quite right, as religious equality still manages to sweep in intent.[213] Religious equality, after all, is a rule against disparate treatment: What is religious cannot be treated worse than what is secular.[214] If the government breaches that rule,

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208. Id.

209. Id.

210. In actuality, equality requires some kind of positive valuation of religion just as religious liberty does. See infra note 214. Professor Peter Westen's powerful argument that any equality norm must rest on substantive valuations—and, on its own, without such substance, is empty—is relevant to this observation. See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982); see also Steven D. Smith, Blooming Confusion: Madison's Mixed Legacy, 75 Ind. L.J. 61, 63–65 (2000) (linking Westen's ideas about equality with religious equality).

211. Tebbe, Equal Value, supra note 16, at 2425.

212. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1301–02 (1994) [hereinafter Eisgruber & Sager, Vulnerability] (emphasis omitted); see also Tebbe, Equal Value, supra note 16 at 2424 ("Nor is the purpose or object of a law central to the concept of equal value . . . .").

213. It is not for nothing that the Court in *Lukumi* described the government's iniquity of "devalu[ing] religious reasons for killing by judging them to be of lesser import than nonreligious reasons" as "*singl[ing] out* [religion] for discriminatory treatment." Church of the Lukumi Babalu Aye, Inc v. City of Hialeah, 508 U.S. 520, 537–38 (1993) (emphasis added) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.); id. at 722 & n.17 (Stevens, J., concurring in part and concurring in the result); United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring in the judgment)). Similarly, while some scholars have characterized MFN as a doctrine of disparate impact, see supra note 27, others have framed it as a doctrine of intentional discrimination. See Nathan Chapman, The Case for of the Current Free Exercise Doctrine, 108 Iowa L. Rev. 2115, 2150 (2023) (describing MFN as a device for "rooting out prejudice against religious discrimination"); Storslee, supra note 16, at 88 (describing *Roman Catholic Diocese* as the Court holding that "regimes regulating religion based on subjective or value-based categories trigger strict scrutiny").

214. Put differently, not only must the government not have "negative" intent, but it must also have the correct amount of "positive" intent. Similarly, not having the correct

it has treated religion as if it has negative value relative to that which has (more) positive value.[215]

Put differently, if something secular receives better treatment due to a higher valuation, religion has received worse treatment due to a *lower* valuation.[216] To be sure, when religion is treated less well than a comparator, the problem is not intentional discrimination in the sense of religion serving as a but-for cause of the disparate treatment. Religion has not necessarily been singled out qua religion for adverse treatment. But—contrary to some who have understood it this way—religious equality is also not a rule against disparate impact, troubled by a law's unintended effects.[217] Religious equality is concerned with governmental *treatment* of religion. It "requires," in the words of Justice Kagan, "that a State treat religious conduct as well as the State treats comparable secular

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amount of positive intent (or "regard") equates with having "negative" intent. This understanding of intent is both similar and dissimilar to the view that disparate impact can also be understood as involving bad intent in the sense of insufficient good intent. See, e.g., Stephanie Bornstein, Reckless Discrimination, 105 Calif. L. Rev. 1055, 1064 (2017) ("So long as employees can show that protected class membership entered the chain of volitional acts that resulted in adverse employment actions, they may prevail."); Sophia Moreau, Discrimination as Negligence, 36 Canadian J. Phil. 123, 139 (2010) (describing theory that "the wrong does not consist in the presence of malice or of an exclusionary intent"). It is similar because the "negative intent" is the *lack* of (sufficient) "positive intent" (i.e., regard or sensitivity) for both. It is dissimilar because, with respect to disparate impact, the "negative intent" is a lack of sensitivity to one consequence (among others) of an otherwise benign policy, specifically the disparity resulting from it. Meanwhile, with respect to MFN, similar to disparate treatment doctrine, the negative "intent" is regarding the subjects of the policy in question themselves: The government is treating one subject better than another—akin to treating one race better than another—due to a lack of adequate positive regard for that other subject ("religion").

215. But see infra note 216 (comparing but-for causation in the racial and religious discrimination contexts). The "intent" involved when the new rule of religious equality is breached is significantly different from "but-for intent," the type of intent normally associated with intentional discrimination. This author proposes that there are three kinds of "intent": the intent affiliated with disparate impact, the intent of MFN, and the intent associated with intentional discrimination.

216. Another way to put this is that under this model, religion must not only not be a but-for cause of adverse treatment, it also cannot be the but-for-it-were-not-something-else, as strange as that might sound. That is, if religion *were* some other secular thing that has received an exemption, it too would receive the exemption. See generally Katie Eyer, The But-For Theory of Anti-Discrimination Law, 107 Va. L. Rev. 1621 (2021) (discussing but-for causation in antidiscrimination law).

217. See, e.g., Litman, supra note 5, at 19, 22–23 (comparing the new doctrine to disparate impact analysis); Portuondo, supra note 16, at 1499 (same); René Reyes, Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied at Least as Strictly as the Free Exercise Clause, 55 Ind. L. J. 276, 309 (2022) (same). In a piece on MFN published in 2020, this author also (somewhat) compared MFN to disparate impact doctrine, calling it a variant of disparate impact. See Rothschild, Lingering Ambiguity, supra note 35, at 284 & n.14 ("The other interpretation of *Smith*'s general applicability test is that it is a variant of the disparate impact test.").

conduct"[218]—that it "*treat* like cases alike."[219] Or, as Justice Gorsuch explained, if a state forbids all indoor gatherings, including "indoor worship," while allowing some secular "operations to proceed indoors," it "obviously *targets* religion for differential treatment."[220]

For the government to treat that which is religious worse than something secular reflects a lack of "equal value"[221]: The government values something secular more than it values religion, while the Constitution requires it to value them (at least) equally.[222] Doing so, as Chief Justice Roberts put it, "reflect[s] . . . insufficient appreciation or consideration of the [religious] interests at stake."[223] It expresses, in the words of Justice Gorsuch regarding lockdown orders, "a judgment that what happens" in "religious places . . . just isn't as 'essential' as what happens in secular spaces."[224] The problem, as Justice Alito clarified in *Fraternal Order* and Justice Kennedy described in *Lukumi*, is that the government has "devalued" religion.[225] This is not the insensitivity toward different consequences of a benign policy—in other words, "disparate impact." Rather, it is the wrongfulness of different valuations resulting in "disparate treatment."

While the new rule of religious equality shares much with disparate treatment antidiscrimination law,[226] this brand of equality is substantively different from disparate treatment doctrine in other areas because what cannot be treated better in this context is an amorphous grouping defined in the negative: anything and everything that is *not* in the protected class. Put differently, the mandate of religious equality rests on a religion–secular binary. What is "secular" is simply all that is not "religious." Because everything is either secular or religious, any time the government

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218. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

219. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting) (emphasis added) (internal quotation marks omitted) (quoting Vacco v. Quill, 521 U.S. 793, 799 (1997)).

220. Id. at 717 (Gorsuch, J., dissenting) (emphasis added).

221. See Tebbe, Equal Value, supra note 16, at 2398–99 ("If its interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices—it has treated them as less worthwhile than the exempted activities.").

222. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). Though, the "intent" of *Epperson* is a far cry from the "intent" of MFN. See supra note 216 (describing but-for causation in religious discrimination).

223. See *S. Bay United*, 141 S. Ct. at 717 (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

224. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

225. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–37 (1993).

226. See Storslee, supra note 16, at 88 ("[R]egulations may not discriminate against religion by drawing value-based distinctions . . . .").

extends a benefit to anything secular but not to all things religious, by definition religion has been treated worse than what is secular.

This equality mandate stands alone in constitutional jurisprudence. The constitutional rules against racial and speech discrimination forbid discrimination among different races and among different contents or viewpoints of speech.[227] In contrast, religious equality covers not only equality *among* religions (and intentional discrimination against religion or the secular as categories) but also any unequal treatment between phenomena that are "religious" and "secular"—that is, all phenomena that happen to not be religious.[228] To better appreciate the novelty of this brand of equality, picture this rule of equality in other contexts. Were this rule applied to race or speech, the government could not treat *anything* better than "race" or "speech" as such. The rule would bifurcate the world into race and all that is not race, speech and all that is not speech. Any time the government granted a benefit to anything at all, it would be wrongful discrimination to not also grant that benefit to all that is "racial" and "speech-regarding." Needless to say, such an understanding of racial and speech equality is unknown to American equality law.

III. PROBLEMS WITH RELIGIOUS EQUALITY

Perhaps surprisingly, the new religious equality doctrine has commanded endorsement—in principle at least—from a wide variety of scholars.[229] For example, Professor Nelson Tebbe supports the Court's "new [version of] equality," which he dubs "equal value,"[230] commending the notion that "the government [ought not] wrongly burden protected actors through disregard or devaluing,"[231] and that "[b]y regulating a basic freedom while exempting other activities, the government implicitly judges the former to be less valuable than the latter."[232] This principle is not only "supportable"; it holds "real attraction."[233] Tebbe has concerns

227. See, e.g., Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 47–48 (1987) (discussing the Supreme Court's practice of nearly always invalidating content-based restrictions).

228. It might be hard to immediately discern the difference between *intentional* discrimination against religion (or against the secular) and (merely) the unequal treatment of that which is secular and that which is religious. Examples might help. There are three categories, which can be illustrated with three examples: (1) a benefit for only those who are Catholic; (2) a benefit for only those who are secular; (3) a benefit for only those who regularly volunteer at the local hospital. The first two are instances of intentional discrimination on the basis of religion. The third is an example of privileging something secular over religion (i.e., the benefit is not granted on the basis of regular church attendance).

229. See supra note 16 and accompanying text.

230. See Tebbe, Equal Value, supra note 16, at 2399–400.

231. Id. at 2401.

232. Id. at 2441.

233. Id. at 2404, 2416.

with the Court's new equality, but they are limited to its "nonideal execution."[234] For Tebbe, "in practice," the "ideal" of equal value is being "applied according to a particular politics,"[235] evidenced by the fact that despite equal value's "significant appeal" for "other areas of constitutional equality law," the Court has declined to apply it beyond free exercise.[236] Tebbe is not alone in leveling only "as applied" criticism of the new religious equality principle.[237] On some level, though, perhaps none of this should come as a surprise: Endorsements of religious equality fit within a long-standing tradition of liberal egalitarianism, a tradition that has included many celebrated progressive scholars who have advanced such

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234. See id. at 2482; see also id. at 2401, 2403.

235. Id. at 2482; see also id. at 2405 ("Religious groups, including the largest denominations, are winning cases, and private speakers are being protected against public regulation, while sexual and racial communities are left undefended by constitutional law against a naturalized stratification of social power.").

236. Id. at 2405, 2462, 2482; see also Portuondo, supra note 16, at 1561 (advocating for adopting the Supreme Court's new approach to the Free Exercise Clause in the equal protection context); Reyes, supra note 217, at 279 (calling for a strengthened disparate impact standard in the equal protection context, following the greater protection for religious groups in the Free Exercise context).

237. Other scholars have also largely centered their criticisms on the ways in which courts have "mis*applied* equal value." See, e.g., Micah Schwartzman & Richard Schragger, Slipping From Secularism 1, 6 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series No. 2022-75, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266290 [https://perma.cc/4GX8-SUGE] ("But on another reading, the court misapplied equal value when it held that the state had to give equal treatment to 'life-sustaining' and 'soul-sustaining' activities."). According to Professors Schwartzman and Schragger, some courts have problematically required the government to have as one of its interests "religion" itself (which, in their view, indicates a "slipping from secularism"). This author agrees with Professors Schwartzman and Schragger that the way the current doctrine operates requires the government to include religion as one of its interests. They shed much light on a key problematic feature of the current doctrine. However, while their essay suggests "equal value" *need not* work this way, this Essay takes the position that it must. They seem to assume there is a meaningful distinction between a government's "interests" and its "values." Thus, when a secular reason is *valued* by the government enough to override the secular interests that justify the government's policy exemptions but a religious reason is not, Professors Schwartzman and Schragger would see a "plausible" argument that the government has problematically violated the principle of equal value. See id. at 2. This Essay does not. Interests and values are interchangeable. And, in any event, every law has "interests" that are undermined to some degree due to governmental attributions of "value."

It should be noted that, as a general matter, some limit their normative endorsement of equality for religion to minority religions, specifically. See, e.g., Paul Gowder, Why Majority Religions Should Not Be Accommodated, 108 Iowa L. Rev. 2153, 2186 (2023) ("The same rule [that free exercise protection should be limited to religious minorities, lacking power] ought to be applied to non-accommodations-based claims of religious discrimination . . . ."). But if applied to only minority religions, it is hard to see how such concern for minority religions is not just a rule of equality *among* religions given the premise that religious majorities *would* receive the benefit in question (and that is certainly not the type of religious equality that has been captured by the doctrine). See supra note 216.

theories of religious equality as "equal regard," "equal concern," and "equal liberty."[238]

This Part argues, however, that a rule of religious equality according to which courts evaluate governmental "unequal" treatment of religion is not only inherently boundless but also conceptually incoherent. Religious equality turns on treating that which is religious the same as its secular "comparators." But religion is not comparable to anything—not in terms of its "essence" nor its value.[239] The only way a rule of religious equality could work is either if all judges decided for themselves the value of religion (or of the particular religion or religious activity before the judge) or assumed that religion is always at least as valuable as all that is secular. The Supreme Court—in this Essay's analysis, the entire Court, not just the more conservative Justices[240]—has taken the latter route. Its new rule assumes that religion is as valuable as, and thus must be treated as well as, anything "not religion."[241] But there is no basis for such an assumption, and, if taken seriously, it would put the viability of basic governance in jeopardy (as it has begun to do). The problem with recent religious equality cases, in other words, is not bad judges or unfortunate and avoidable "misapplications" of an otherwise desirable principle. The problem lies with the principle itself.

By illustrating how the new principle of religious equality licenses extreme results, this critique is not meant to suggest that the Supreme Court (or any court) is likely to reach all of those results. Rather, the reductio ad absurdum critique serves three related objectives. First, it aims to situate lower courts' recent free exercise decisions within the new

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238. Beginning with a cluster of articles in the mid-1990s (which were turned into a much-anticipated and much-discussed book in 2007), Professors Eisgruber and Sager developed a theory of religious equality based on "equal regard." See Eisgruber & Sager, Religious Freedom, supra note 89, at 13; Eisgruber & Sager, Vulnerability, supra note 212, at 1253. According to this principle, the state is "obliged to treat . . . deep [religious] interests as equal in importance and dignity to the deep religious or secular interests of other persons." Id. at 1286. Professors Eisgruber and Sager also refer to this principle as "equal liberty," a term John Rawls used as well. See Eisgruber & Sager, Religious Freedom, supra note 89, at 15; John Rawls, A Theory of Justice 171–86 (1999). Similarly, Ronald Dworkin proposed that "religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that *do not display less than equal concern for them*." Ronald Dworkin, Religion Without God 136 (2013) (emphases added); see also Jocelyn Maclure & Charles Taylor, Secularism and Freedom of Conscience 21 (2011) ("[A] 'difference-blind' conception of equality can end up preventing the free exercise of religion of the members of religious minorities."); Martha Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 19–22 (2008) (advancing an "equality principle" interpretation of free exercise premised on "equal respect").

239. See, e.g., Abner S. Greene, Liberalism and the Distinctiveness of Religious Belief, 35 Const. Comment. 207, 210 (2020) ("For many religious people, belief in God and what follows from that is not comparable to anything . . . .").

240. See infra section III.D.

241. See infra note 362.

doctrine. Far from representing contorted applications of the doctrine, these recent cases are faithful applications of it. Second, the critique aims to destabilize the principle's normative appeal by way of reflective equilibrium, that is, by showing the results that a principled, consistent application of the rule would yield. Finally, it seeks to motivate scholars and jurists to (re)consider alternative normative and conceptual bases for free exercise doctrine. To that end, the critique in this Part sets up a brief discussion in Part IV about the role that "intent" can play in crafting a synthetic and more workable—even if less attractive—doctrine of free exercise.

A. *The Futility of Strict Scrutiny*

It is worth starting at the end—with the "remedy" of strict judicial scrutiny that is granted if a court determines that the government has treated religion unequally. Courts adjudicating religious equality cases and scholars opining on them have assumed that the new religious equality standard is not entirely destructive to the government's ability to enforce laws that incidentally burden religious practice while exempting comparable secular activity.[242] The government can still justify such laws if they are narrowly tailored to advance compelling interests. In other words, regardless of how powerful of a constitutional mandate religious equality might be at the front end, it will not always impede governmental regulations at the back end. At most, a finding of religious inequality "triggers" a more searching review of the government's interests and selected means for achieving them, a type of review that is common in constitutional law and that need not be fatal.[243] In that vein, several commentators during the pandemic expressed optimism that strict scrutiny could and would bail out the government when lockdown orders

242. See Tebbe, Equal Value, supra note 16, at 2450 ("With regard to equal value, claims . . . can be defeated at the back end of the analysis if the government can carry its burden."); Tebbe, Liberty, supra note 144, at 283, 295 (describing the new free exercise equality right as "contain[ing] an egalitarian safeguard at the back end of the analysis, insofar as it can be overcome by strong state interests"); Douglas Laycock, Opinion, Do Cuomo's New Covid Rules Discriminate Against Religion?, N.Y. Times (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html [hereinafter Laycock, Cuomo's New Covid Rules] (on file with the *Columbia Law Review*) ("Nondiscriminatory rules to protect human life can be applied to the exercise of religion. But the rules must really be nondiscriminatory.").

243. See Koppelman, supra note 16, at 2251 ("What the triggering right triggers is the application of some level of heightened scrutiny."); Tebbe, Equal Value, supra note 16, at 2451 (advocating for "first . . . determining comparability at the threshold stage . . . and then [doing] . . . the back end . . . analysis").

and vaccine mandates were challenged on religious discrimination grounds.[244]

But these reassurances proved empty, not because of a "distort[ion in] the application of strict scrutiny,"[245] but because—for relatively straightforward reasons—the outcome of any scrutiny of the government's reasons for treating religion unequally is foreordained. Once a court has determined that the government has wrongfully discriminated against religion, it will not—because it cannot—then conclude that the government has a compelling reason for doing so.[246] The valence of "inequality" precludes the government from surviving any kind of constitutional scrutiny. The logic that implicates strict scrutiny under religious equality—that a secular entity or activity has been exempted while comparable religious entities and activities have not—locks in the conclusion that the lack of religious exemptions bespeaks a lack of narrow tailoring, a lack of a compelling interest, or both.

More specifically, as courts have indeed reasoned, how compelling can an interest that tolerates (secular) exceptions possibly be?[247] And even if the interest is compelling, how can the government claim it is *necessary* for the law to not provide an exemption (for religion) when the law does provide exemptions?[248] In *Fulton*, Chief Justice Roberts—drawing on one of his own early free exercise opinions[249]—explained that to survive strict scrutiny (in the context of free exercise, at least), the government must demonstrate a "compelling interest" not just "in enforcing its . . . policies generally, but . . . in denying an exception" to the religious objector.[250] In

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244. Indeed, one such commentator was Professor Laycock. See Laycock, Cuomo's New Covid Rules, supra note 242 (insisting that "[p]andemic restrictions" on houses of worship and vaccine mandates can survive strict scrutiny).

245. Koppelman, supra note 16, at 2253.

246. See Rothschild, Individualized Exemptions, supra note 32, at 1113–14 ("[T]his rendering of free exercise as an equality right not only triggers strict scrutiny in essentially every instance but also virtually guarantees victory for religious objectors.").

247. See, e.g., Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *9–11 (D. Ariz. Nov. 5, 2021) (holding that a school's policy was not generally applicable when it granted secular exemptions to vaccine policies but not religious exemptions); see also supra notes 163–171 and accompanying text.

248. See Rothschild, Individualized Exemptions, supra note 32, at 1113–14 ("The very logic that implicates strict scrutiny . . . locks in the conclusion that the lack of an exemption for religion is either not compelling, not narrowly tailored, or both."); see also Rothschild, Lingering Ambiguity, supra note 35, at 284 & n.13 ("[U]nder a broad general applicability test, strict scrutiny would almost always fail—how can a discriminatory, underinclusive exemption scheme be narrowly tailored?—and likely would not be undertaken in the first place."); Rothschild, Partisanship, supra note 122, at 1094 & n.130 (arguing the same).

249. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" (alteration in original) (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006))).

250. Id.

other words, the government must first present a compelling interest in *not* exempting religion, then it must prove that it could not achieve that interest if it exempted religion. The test is impossible to meet so long as the government has extended any exceptions (or, for that matter, if its law is "underinclusive" in any other way—more on that later). Even a single exemption (or any other underinclusivity) precludes the government from claiming it is necessary to not—meaning, not *possible* to—exempt religion. So long as the law "brook[s] . . . departures," as Chief Justice Roberts put it in *Fulton*, it cannot be said that it is not possible to make a departure for religion.[251]

One might argue that the Court is applying strict scrutiny incorrectly. On this view, the Court could simply course correct and apply strict scrutiny differently (and better) by asking instead if the secular *exemption* furthers a *distinct* compelling interest—a shift that perhaps could (partially) rehabilitate the new religious equality doctrine.[252] But under MFN religious equality, conducting a strict scrutiny test of this sort would be conceptually contradictory. That is because the new religious equality is premised on a religion–secular binary. It divides the world—people, entities, activities, motivations, and interests—into the religious and the secular. And it imbues the latter with significance: What is secular (and receives an exemption) is not just descriptively the (benign) "not-religious," but the (charged) "*non*religious." That is, everything that is not religious is to the religious as male is to female, Catholicism is to Judaism, and Black is to white. Put differently, the new rule of equality for "religion" collapses any distinctions between (1) privileging one religion over other religions or treating the secular *as a category* better than religion and (2) valuing something that happens to not be religious more than something that is. As a result, it is impossible for a law that even presumptively violates the new rule of religious equality to pass muster under strict scrutiny. While the government can rarely successfully defend a law that treats one race or gender better than another using any justification,[253] it can *never* win under strict judicial scrutiny with the argument that one race or gender is simply more valuable than others.[254] Yet that is precisely what the government's argument regarding the "interest" in exempting the secular

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251. See id at 1882.

252. See infra note 308. Later, this Essay argues that "interests" in avoiding costs associated with applications of laws (i.e., the interests that propel exceptions) should be conceptualized as part of a law's general interest.

253. See April J. Anderson, Cong. Rsch. Serv., IF12391, Equal Protection: Strict Scrutiny of Racial Classifications 1 (2023), https://crsreports.congress.gov/product/pdf/IF/IF12391 (on file with the *Columbia Law Review*) ("When a statute, regulation, or other government action distributes burdens or benefits based on race, ethnicity, or national origin, courts will impose a rigorous, 'strict scrutiny' test . . . .").

254. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that "maintain[ing] [w]hite [s]upremacy" is not a legitimate interest).

activity or entity would be—that it values a secular concern more than a religious one. Under the MFN rule of equality, a discrepancy in valuation is what triggers constitutional scrutiny: The government has valued something secular more than religion and thereby *de*valued religion relative to that secular comparator. For the government to now argue at the so-called back-end that the secular interest served by the activity that is exempted is compelling serves only to dig the government into an even deeper hole. That the government finds something secular, but not "religion," important enough to override the law's application is precisely the constitutional wrongdoing that sets strict scrutiny into motion in the first place.[255]

To construe MFN's first prong as a mere triggering device for strict scrutiny and not as itself a finding of fault is not only inconsistent with the very novelty and purpose of the new doctrine, it also results in a tautology. It would mean that courts take a closer look to determine in a case-by-case way if the government has "actually" devalued religion. Courts would do so by asking if the secular interest served by the law's exemption is compelling, that is, if the government has *deservingly* considered it more valuable than religion.[256] The rule is thus that the government has valued religion less than it should whenever the government has valued religion less than it should (or, put differently, that the government has valued religion less than its *actual* value whenever the government has valued religion less than . . . its actual value).

This is not merely a theoretical musing. To date, and for good reason, one would be hard-pressed to find cases in which federal courts have held both that a law triggers strict scrutiny because it treats religion unequally under MFN religious equality *and* that the law survives strict scrutiny.[257]

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255. To put this slightly differently, so long as we are talking about a rule of equality and so long as the rule is that religion cannot be treated unequally (worse) vis-à-vis something "secular," the government surely cannot defend its inequality by stating that the "secular" interest that it treats unequally better *is* better (read: "compelling"). That would be akin to saying men just *are* better (or more valuable) than women. Under no version of strict scrutiny is that permissible.

256. See Tebbe, Liberty, supra note 144, at 292–93 ("[G]overnment . . . may not regulate a conscientious practice while exempting other activity to which the government's interests apply in the same way. Such differential treatment usually, though *not invariably*, violates free exercise by treating the exercise of conscience with less than equal regard." (emphases added) (footnote omitted)); see also Brief of Amici Curiae Professors Stephanie H. Barclay and Richard W. Garnett in Support of Appellants-Defendants' Petition to Transfer at 7, Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1, 233 N.E.3d 416 (Ind. Ct. App. 2024) (No. 22A-PL-2938), 2024 WL 2863289 ("The [a]bortion [l]aw easily satisfies strict scrutiny.").

257. It is exceptionally rare for a federal court to first find a lack of general applicability and then hold that the government's actions survive strict scrutiny. For a rare exception, see St. Dominic Acad. v. Makin, No. 2:23-CV-00246-JAW, 2024 WL 3718386 (D. Me. Aug. 8, 2024).

B. *The Plasticity of Comparability*

That strict scrutiny does not provide an escape valve puts more pressure on the new religious equality doctrine. If a limiting principle cannot be found at the back end, it must inhere within the principle of religious equality itself at the front end. And indeed, the doctrine does appear to come equipped with a limiting principle: Religious entities, activities, and motivations must be exempted only if they are *comparable* to the secular entities, activities, and motivations that are exempted. In the words of Justice Kagan, religious equality requires the equal treatment of apples and apples, not "apples and watermelons."[258] To know the difference, Justice Kagan instructs—along with every other Justice and a coterie of scholars—that one look to the "government's interests" and ask whether the secular exemption "endangers [the interests] in a similar or greater degree" as religious exemptions would.[259]

This "comparability" test serves the new doctrine well. It has the double upshot of offering an easy way to render unconstitutional essentially every law that does not offer religious exemptions—a feature of the rule that was not lost on its architect[260]—while simultaneously providing the veneer of limitation. Since not *every* law that provides secular but not religious exemptions wrongfully discriminates against religion, proponents of the new religious equality rule can portray it as sensible and manageable.[261] It is sensible because requiring the government to "treat

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258. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

259. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993); see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); Laycock & Collis, supra note 66, at 11 ("We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms."); Tebbe, Equal Value, supra note 16, at 2409 (noting that the *Lukumi* Court held that "the ordinances were underinclusive because they failed to prohibit nonreligious behavior that implicated [the city's policy goals] in a similar way and to a similar degree").

260. Under the MFN "standard [of] lack of general applicability," Professor Laycock explained, "many statutes violate *Smith* and *Lukumi*." See Laycock, Conceptual Gulfs, supra note 64, at 772; Laycock, Implications of *Masterpiece*, supra note 83, at 176 ("[M]any laws will fail the test of general applicability . . . ."); see also Richard F. Duncan, Free Exercise Is Dead, Long Live Free Exercise: *Smith*, *Lukumi* and the General Applicability Requirement, 3 U. Pa. J. Const. L. 850, 883 (2001) [hereinafter Duncan, General Applicability] ("[M]any religious liberty claims will receive more protection than ever under *Lukumi* when brought against laws that are not neutral or not generally applicable.").

261. See Koppelman, supra note 16, at 2255 ("The plaintiffs' success in [*Fraternal Order*] was based on the existence of a clear secular comparator—the exemption for [medical reasons]."); Douglas Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 209 (2004) (listing *Fraternal Order* as the "leading case" in drawing the line); Lund, supra note 16, at 869 (describing *Smith* as "den[ying] judges any discretion" by requiring plaintiffs to show there is a secular exception that "has already undermined the law . . . as much as a religious exemption would").

like cases alike"—as Justice Kagan put it[262]—is a well-established constitutional rule; it is manageable because only in *some* instances will laws be rendered unconstitutional as applied to religion.[263]

Yet all this is illusory. Comparability as a limiting principle in this context is not principled and does little limiting. The most obvious problem is the sheer prevalence of exceptions. Essentially every law has exceptions, and it is in the nature of exceptions to "undermine" the "interests" of the law to which the exception applies.[264] Consider the example of an Orthodox Jewish person rushing to make it home before the Sabbath begins at sundown on a Friday who exceeds the speed limit and runs a red light. According to religious equality's comparability test, this person should be immune from the state's traffic laws if the state provides even a single exemption—including, say, for entourages of foreign dignitaries or emergency vehicles—that undermines the law's interest in traffic safety.[265] To privilege the secular interests served by the exemptions over the religious interests that would be served by allowing the Orthodox Jewish person to avoid violating a religious command is to

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262. See S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting) (internal quotation marks omitted) (quoting Vacco v. Quill, 521 U.S. 793, 799 (1997)).

263. See id. at 720 ("[The] government cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'" (second alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993))); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("[S]tate officials seeking to control the spread of COVID–19 . . . may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict."); Schwartzman & Schragger, supra note 237, at 3 ("[I]f [religious objectors] can show that the state has regulated their interests in a manner that devalues them as compared with others, then they have at least a *prima facie* claim for legal exemption."); Tebbe, Equal Value, supra note 16, at 2243 ("Using the government's interest to set the baseline for comparability is a device for identifying most situations where protected actors or activities have been devalued."); see also Brownstein & Amar, supra note 16, at 789 ("This focus on underinclusivity has some validity. Certainly, not all exemptions to laws are inconsistent with a law's purpose such that granting the exemption would render the law underinclusive as to its objective."); Koppelman, supra note 16, at 2251 ("Discrimination claims are a contingent kind of triggering right. They depend on the availability of comparators.").

264. Laycock & Collis, supra note 66, at 21 ("[A] single secular exception . . . triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct"). And it takes only a single "similar" secular exception to fail the "most-favored nation" doctrine. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (stating this rule).

265. See, e.g., N.Y. Veh. & Traf. Law § 1104(a)–(b)(3) (McKinney 2025) ("The driver of an authorized emergency vehicle, when involved in an emergency operation, may . . . [p]roceed past a steady red signal . . . [or] [e]xceed the maximum speed limits . . . ."). If one sees these as incomparable because emergency vehicles have lights and sirens that alert other drivers to yield to them, imagine emergency vehicles that do not have lights and sirens, or that the car being driven by the Orthodox Jewish person does have them. Also, one might argue that dignitaries can ignore traffic rules in light of the risk of being attacked on the road; imagine the exception is driven by the desire to show them respect.

devalue the latter in light of the former.[266] It does not help to recast the "interest" at a higher level of abstraction—say, as general "safety"—such that the secular exceptions would not undermine the interest while the religious exception would.[267] For while doing so might deal with *some* emergency vehicles under that exception, it would not address the suspension of speed limits for foreign dignitaries or, for that matter, an ambulance transporting someone in labor to the hospital. And more fundamentally—as this Essay discusses later—the move to higher levels of abstraction to avoid triggering comparability collapses under its own weight.[268]

In addition to the sheer prevalence of secular exceptions, there is a more fundamental problem with a rule of religious equality that assesses comparability based on laws' interests: Laws often do not *have* "interests"—at least not identifiable and determinate ones.[269] Most prosaically, legal rules often do not reveal their rationales.[270] And even if a rule explains its interests in some way, those interests are often so thinly described that they are practically of no use. In the COVID-19 free exercise

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266. Moving beyond hypotheticals, consider the police department's no-beard policy in *Fraternal Order*. Indeed, *Fraternal Order* is often touted as the paradigm case of MFN-style equality's limiting principle in action, garnering support even from those who critique MFN. See Brownstein & Amar, supra note 16, at 789 (citing *Fraternal Order* as a paradigm case on this point); Koppelman, supra note 16, at 2256 (same). Yet, in fact, *Fraternal Order* only further reinforces the absence of "comparability" doing any meaningful limiting. Recall that in *Fraternal Order*, the police department's no-beard policy included two secular exemptions, one for undercover officers and one for officers with medical conditions, but none for officers who had religious objections to shaving. See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360, 365 (3d Cir. 1999). Judge Alito was quick to explain that the former did *not* undermine the policy's interests. Id. at 366. Had the policy exempted *only* undercover officers, Judge Alito reported, the policy *would* have been generally applicable. Id. The department's interest "in fostering a uniform appearance" was not undermined by the undercover exception "because undercover officers 'obviously [we]re not held out to the public as law enforcement personnel.'" Id. (quoting Reply Brief in Support of the Appellants, City of Newark, Newark Police Department & Employees of the City of Newark, Appeal at 9, *Fraternal Order*, 170 F.3d 359 (No. 97-5542), 1998 WL 34104439). Judge Alito's "demonstration" of MFN's limiting principle does not hold up to closer inspection. To be sure, when undercover officers are on undercover missions, they are not identifiable as on-duty police officers. But undercover officers are not always on undercover missions. In fact, as the police department explained to the court, the officers were undercover for only "limited periods" to run "specific undercover operations." Reply Brief in Support of Appellants, City of Newark, Newark Police Department and Employees of the City of Newark at 9, *Fraternal Order*, 170 F.3d 359 (No. 97-5542), 1998 WL 34104439. *Fraternal Order*'s undercover officer exemption is thus an ironic model of religious equality's limiting principle.

267. I thank Nelson Tebbe for pointing out this objection and encouraging me to address it.

268. See infra section III.B.

269. See infra note 272.

270. See Martin Shapiro, The Giving Reasons Requirement, 1992 U. Chi. Legal F. 179, 193 ("Legislatures are not seen as subject to a formal giving reasons requirement.").

cases, for example, the constitutionality of local governments' mandates turned on the precise nature of the governments' interests.[271] Yet many of the emergency orders did not state a rationale beyond barebones observations that the ongoing pandemic required an emergency response.[272] Unsurprisingly, the lack of clarity around a law's precise interests can lead to judges inventing interests so as to achieve desired results.[273]

Even if a law does articulate detailed interests, more fundamental problems lie ahead. Because comparability looks to the law's interests as a benchmark for comparing exemptions, it assumes that interests are stable, precise, and objectively identifiable. They are not. Not only do laws often pursue multiple interests, but each interest typically permits multiple

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271. That is because, recall, the "test" for comparability is whether the secular exception undermines the governmental interest motivating the law in question to the same degree as would a religious exception. See supra notes 134–136 and accompanying text.

272. For example, New York's order at issue in *Roman Catholic Diocese* provided only this as its "purpose": "Whereas, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue . . . ." N.Y. Exec. Order No. 202.68 (Oct. 6, 2020). One might argue that the order's purpose was obvious: to reduce contagion. But courts split hairs over how to construe the governments' interests in these cases because everything hinges on the precise nature of the interests. See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020) (Breyer, J., dissenting) ("The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York.").

273. Such was the case in *Blackhawk*, the second of then-Judge Alito's early religious equality decisions that, in addition to *Fraternal Order*, is often advertised as a model example of court-enforced religious equality. Recall that *Blackhawk* involved an owner of black bears used in religious rituals. See Blackhawk v. Pennsylvania, 381 F.3d 202, 204–05 (3d Cir. 2004). Because Pennsylvania exempted nationally recognized circuses and public zoos from its permit fee requirement, Judge Alito held that not exempting the keeping of wild animals for religious purposes constituted discrimination against religion. See id. at 211–12. The state had explained that it did not charge zoos and circuses the fee because they were subject to independent accreditation and thus were not required to secure a permit in the first place. See Reply Brief for Appellant/Cross-Appellees Vernon Ross, Thomas Littwin, David E. Overcash, Frederick Merluzzi and Barry Hambley at 19, *Blackhawk*, 381 F.3d 202 (Nos. 02-3947, 02-4158), 2003 WL 24300780. But this difference did not matter. One of the state's interests, Judge Alito explained, was "discourag[ing] the keeping of wild animals in captivity," and the secular exemptions "work[ed] against [that] interest[] to at least the same degree" as a religious exemption would. *Blackhawk*, 381 F.3d at 211. The only problem is that Pennsylvania never suggested its annual $200 fee was underwritten by such an interest—indeed, its policy did not mention any interests whatsoever. See 34 Pa. Stat. and Cons. Stat. Ann. § 2904 (2004) (listing the permit fees without reasons). The court *deduced* it from the sheer fact that Pennsylvania permitted the Commissioner to issue fee waivers for those who exhibited extreme hardship *and* were keeping wild animals temporarily "with the intent of reintroducing [them] into the wild." Blackhawk v. Pennsylvania, 225 F. Supp. 2d 465, 470 (M.D. Pa. 2002). Thus, Judge Alito divined, Pennsylvania's "interest" in requiring an annual $200 permit fee was to disincentivize the keeping of wild animals in captivity. *Blackhawk*, 381 F.3d at 211. It is once again ironic that one of religious equality's canonical cases suggests the opposite: that, if anything, the "comparability" test upon which religious equality rests is (at least often) *not* availing.

characterizations.[274] That is because laws are means to ends, and in between the most granular of means and the most abstract of ends—from the law's concrete, specific command to its ultimate objective—there is often a chain of means and ends. The law's command is a means to an end which in turn is a means to a more abstract end, and on it goes until some ultimate end is reached. Any one of these ends can be used to describe the law's interest; none is more correct than the other.[275]

Consider the government's interests in *Fraternal Order*.[276] The police department had justified its no-beard policy with reference to an interest in "uniformity," which was premised on an interest in building the public's confidence in the police force.[277] That interest might seem straightforward—Judge Alito and those who championed the decision certainly portrayed it as such.[278] But it was not. The government's interest could have been construed in various ways: narrowly, as uniformity (with respect to facial hair); more generally, as respect for and confidence in the police force; and more generally still, as public safety. And how one chooses to characterize the interest—again, a choice with no objectively correct answer—can determine the outcome of the comparability analysis.

For example, in light of the department's interest in "uniformity," driven by its interest in "public confidence and respect," propelled by its interest in "public safety," one might conclude that the department's

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274. See Joseph Blocher, Bans, 129 Yale L.J. 308, 311–13 (2019) (framing a regulation as a "ban" can be decisive in determining its validity); Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311, 1383 (2002) ("[D]ifficult and potentially controversial judgments . . . [are often] simply buried underneath implicit framing choices.").

275. To be sure, levels-of-generality manipulability is hardly unique to religious equality. See, e.g., Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 161–68 (2023) (showing how levels of generality inform constitutional interpretation when looking for historical analogies); Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1058 (1990) ("The question then becomes: at what level of generality should the Court describe the right previously protected and the right currently claimed?" (emphasis omitted)).

276. See supra note 266 and accompanying text.

277. See Reply Brief in Support of the Appellants, City of Newark, Newark Police Department and Employees of the City of Newark, Appeal at 4, Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (No. 97-5542), 1998 WL 34104439 (quoting certification of Director Joseph J. Santiago) ("The grooming policy creates an environment of teamwork and solidarity among the officers. My goal is to project professionalism and dignity among Newark Police Officers. This will foster respect and confidence among the public and police officers." (quoting certification of Director Joseph J. Santiago)).

278. See *Fraternal Order*, 170 F.3d at 366 ("The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its 'no-beard' policy."); Storslee, supra note 16, at 77 ("Exemptions for medical beards and religious beards both undermine[d] the government's asserted interest in officer uniformity.").

exception for undercover officers undermined its interests, while another might conclude the opposite.[279] Neither would be wrong. From the vantage point of the department's interest in uniformity, that interest was undermined because (as previously explained[280]) there was no reason to believe that undercover officers (who often were not on undercover operations) typically went unrecognized as officers.[281] Yet from the vantage point of the policy's far more abstract interest in public safety, one could say the policy's interest was not undermined if facial hair was necessary for the success of undercover operations which contributed to public safety.[282]

The more recent and much-discussed free exercise vaccine mandate case, *Does 1–3 v. Mills*, helps to further illustrate the malleability of laws' interests.[283] In *Mills*, plaintiffs challenged Maine's emergency vaccine mandate for healthcare workers, which exempted the medically contraindicated but not the religiously contraindicated.[284] The state, in a declaration, provided three interests that its mandate was designed to serve, which could be grouped into two categories.[285] The first category was individual-based: to protect healthcare workers and patients in their individual capacities from contracting COVID-19.[286] The second category was system-based: to avoid a collapse of the healthcare system in the event of too many healthcare workers contracting COVID-19.[287] In light of these interests, the First Circuit reasoned that the two sets of exemptions—for the medically contraindicated and for religious objectors—were not comparable; whereas the latter would undermine the state's interests, the former was in perfect harmony with it.[288] That was so because the mandate's interest was "public health" writ large.[289] Once the interest was framed at so high a level of abstraction, it was effortless for the court to map it onto Maine's exemption for the medically contraindicated and

279. See supra note 277–278 (detailing the police department's interests in uniformity, confidence, and respect).

280. See supra note 266.

281. But see Tebbe, Equal Value, supra note 16, at 2412 (suggesting that the undercover officer exemption "did not raise the same concern because it did not undermine the department's interest in uniformity").

282. Assuming, that is, that the officer must have facial hair at all times, even while not on undercover operations. As it happens, though, even this construction of the policy's interest *ultimately* does not save the government under the MFN approach to religious equality. See supra notes 264–268 and accompanying text.

283. 142 S. Ct. 17 (2021).

284. See Does 1–6 v. Mills, 16 F.4th 20, 24 (1st Cir. 2021).

285. See id. at 30–31; see also supra note 272.

286. See *Mills*, 16 F.4th at 30–31.

287. See id. This second interest, of course, is a corollary of the first—if too many healthcare workers are unable to work, the entire healthcare infrastructure could collapse—but it is also ultimately a distinct interest as the focus is not individuals contracting COVID-19 but the *effect* of *too many* (individual) healthcare workers contracting COVID-19.

288. See id. at 34.

289. Id. at 28.

conclude that the two were harmonious.[290] The vaccine mandate was driven by an interest in protecting public health and the medical exemption was propelled by precisely the same interest.[291]

When the Supreme Court declined to grant emergency relief—Justices Barrett and Kavanaugh concurred in the denial on procedural grounds[292]—Justice Gorsuch, joined by Justices Alito and Thomas, wrote an impassioned dissent.[293] The dissent characterized the state's interest at a different level of abstraction than the First Circuit had and thus arrived at a different conclusion.[294] To appreciate the difference between Justice Gorsuch's characterization of Maine's interests and Judge Sandra Lynch's, it will be productive to see their respective descriptions side by side. First, Justice Gorsuch wrote:

> Maine . . . offered four justifications for its vaccination mandate:
>
> (1) Protecting individual patients from contracting COVID-19;
>
> (2) Protecting individual healthcare workers from contracting COVID-19;
>
> (3) Protecting the State's healthcare infrastructure, including the work force, by preventing COVID-caused absences that could cripple a facility's ability to provide care; and
>
> (4) Reducing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work.[295]

Meanwhile, Judge Lynch described Maine's interests as:

> (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of the those in the state most vulnerable to the virus—including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3)

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290. See id.

291. Indeed, the court found that "the medical exemptions *support* Maine's public health interests" because "Maine would hardly be protecting its residents if it required them to accept medically contraindicated treatments." Id. at 34 (emphasis added).

292. The Court's basis for denying emergency relief was that it was generally preferable to refrain from granting such (discretionary) relief so as to avoid incentivizing petitioners to "use the emergency docket to force the Court to give a merits preview . . . on a short fuse without benefit of full briefing and oral argument. . . . [T]his discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented." Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief, joined by Kavanaugh, J.).

293. See id. at 18–22 (Gorsuch, J., dissenting).

294. See id.

295. Id. at 19 (citing Appendix to Brief of Respondents ¶ 56, *Mills*, 142 S. Ct. 17 (No. 21-717)).

> protecting the health and safety of all Mainers, patients and healthcare workers alike.[296]

Justice Gorsuch and Judge Lynch agreed that Maine's interests included protecting patients and healthcare workers and avoiding structural complications due to healthcare worker shortages.[297] Yet behind their agreement lay a nuanced but critical disagreement regarding how each of those interests should be construed. For Justice Gorsuch, the interests were tethered to COVID-19 specifically; for Judge Lynch, they were not. Both noted Maine's concern for the health of individual healthcare workers and patients. But for Justice Gorsuch, that concern was specific: It was a concern about the deterioration of health caused by contracting COVID-19.[298] For Judge Lynch, by contrast, Maine's interest was understood at a higher level of abstraction: It was the "health and safety" of the individual healthcare workers and patients.[299] The same went for Maine's other interests. For Justice Gorsuch, the state's structural interests were "preventing COVID-caused absences that could cripple a facility's ability to provide care" and "[r]educing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work."[300] But for Judge Lynch, the state's other interests were, first, "ensuring that healthcare workers remain healthy" so that they can "provide the needed care" and, second, "protecting the health of the those in the state most vulnerable to the virus."[301] For Justice Gorsuch, the state's interests were granular; for Judge Lynch, they were general.

What might appear like hairsplitting semantic differences were quite significant; indeed, they were determinative. If Maine's interests were grounded in general public health, it would be fair to say that exemptions for the medically contraindicated not only did not undermine its interests but reinforced them. Yet if Maine's interests were more specific and pertained to stemming the tide of COVID-19, exempting health workers for reasons unrelated to reducing COVID-19 contagion would undermine those interests to the same degree as would religious exemptions.[302]

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296. *Mills*, 16 F.4th at 30–31 (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 874 (1990)).

297. See id.; see also *Mills*, 142 S. Ct. at 19–20 (Gorsuch, J., dissenting).

298. See *Mills*, 142 S. Ct. at 19–20 (Gorsuch, J., dissenting) (framing the mandate's objective as "protecting patients and healthcare workers from contracting COVID-19").

299. See *Mills*, 16 F.4th at 31 (framing Maine's third interest as protecting "health and safety" generally, without reference to COVID-19).

300. *Mills*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

301. *Mills*, 16 F.4th at 30–31.

302. One might argue—as Maine tried to argue—that numbers should be taken into consideration; that, for example, perhaps there are *fewer* people who are medically contraindicated than those who are "religiously contraindicated." But putting aside that the government would need actual empirical support for such a prediction, Justice Gorsuch

Who was right, Judge Lynch or Justice Gorsuch? Both were. It is true, as Justice Gorsuch contended, that it is "the government's *actually asserted* interests as applied to the parties before it [that should] count."[303] But there was hardly only one way to *characterize* those interests. According to Justice Gorsuch, the state's interests in public health writ large were just "*post-hoc* reimaginings . . . expanded to some society-wide level of generality."[304] Each of Maine's four asserted interests mentioned COVID-19 explicitly, and for obvious reasons: They appeared in a declaration regarding the state's mandate for vaccination against COVID-19.[305] But that does not mean Maine's interest in diminishing COVID-19 contagion by way of a vaccine mandate could not also fairly be described in terms of a broader public health goal. If Maine had not cared about public health in the first place, it would not have sought to reduce COVID-19 transmission. There is no telling which of these interests is more "actual"; one is just more general than the other.

This gives courts license to pick the "interest" that will yield their preferred outcome. If religious equality depends on comparability, and comparability is to depend on the extent to which secular and religious exemptions undermine the law's interests, courts hoping to avoid striking down a law as applied to religious objectors can characterize the law's interests at higher levels of abstraction, while courts wishing to side with the religious plaintiffs can select among various other levels of generality to reach their preferred outcome—or vice versa.[306] The trend of selecting

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(correctly, in this Essay's view) rebutted this attempt at an answer in a separate case. If the state in fact believed that exempting *all* the medically contraindicated would not jeopardize herd immunity but exempting *all* religious objectors would, why not require the government to "divide[] [the total number of exemptions in] a nondiscriminatory manner between medical and religious objectors"? See Dr. A v. Hochul, 142 S. Ct. 552, 557 (2021) (Gorsuch, J., dissenting). If equality is the touchstone, allocate the exemptions equally.

303. See *Mills*, 142 S. Ct. at 20 (Gorsuch, J., dissenting).

304. See id.

305. See id. at 19–20 (describing Maine's four "asserted interests" behind its COVID-19 vaccine mandate); see also Me. Rev. Stat. Ann. tit. 22, § 802 (West 2021) (requiring workers to be vaccinated against specified infectious diseases).

306. Sometimes *narrowing* the government's interest will result in free exercise protection, as was the case in the vaccine mandate cases, see, e.g., Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651 (E.D.N.C. 2020), and other times *abstracting* the government's interest will enable a finding of comparability and, thus, wrongful inequality. See Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004). In addition to the "disincentivizing" interest Judge Alito invented in *Blackhawk*, Judge Alito discovered a second "interest" in the permit fee requirement: raising funds. See id. at 211. Because at one point in its brief Pennsylvania had explained that it used the funds it collected from the permit fees to help cover costs associated with facilitating the permit, according to Judge Alito that meant its interest was "raising money." See id. With such a general interest in place, it was impossible not to conclude that the secular exemptions and religious exemptions were similar—both resulted in less money in Pennsylvania's coffers. To be sure, the fact that Pennsylvania used the fee money for "administering and enforcing its regulations . . . such as inspecting the facilities of owners of wild animals," Blackhawk v. Pennsylvania, 225 F. Supp. 2d 465, 469 (M.D. Pa.

the preferable level of abstraction for describing the government's interests in a given law or policy—be it at a high level or a low level—is quickly becoming commonplace in religious equality cases.[307] Identifying religious discrimination under the current doctrine, then, has more to do with whether a judge wants a law to unconstitutionally discriminate against religion than whether the law does; courts do not discover a law's wrongful discrimination but rather construct it.

As problematic as that may be, opting for higher levels of abstraction does not ultimately help courts wishing to avoid striking down a law as applied to religion. Construing a law's interest at a high level of generality might permit a court to win the religious equality battle, but only at the expense of the war. The more general the law's interest, the less possible it is that the law covers *all* it can to further that interest. For example, if the interest in issuing a vaccine mandate is public health writ large, all that is *not* regulated that, if regulated, would further public health constitutes "underinclusivities." So long as exceptions are measured against a law's interests—that is, exceptions are "unequal" when they undermine the law's motivating interest, but not if they do not—there is no reason to conclude that "noncoverages" are not "exceptions" for all intents and purposes. Thus, abstracting a vaccine mandate's interest as "public health" may result in the determination that one set of exemptions—medical exemptions from the vaccine mandate—do not undermine the mandate's interest in "public health." But it will also mean that countless other "nonapplications" *do* undermine that interest, as there will always be additional ways the mandate (or other means entirely) could further the law's broad interest in public health. This observation leads to another, possibly unintuitive, observation: All interests other than those that tautologically restate the law itself as its "interest" are undermined to some degree.

C. *The Meaninglessness of Exceptions*

If nonapplications can just as well be recast as exceptions, it follows that "exceptions" do not comprise an independently meaningful analytic

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2002) aff'd sub nom. *Blackhawk*, 381 F.3d at 215–16, could suggest it had an affirmative desire to "bring[] in money." *Blackhawk*, 381 F.3d at 211. Unlike the "disincentivizing" interest Judge Alito had divined, this interest was not completely fabricated. It was just, conveniently, exceptionally general.

307. See, e.g., U.S. Navy Seals 1–26 v. Biden, 27 F.4th 336, 351 (5th Cir. 2022) ("The Navy has an extraordinarily compelling interest . . . (1) to reduce the risk that they become seriously ill and jeopardize the success of critical missions and (2) to protect the health of their fellow service members."); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1178 (9th Cir. 2021) ("Limitation of the medical exemption in this way serves the primary interest for imposing the mandate—protecting student 'health and safety'—and so does not undermine the District's interests as a religious exemption would."); see also Rothschild, Partisanship, supra note 122, at 1102–1103 (discussing the high level of abstraction at which government interests are sometimes described).

category. Conceptually, exceptions are no different than limitations on the scope of the rule to which they apply. Exceptions merely reflect the outer bounds of a law and the determination that the costs of applying it in certain circumstances outweigh the benefits of doing so—and every law has an outer bound informed by costs. There is nothing exceptional about exceptions.[308]

Yet exceptions' exceptionality plays a crucial role in the rule of religious equality. First, and most obviously, a necessary premise of religious equality for exceptions is that exceptions are distinct benefits, reflecting a lawmaker's choice to grant preferred—that is, exceptional—treatment to select beneficiaries who are relieved from the burdens imposed by the law in question. Thus, the very question whether the government has acted wrongfully by treating religion unequally with respect to the benefit of receiving an exception depends on the assumption that exceptions are a coherent category, the unequal distribution of which constitutes wrongful discrimination. Second, religious equality invests exceptions with special significance because otherwise every law would be rendered religiously discriminatory so long as it restricts some religiously motivated activity but not every secularly motivated activity—an outcome even the most ardent supporters of religious equality disclaim.[309] The category of exceptions enables the distinction between all laws and only those laws that discriminatorily favor (by exempting) specific secular interests. The distinction, in other words, saves religious equality from the charge of absurdity.

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308. In one of the (surprisingly) few scholarly works dedicated to "exceptions" as a legal category, Fred Schauer very helpfully problematizes the exception–rule binary. He does so in a slightly different way than this Essay does (though there is overlap). See Frederick Schauer, Exceptions, 58 U. Chi. L. Rev. 871, 898 (1991) (describing how "exceptions [are] often used to disguise what is no different from a modification or repeal of the previously existing rule"). For Schauer, when one adds exceptions to a rule, one is *changing* the rule. Id. at 872 ("[T]here is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further."). On this Essay's analysis, exceptions do not change anything. They are part and parcel of the rule itself. The only difference between the outer bound of a rule and an exception is that the latter is (often) more granular than the former; conceptually, though, they are the same. Schauer, in his book-length project on rules (published contemporaneously with his essay), acknowledges a distinction between internal and external interests that seemingly would grant exceptions some conceptual independence. See Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life 117–18 (1991) [hereinafter Schauer, Playing by the Rules] This Essay grants them none. See infra note 339.

309. See supra note 266 (discussing how Judge Alito in *Fraternal Order* distinguished the exemption for undercover officers, concluding it was not an "exemption" because it did not undermine the government's interest); see also Tebbe, Equal Value, supra note 16, at 2447 ("No one believes that regulatory exemptions are necessarily invalid just because they fail to include a protected group.").

Fraternal Order nicely illustrates this assumption of religious equality and its shortcomings.[310] According to then-Judge Alito in *Fraternal Order*, the police department's choice to provide medical but not religious exceptions from its no-beard policy "indicate[d] . . . a value judgment that [certain] secular . . . motivations" were more important than religious motivations.[311] In Judge Alito's view, however, the same could not be said of the department's exception for undercover officers. Unlike the medical exception, this exception did not undermine the department's "interest in uniformity" because undercover officers purportedly were not recognized by the public as officers.[312] Rather than revealing a "value judgment," exempting undercover officers merely reflected the scope of the department's interest—and "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing."[313] The undercover officer exception, Judge Alito seemed to say, was not really an exception at all. Rather, undercover officers simply fell outside the scope of the policy. Judge Alito's distinction between governmental interests (that define the scopes of laws) and governmental valuations (that define exemptions from laws) is—for obvious reasons—shared by other supporters of the new religious equality.[314]

Yet this purported distinction between value judgments and mere interests proves unsustainable.[315] How can the government choose which interests to pursue—and how far to pursue them—without making value judgments? And how can it make value judgments without a view to its interests? The scopes of laws—the extent to which and the ways in which the government chooses to pursue its interests—are hardly value-neutral. Like decisions to grant exceptions to laws, decisions about how far and in what way to apply a law reflect judgments about the costs of the various possible structures of the law in question. And so long as the scopes of laws are informed by value judgments, there is no principled reason not to apply the rule of religious equality to laws that cover religious conduct but not some nonreligious conduct merely because the law does not include explicit secular exemptions.

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310. For more on this case, see supra section I.B.

311. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

312. Id. But as explained in supra note 266, as a factual matter, there was no reason to assume the undercover officers were not often recognized by the public as officers. Judge Alito played fast and loose with the facts.

313. *Fraternal Order*, 170 F.3d at 366.

314. See, e.g., Tebbe, Equal Value, supra note 16, at 2443 (assuming and agreeing with this distinction); see also Schwartzman & Schragger, supra note 237, at 4 (same).

315. Taken seriously, the distinction would render antidiscrimination law completely hollow, as the defendant could always just assert that he has an "interest" in granting benefits to some—say, those of a specific gender or race—but not others. The *interest* is precisely the problem.

The COVID-19-related lockdown orders help show the lack of a meaningful distinction between exceptions and scopes of laws. Many states issued lockdown orders that differentiated between essential and nonessential businesses, requiring the latter but not the former to close their doors. Some houses of worship objected to the government not including them in the state's essential category, which presumably rested on the belief that, as Justice Gorsuch put it, "what happens [in houses of worship] just isn't as 'essential' as what happens in secular spaces."[316]

In *Roman Catholic Diocese*, the Brooklyn diocese argued along precisely such lines: that distinguishing between essential and nonessential entities, and categorizing houses of worship as the latter, constituted unconstitutional discrimination against religion.[317] A federal district court disagreed, concluding that the "religious gatherings" were covered by the ordinance strictly "because they [we]re gatherings,[and] not because they [we]re religious."[318] As for the diocese's grievance that religious institutions were not categorized as essential such that they would be spared the order's restrictions, the district court declined "to second guess the State's judgment about what should qualify as an essential business."[319] The Second Circuit affirmed.[320]

In its first decision to formally adopt the new rule of religious equality, the Supreme Court overturned the Second Circuit's decision and granted the diocese emergency relief.[321] What bothered the Court was that New York had created two classes: a preferential class of all that was essential and a nonpreferential class of all that was nonessential.[322] Since New York placed churches in the latter class,[323] the Court held, its "regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[324] To be sure, New York's order did not issue a list of nonessential businesses and thus by no means explicitly classified houses of worship for adverse treatment. Rather, the state simply applied its lockdown to one class—"non-essential businesses"—and not another.[325] Nonetheless, according to the Court, New York engaged in "disparate

316. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (Gorsuch, J., concurring).

317. See Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 130 (E.D.N.Y. 2020), rev'd by Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir.).

318. See id.

319. See id.

320. See Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 225–26, 228 (2d Cir. 2020) (denying the Diocese's motion for an injunction pending appeal).

321. See *Roman Cath. Diocese*, 141 S. Ct. 63, 69 (2020) (per curiam).

322. See id. at 66.

323. Id.

324. Id.

325. See N.Y. Exec. Order No. 202.68 (Oct. 6, 2020). For an example of a similar lockdown order, see generally Conn. Exec. Order No. 7HH (May 1, 2020).

treatment" simpliciter;[326] it treated some secular entities better than houses of worship. At the end of the day, New York carved out a class for preferential treatment and houses of worship were not in it. The absence of houses of worship in the favored class necessarily meant that they were included in an implied disfavored class—or, put differently, the order *classified* houses of worship disfavorably.[327]

Roman Catholic Diocese thus represents not only the first time the Court formally adopted a clear rule of religious equality; it also hinted that there is no reason to assume religious equality would be, or should be, limited to traditional exemption cases—a view the Court had already unwittingly assumed in *Masterpiece Cakeshop* several years earlier.[328] Without saying so explicitly, the Court adopted the logic that exceptions contained within laws are no different than the limitations that are inherent to the scopes of laws. It did not matter to the Court that New York never "exempted" any businesses from its lockdown order and rather simply opted to cover certain businesses and not-for-profits (including houses of worship) but not those it deemed central to New Yorkers' "health, [physical] welfare, and safety."[329] The Court did not even purport to engage in comparability analysis between the noncovered secular entities and houses of worship.[330] Instead, it simply declared that any beneficial category created by the government that does not include "religion" in it wrongfully discriminates against religion.[331] Lest the breadth of that approach get lost, Justice

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326. See *Roman Cath. Diocese,* 141 S. Ct. at 66.

327. See id. at 67.

328. See supra notes 101–113 and accompanying text.

329. See N.Y. Exec. Order No. 202.6.

330. If one reads the decision carefully, one will notice that the fraction of an allusion to "comparability" analysis is not really "analysis" at all. See *Roman Cath. Diocese*, 141 S. Ct. at 66–67 (discussing in one paragraph the limitations on secular spaces compared to houses of worship with a limited analysis of the risk of COVID-19 transmission in those spaces). Selecting its words carefully, the Court included comparability language merely for dramatic effect. See id. After establishing that the problem with New York's order was that it differentiated between essential and nonessential businesses and considered houses of worship to be of the latter sort (and thus, according to the Court, "*singl[ing] out*" religion), as an aside, the Court mentioned: "And the list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities." See id. at 66. A little later, and again for dramatic effect, the Court observed (after having already concluded its analysis) that:

> These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day.' Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service.

See id. at 66–67 (quoting App. to Application in No. 20A87, Exh. D at 83).

331. See id. at 68 ("The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.").

Kavanaugh in a concurrence underscored the Court's new rule: "[O]nce a State creates a favored class of businesses, . . . [it] must justify [under strict scrutiny] why [religion is] excluded from that favored class"—full stop.[332]

Every law includes a favored class by virtue of covering only a limited class. Under the Court's rule of religious equality, then, *every* law that applies to religiously motivated activity wrongfully discriminates against religion. New York can be understood to have raised precisely this concern to the Court. In its briefing, New York intimated that it did not classify houses of worship for adverse treatment any more than any law classifies for adverse treatment that which it *covers*. To be sure, New York's reason for including within its scope houses of worship and not other entities was that it deemed only some activities essential (i.e., very important)—a reason that ignited outrage from Justices and scholars alike, propelling Cass Sunstein to dub *Roman Catholic Diocese* "our anti-*Korematsu*."[333] But it is perfectly ordinary for regulations to consider costs and decide not to cover some things they otherwise would have if costs were irrelevant. Making such determinations is what governments do: They balance competing interests in light of unfolding circumstances and make choices about when to regulate, how to regulate, and what to regulate.[334] Decisionmaking based on cost–benefit analysis is the very stuff of government.[335]

According to the Supreme Court, however, it did not help that New York's classifications were the product of everyday cost–benefit analysis.[336]

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332. See id. at 64 (Kavanaugh, J., concurring).

333. See Sunstein, supra note 16, at 237; see also *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring) ("[T]here is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."); Michael W. McConnell & Max Raskin, Opinion, If Liquor Stores Are Essential, Why Isn't Church?, N.Y. Times (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/first-amendment-church-coronavirus.html (on file with the *Columbia Law Review*) ("It is not for government officials to decide whether religious worship is essential. . . . Mass is not a football game, a minyan not a cruise.").

334. See Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 130 (E.D.N.Y 2020) ("[T]he court should not and will not parse the reasonable distinctions that the State has made, in very difficult circumstances, between essential and non-essential businesses."), rev'd by Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir.).

335. There is not only nothing remarkable about a government engaging in cost–benefit analysis when deciding the scope of a lockdown order, but the converse is true—it would be remarkable for the government *not* to do so. See, e.g., Ole F. Norheim, Joelle M. Abi-Rached, Liam Kofi Bright, Kristine Bærøe, Octávio L. M. Ferraz, Siri Gloppen & Alex Voorhoeve, Difficult Trade-Offs in Response to COVID-19: The Case for Open and Inclusive Decision Making, 27 Nature Med. 10, 10–13 (2021) (discussing governmental choices "involving the best balance between health on the one hand and income, liberties, education and further goods on the other").

336. See *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) ("The only explanation for treating religious places differently seems to be a judgment that what happens

In fact, that was precisely the problem. In light of its cost–benefit analysis, New York concluded that the cost of applying its lockdown order to some secular establishments outweighed the benefits of doing so, but it did not draw the same conclusion when it came to religious establishments.[337] That meant New York attributed greater value to certain secular interests—including ensuring access to pharmacies, grocery stores, barber shops, and hardware stores—than it did to religious interests. And to value anything secular more than religion is to "*de*value religion"—exactly what the new religious equality forbids.[338] New York violated the Free Exercise Clause insofar as it did not apply its lockdown order to some secular entities *because* of the cost of doing so but applied it to religious entities *despite* the cost of doing so.[339]

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there just isn't as 'essential' as what happens in secular spaces. . . . *That* is exactly the kind of discrimination the First Amendment forbids.").

337. New York considered it too costly to cover under its lockdown order "any business providing products or services that are required to maintain the health, welfare and safety of the citizens of New York State." See Empire State Dev., Frequently Asked Questions for Determining Whether a Business Is Subject to a Workforce Reduction Under Recent Executive Order Enacted to Address COVID-19 Outbreak 2 (2020), https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf [https://perma.cc/T23L-MDQL]; see also N.Y. Executive Ord. 202.6 (Mar. 18, 2020). Thus, all entities that New York considered necessary to secure "health, [physical] welfare, and safety"—including "laborator[ies]," "airports," "grocery stores," and "pharmacies"—were deemed essential by New York. Id.; see also Reply Brief in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 3–4, Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2d Cir. 2020) (No. 20-cv-4844), 2020 WL 10319982.

338. The Court in *Lukumi* described the government as "devalu[ing] religious reasons for killing by judging them to be of lesser import than nonreligious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993); see also S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Roberts, C.J., concurring) (stating that the government has "devalued" religion); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Alito, J., dissenting) (arguing that granting exemptions to only certain gatherings but not all religious gatherings devalues religious reasons for congregating); id. at 2614 (Kavanaugh, J., concurring) (stating that the government "'devalues religious reasons' for congregating 'by judging them to be of lesser import than nonreligious reasons'" (quoting *Lukumi*, 508 U.S. at 537–38)); Stormans, Inc. v. Wiesman, 579 U.S. 942, 949–50 (2016) (Alito, J., dissenting) ("Allowing secular but not religious refusals is flatly inconsistent with [*Lukumi*]. It 'devalues religious reasons' for declining to dispense [abortion] medications 'by judging them to be of lesser import than nonreligious reasons[]' . . . ." (quoting *Lukumi*, 508 U.S. at 537–538)); Tebbe, Equal Value, supra note 16, at 2398 ("If [the government's] interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices . . . .").

339. The select few scholars who have engaged with legal exceptions draw a sharp distinction between "internal" and "external" limitations. For example, according to Professor Claire Finkelstein, there is a difference between a sign that reads, "Do not enter unless authorized personnel" and a sign that reads, do not enter "unless someone is having a heart attack inside . . . and you are a doctor." See Claire Oakes Finkelstein, When the Rule Swallows the Exception, 19 Quinnipiac L. Rev. 505, 508–09 (2000). On Professor Finkelstein's account, the first sign includes only a condition, whereas the second sign includes an exception. See id. at 509–10. The first sign's statement is made up entirely of a *rule*, the rule being that non-authorized persons cannot enter the designated area. By

Thus, *Roman Catholic Diocese* helps illustrate that the underlying logic of the new religious equality is not limited to explicit exceptions granted for specific secular interests. Recognizing the nonexceptionality of exceptions—as the Court unwittingly did in *Roman Catholic Diocese*—puts into sharper relief the limitlessness of the new doctrine, a limitlessness that cannot be undone with a formalist distinction between a rule's exceptions and its scope.

D. *The Impossibility of Value*

Appreciating the role of costs in determining the scopes of laws helps bring into focus arguably the most fundamental problem with a rule of religious equality: It requires attributing specific value to religion qua religion. This requirement puts courts in the untenable position of either assessing religion's value in a case-by-case way or attributing some predetermined, set value to religion.

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contrast, the second sign's qualification "fall[s] *outside* the rule," making that sign's statement an exception to, rather than just a condition of, the rule. Id. (emphasis added). But what makes the limitation in the second sign any more a limitation than the limitation in the first sign? And what makes the rule in the first sign any more a "rule" than the rule in the second sign? The only difference is the specificity of the carve-out: In the first sign, the exception is broad, whereas in the second sign, the exception is narrow. But why should that matter? And in any event, generality and specificity are relative. All laws are general in some respects and specific in other respects.

For Professor Finkelstein, they are different because there is a meaningful distinction between exceptions that stem from "internal failure[s]" and those that result from "external failure[s]." Id. at 515. Only the latter are *exceptions*. When an exception is granted because a specific application of the rule would conflict with the interests that drive the rule, such a carve out is not in fact an exception but only a clarification of the rule. It is entirely different, however, when an exception stems from "external" principles that conflict with "the rule's own background justification." Id. at 511. When such conflicts arise and result in exceptions, they are given in "recognition of the weight or importance of [the] *contrary* . . . principle." Id. at 516. Only under such conditions is it appropriate to speak of exceptions. To make this more concrete, consider the two signs. One might argue that the rule prohibiting unauthorized individuals from entering a restricted area is not "exempting" authorized individuals if the purpose of the rule is to keep out *un*authorized individuals. Conversely, a rule seeking to prevent *anyone* from entering but exempts doctors under certain circumstances *does* provide an "exception," since allowing doctors to enter has no relation to the "purpose" of the rule. Here, the "exception" is motivated by a wholly "external" purpose that stands in conflict with the purpose underlying the rule. Although Fred Schauer elsewhere helpfully problematizes the rule–exception binary, he shares this view that there is a categorical difference between exceptions that stem from internal failures and those that are motivated by external failures (and only the latter are exceptions, whereas the former are not). See Schauer, Playing by the Rules, supra note 308, at 117–18.

The problem with Finkelstein's and Schauer's distinction is that it rests on a rather (surprisingly) impoverished view of law. Determining a law's bounds is not secondary to its creation. Such determination is not undertaken at some point *after* (temporally or conceptually) the "rule" comes into being. Rather, declaring what is *not* law occurs at the inception of the law's creation, and is as integral to it as any "affirmative" determinations.

Ironically, this results in religious equality reproducing the very problems that motivated the Court to adopt it in *Smith* in the first place. Under the religious liberty model, courts were required to balance a law's burdens on religious practices against its intended benefits. *Smith* replaced religious liberty with equality largely because the latter purported to resolve the problem of judges weighing the value of religion against competing governmental interests.[340]

But religious equality works similarly and thus proves no better than religious liberty. Under both, the government is constitutionally mandated to "value" religion sufficiently to refrain from imposing even unintended, incidental burdens on religious practice.[341] And under both, courts fill the role of judging the government's judgments,[342] ensuring that the government has valued religion sufficiently in its cost–benefit analyses.

For a court to judge the government's judgment, it must reassess the government's cost–benefit analysis—for how can a judgment be wrong if it balanced all the costs and benefits correctly? If, in the court's assessment, the government's cost–benefit analysis was pristine, presumably the court would have made exactly the same judgment. To declare that the government's judgment not to exempt religion was wrong, then, the court must supplant the government's cost–benefit analysis with its own. Put another way, the government will be held to have acted wrongly whenever its cost–benefit analysis differs from the court's.

The difference between religious liberty and religious equality is that while the former requires the court to evaluate one cost–benefit analysis, the latter requires it to assess two. When the government has exempted certain secular activities but not all religious activities, it has (at least implicitly) made two determinations: (1) that the benefits of applying its law to the religious activities in question outweigh the costs of doing so and (2) that the costs of applying the law to the secular activities it has exempted outweigh the benefits of doing so. To judge that judgment, a court must weigh for itself the costs and benefits of the law's application to both the nonexempted religious activities and the exempted secular activities. Only if the court determines that the net benefits (or costs) of applying the law in question to the religiously motivated activity are no greater (or less) than the benefits (or costs) of the secular activity that has been exempted can it conclude that the government has treated unequally what it should have treated equally. In contrast, the liberty paradigm called

340. See Krotoszynski, supra note 56, at 1199 (explaining the superiority of the equality-based approach to free exercise advanced in *Smith*).

341. See Laycock, Remnants, supra note 23, at 52; supra section I.A.

342. As Justice Felix Frankfurter put it somewhat similarly, courts are "not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

for no such comparative cost–benefit analysis: Courts assessed the costs and benefits of a law's application to a given religious activity without having to also assess its applications to *other* secular activities.[343]

How might a court go about making these assessments? The court might start by looking to the law's intended benefits. After all, laws are instruments for achieving designated beneficial objectives, so decisions about whether, how, and when to apply legal requirements will depend on the likelihood of realizing the hoped-for benefits. If the secular and religious activities differ with respect to that likelihood, it would be sensible for the government to treat them differently.[344]

But benefits should not be the sole dimension of comparison. As previously discussed, decisions about the content and scope of laws involve more than just consideration of the law's potential benefits.[345] It would be irresponsible, if not reckless, for the government to one-sidedly concern itself with a law's potential benefits without also considering attendant costs.[346]

Consider a simple example. Applying a speed limit to unmarked police vehicles rushing to catch fleeing criminals would generate the same benefit of reduced risk of injury and death (caused by speeding vehicles) as applying the speed limit to cars racing to make the showtime of a new blockbuster. But the two applications—to unmarked police cars and hurried moviegoers—would incur sharply different costs, which is why the state "exempts" only emergency vehicles. It does so not because applying the speed limit to emergency vehicles would not yield highway-safety benefits, but because the costs of applying it (including, for example, of criminals fleeing with impunity) outweigh those benefits.

The same goes for all laws. Every law could accomplish more if it covered more. But no law is truly universal in scope; every law has a stopping point because, at a certain point, the costs of expanded coverage outweigh the benefits. Indeed, it would perhaps not be wrong to say that, at least in many contexts, consideration of costs plays as significant a role in determining a law's content and scope as considerations of benefits. Which is to say, laws' interests are just as much "negative" as they are "positive." They are composites of (equally important) desired benefits and *non*desired costs.[347]

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343. See supra notes 39–40 and accompanying text.

344. Here, the government would be treating differently "apples and watermelons," as Justice Kagan put it. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

345. See supra notes 317–339 and accompanying text.

346. See, e.g., Irving L. Janis & Leon Mann, Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment 174–75 (1977) (arguing that rational decisions require consideration of costs and benefits); supra note 335.

347. Another example may help make this more concrete. Suppose someone has an interest in going on vacation to obtain the benefit of relaxation but also does not wish to

In addition to recognizing that comparisons between religious and secular exemptions require a *two*-step inquiry into both benefits and costs, it is important to appreciate the different natures of these inquiries. The first inquiry, which asks whether two sets of activities are similar with respect to a law's intended benefits, is (at least in theory) based on a defined, externally-provided metric. The hoped-for benefits that laws are intended to achieve are (in theory, anyhow) preselected. Once a court believes it has identified those intended benefits and construed them at the correct level of abstraction (both of which are not without their problems, as explained earlier[348]), the only question remaining is whether applying the law to the two sets of activities would yield similar benefits. That analysis certainly may provoke outcome-determinative disagreements, but (again, in theory at least) they would be disagreements about facts.

One can see this in the COVID-19 lockdown order cases decided once Justice Barrett joined the bench. In these cases, Justices Breyer, Sotomayor, and Kagan each wrote fiery dissents chastising the majority for engaging in "armchair epidemiology,"[349] that is, for inappropriately assuming for themselves the role of public health expert and making factual public health-related assessments. But even as the Justices leveled this critique, they too assessed the facts for themselves.[350] It seemed clear to them that there was a higher risk of COVID-19 contagion when congregants pray than when patrons dine or get a haircut.[351] The Justices' comparability

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spend more than $2,000. In that case, the person's interest ought to be formulated as "relaxing by going on a $2,000 (or under) vacation." A vacation that would cost $3,000 would further one of their interests (relaxation) but undermine another (not spending more than $2,000). While one of the interests might be framed positively and the other negatively, they are of equal importance. If the person did not want to relax *or* if they could not find a vacation within their price range, they would not be going on vacation.

348. See supra text accompanying notes 269–282.

349. See, e.g., S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720–23 (2021) (Kagan, J., dissenting) ("Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.").

350. See id. at 722 ("The only secular conduct the State treats better is the kind that its experts have found does not so imperil its interests—the kind that poses less risk of COVID transmission."). So long as the relevant question is whether two sets of entities are similar for the purposes of religious equality, how could they *not*? Indeed, precisely because the Court engaged in this fact-based inquiry despite the complex nature of the inquiry and that a national emergency was afoot, Cass Sunstein heaped praise on the Court for, as he (inaptly) put it, finally parting ways with *Korematsu*. See Sunstein, supra note 16, at 222 (describing *Roman Catholic Diocese* "as a strong signal of judicial solicitude for constitutional rights and of judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line").

351. See *S. Bay United Pentecostal Church*, 141 S. Ct. at 722–23 (Kagan, J., dissenting) (criticizing the majority for holding that "the State must treat this one communal gathering like activities thought to pose a much lesser COVID risk, such as running in and out of a hardware store").

analyses rested on "the conditions [that] facilitate the spread of COVID-19,"[352] including and especially the amount of "respiratory droplets produced."[353] The relevant questions when comparing the benefits of applying the lockdown order, in other words, were questions of fact.

In contrast, assessing the costs of such applications involves a much more fraught kind of inquiry. The costs of applying a law to a certain activity are the lost benefits that otherwise would have been obtained had the restrictive law not applied. The cost of applying a speed limit to emergency vehicles, to return to our example, is the loss of the benefits that would otherwise be derived from making timely arrests, deterring crime, rushing people to hospitals, and so on. The trouble is that comparing the costs of restricting different activities requires a shared metric of valuation, and there is none. The cost of burdening an activity depends on the value of that activity *itself*. In the COVID-19 context, the cost of applying a lockdown order to hair salons is measured according to the value of accessing the services provided by salons. The more one values haircuts, the greater the perceived costs of restricting access to them. The same goes for communal prayer. The cost of applying a lockdown order to churches depends on the value of unrestricted access to churches and the communal prayer that takes place in them.

Note that only once we have turned to a comparison of the costs of laws' applications to various entities or activities are we actually employing a rule of religious equality. Only now are we comparing *religion*—not room sizes and respiratory droplets—with that which is secular. And to conduct such a comparison requires an assessment of religion's value and comparing it with the value of a given secular activity that has been exempted.

Yet such a comparison is impossible.[354] For how can a court divine the value of religion? What—for example—is the value of communal prayer? As hard, if not impossible, as it would be for a court to know the value of a haircut, it is even harder, and even less possible, to know the value of communal prayer. The Court has not even been willing (because it is not able) to provide a definition of religion.[355] How can one know the value of something for which one has no definition? But even putting to the side

352. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting).

353. Id. at 78 (Breyer, J., dissenting).

354. Subjective valuations are certainly possible. People make valuations all the time; they could not decide among alternatives if they did not. And, as this Essay discusses in the context of cost–benefit determinations, the *government* engages in valuations with respect to every rule it enacts. See supra notes 336–338 and accompanying text. What is impossible are *objective* valuations. To assess a valuation made by the government, how is a *court* to know it was "wrong" without an objective metric? It cannot. To pass judgment on a judgment about the value of religion and conclude it was wrong is impossible to do objectively.

355. See supra note 53.

the problem of definitions, religion does not have a cognizable inherent and objective value.[356] And if the value of religion is beyond reach, how can a court know whether religion should have been valued the same, and thus treated the same, as a secular activity? It cannot.

To claim, as some have, that the Constitution's "singling out" of religion reveals religion's legal value as a purely positivist matter is circular.[357] For the entire debate is over how the Free Exercise Clause *should* be interpreted, and construing religion as especially valuable—rather than as especially vulnerable to persecution as a sheer historical matter—is hardly the Clause's only plausible interpretation.[358] Further, the Bill of Rights names plenty of interests other than just religion.[359] Imagine requiring the government to treat all interests in the Constitution as though they have practically infinite value and applying the Court's new rule of equality to them. Would anyone say that because the Constitution singles out speech and guns, privileging anything without granting speech or guns the same benefit is to unconstitutionally discriminate against them?[360]

How then might courts proceed? Broadly speaking, courts have two options. One option is for each court to subjectively assess for itself the value of religion—or of the particular religion or particular religious activity before it—on a case-by-case basis. The second option is for the Supreme Court to establish, and for lower courts to apply, an ex-ante

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356. Its value, like the value of "beauty," is in the eye of the beholder.

357. See, e.g., Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 228, 230 (2d Cir. 2020) (Park, J., dissenting) (stating that New York's lockdown order was "odious to our Constitution" because "a public health measure 'must always yield in case of conflict with . . . any right which [the Constitution] gives or secures'" (alterations in original) (internal quotation marks omitted) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 (1905))); see also Laycock, Religious Liberty, supra note 190, at 314 (arguing for a robust religious liberty right "[b]ecause the Constitution says so" (internal quotation marks omitted)); Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 9 (2000) ("The very text of the Constitution 'singles out' . . . religion . . . .").

358. See infra notes 372–381 and accompanying text.

359. See, e.g., U.S. Const. amend. II.

360. Say, for example, the government provides a subsidy for housing for the poor but not for shooting ranges or theaters. In fact, as surprising as it might seem, thanks in no small measure to the new religious equality doctrine, some courts *have* already begun to hold precisely this. See supra note 189. And while courts during the pandemic rejected free *speech* MFN-style challenges, that well may change (as some have argued it should). See Clementine Co. v. de Blasio, No. 21-CV-7779, 2021 WL 5756398, at *23–30 (S.D.N.Y. Dec. 3, 2021), vacated by Clementine Co. v. Adams, No. 21-3070, 2022 WL 4113100 (2d Cir. July 11, 2022) (rejecting charge of discrimination against speech in light of exemptions for some businesses, but not for theaters); Tebbe, Equal Value, supra note 16, at 2455–57 (suggesting "it would not be surprising to see" the Roberts Court apply its new rule of equality for religion to speech in the censorship context). Indeed, at least one federal court has already lamented the lack of MFN-style free speech doctrine when it comes to speech. See supra note 189.

valuation of religion. This latter option could take the form of either attaching a specific, set value to all religious activity—as the religious liberty model once did before *Smith*'s admonitions[361]—or establishing an ex ante rule of *comparative* value of religion: that religious activity is always at least as valuable as the most valued secular activity.

The Court's new doctrine of religious equality adopts the last of these options.[362] Recall that the doctrine allows the government to apply laws to religious activities but not secular activities only if applying the law to the two would reap different benefits. The government may not differentiate between religious and secular activities on the basis of costs—that is, differentiating on the assumption that the cost of restricting the secular activities is greater than the cost of restricting the religious activities. Rather, whenever the government appreciates the costs of burdening a specific secular activity and, in light of that appreciation, exempts it from the law's coverage, the government must treat religious activities as if they would be just as costly to restrict and, as a result, exempt them from the law's coverage as well. If the government has exempted a secular activity because it has valued it at A, to value religious activity at anything less than A is to value religion wrongly; it is to treat that which is at least equal in value as of less value.[363]

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361. See supra notes 39–40 and accompanying text.

362. See supra section I.D. It is easy to be misled by the Court's ostensible epistemic humility about the value of religion and its disclaiming any valuation of religion when employing MFN religious equality. (Recall that the Court in *Tandon* instructs that reasons for engaging in the compared activities—secular and religious—are irrelevant and are not to be included—that is, comparatively *evaluated*—in the calculus.) But it avoids valuing religion only by evaluating it to be no less *valuable* than anything secular. One might think this is reasonable. If we do not know the value of something, maybe it is best to err on the side of assuming maximum value. But upon closer inspection, such an argument—suggested by Professor Laycock, as it happens—is fairly absurd. See Laycock & Collis, supra note 66, at 23–24 (explaining that all a court needs to "know [is if] the rule maker found a religious exception undeserving, and secular exceptions deserving" and, if it did, "that is the value judgment that the Free Exercise Clause prohibits"). Imagine a student asking a school principal for permission to miss school to visit her sick grandmother. The principal does not know the value of such a visit. So, should he assume it has the *maximum* possible value and exempt the student from the school's strict attendance policy, so long as he has allowed a student to miss school for surgery to remove a cancerous tumor? But—one can anticipate the retort—visiting grandmothers is not specified in and privileged by the Constitution, whereas religion is. So if a seventeen-year-old student with a gun license asks for an exemption to practice shooting at a gun range, should the public school principal assume the activity has the maximum possible value and grant the exemption so long as he has allowed absences for surgery? Surely not.

363. Again, taking this rule seriously would suggest that the government cannot pursue *any* interests without also seeking to advance religion. If the government exempts self-defense from a murder statute, it has privileged (and thereby valued) the "necessity" of killing in order to save one's own life over the "necessity" of killing in order to obey a religious command. Indeed, when probed by Justice Scalia at oral argument in *Lukumi,* even Professor Laycock admitted that an exception for self-defense from an otherwise "absolute" rule against killing animals would trigger strict scrutiny because that exemption puts the

To put this logic in starker terms with the aid of an illustration, if a local government extends grants to buildings over one hundred years old because it values preserving history, it must also extend the grant to all religious buildings (even newly built ones); otherwise, the government is devaluing religion vis-à-vis historical preservation. To be sure, this hypothetical does not concern exemptions. But why should that matter? The new rule of religious equality requires that religion be treated as well as that which is secular.[364] So why should it matter if the benefit at issue is an exception or a monetary grant? And if one insists that religious equality does and should apply only for exceptions, there is little that stands in the way of conceiving the grant as just that: The government's baseline is "no funding," yet it makes an exception for historical buildings.[365]

Perhaps surprisingly, this rule of religious equality has been adopted by the entire Supreme Court, including the Justices on the left, seemingly without recognition of its implications.[366] While the Justices on the left took to writing impassioned dissents in the Court's new MFN-style religious equality cases, these dissents always engaged with the doctrine on its own terms rather than denouncing it. As Justice Kagan put it, "the First Amendment['s] demand[] [of] 'neutrality'" is that the "government

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"purpose" of the animal killing into play and privileges a secular purpose over religious ones. See *Lukumi* Transcript of Oral Argument, supra note 69, at 21–22.

As mentioned earlier, the point is not that religious plaintiffs will actually succeed in challenging murder laws that include a self-defense exception but not a religious exception, or, to draw on a less hypothetical case, abortion bans that include exceptions when a mother's life is at risk. Courts can always find ways to avoid such results—as we have seen, the doctrine is certainly malleable enough. See supra section III.B. But this malleability and the fact that the current rule of religious equality allows extreme results are important in themselves. Indeed, as this Essay has shown, the new principle of equality already *has* led to extreme results, including invalidating vaccine mandates for religious objectors. See supra section II.A.1. Yet the doctrine, and certainly the theory of equality underlying it, continues to find support. See supra notes 229–238 and accompanying text; see also supra note 16. But a principle that readily lends itself to such beyond-the-pale applications is not worth defending even in the abstract, especially when it lacks a coherent conceptual and normative foundation and is built on an analytic contradiction. See supra note 28 and accompanying text.

364. See supra section II.B.

365. One can imagine a scenario in which a church requests government funding and the government responds that it lacks the budget. In saying so, the government has revealed that it has a general rule of no funding which is driven by its interest in preserving funds. Yet it undermines that interest by making an exception for historical buildings.

366. Similarly, according to Schwartzman and Schragger, what matters for determining whether the government has "flout[ed] the antidiscrimination principle . . . of equal value" is whether the "secular and religious exemptions would undermine [a law's] interest in the same (or similar) ways." See Schwartzman & Schragger, supra note 237, at 4. Thus, "equal treatment" between "secular and religious views" is "require[d]" when they "pose similar or comparable risks to a compelling state interest." Id at 2. Yet, as this Essay argues, see infra notes 366–369 and accompanying text, such a rule is sensible only so long as one assumes that religion is—and must be viewed by the government as—at least as valuable as all things secular (i.e., the very assumption Schwartzman and Schragger condemn).

cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'"[367] Thus, the dissents attempted to show how, vis-à-vis the state's interest in preventing COVID-19 contagion (the benefit sought by the lockdown order), houses of worship and home-based Bible study were different from dining at a restaurant, filming in a movie studio, or shopping at a hardware store.[368] The only criterion for determining wrongful discrimination was whether the religious activities and the secular activities were comparable vis-à-vis the law's intended benefits, never whether they were comparable vis-à-vis the *cost* of applying the law to them. These Justices seem to have accepted the assumption that governments may never find it more costly to restrict a secular activity than a religious one without wrongfully discriminating against religion.[369]

The assumption that religion is always at least as valuable as all things secular is troubling enough. But it also results in an asymmetry that renders "religious equality" a contradiction in terms. According to the Court's rule of religious equality, religion must be treated as well as all that is secular. Yet the same does not apply conversely; what is secular need not be treated as well as that which is religious. If a law gives special treatment to religion by exempting it, secular interests cannot be a basis for

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367. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720–21 (2021) (Kagan, J., dissenting) (fourth alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 543 (1993)).

368. See, e.g., id. at 722 (arguing that "California's choices make good sense" in light of the fact that "[f]ilm production studios in California, for example, must test their employees as many as three times a week—a requirement that 'could not feasibly be applied to the congregation of a house of worship'" (quoting Declaration of Dr. George Rutherford ¶ 121 & n.8, *S. Bay United*, 141 S. Ct. 716 (No. 3:20–cv–865))); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("Unlike religious services . . . stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time." (citing Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Medical Association and the Medical Society of the State of New York as *Amici Curiae* in Support of Respondent at 7, *Roman Cath. Diocese*, 141 S. Ct. 63 (No. 20A87))).

369. To determine that the cost of burdening a secular interest is more valuable than the cost of burdening a religious interest is, under the current doctrine, to (unconstitutionally) devalue religion. As *Tandon* makes clear, only "risks" associated with the two sets of activities (the risks being what the law seeks to reduce, which is the "interest" of the law, or, put differently, the benefit it pursues) may be taken into consideration; the *reasons* people engage in those activities (i.e., the nature of the activities themselves and why people engage in them), may not be taken into consideration. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people gather." (citation omitted) (citing *Roman Cath. Diocese*, 141 S.Ct. at 67 (per curiam); id. at 66 (Gorsuch, J., concurring))).

challenging the law, even if the law's interest would be similarly undermined.[370]

Note, then, that under the current rule of religious equality, religion is *not* equal in value to the secular. If it were, that would imply the reverse as well: that the secular is equal in value to religion. If religion and the secular were truly equal in value, an exemption for anything secular would necessitate an exemption for all that is religious *and*, conversely, an exemption for anything religious would necessitate an exemption for all that is secular. Yet exempting all that is religious and all that is secular—in a word, everything—would eradicate the very law from which either would be exempted. There could be no religious equality for exemptions because there would be no laws from which there could be exemptions.

Ultimately, religious equality requires giving religion preferential treatment over the secular, which is why the current doctrine insists that only religion is at least as valuable as (and thus must be treated as well as) all that is secular. The secular, meanwhile, is not always as valuable as that which is religious; indeed, the secular very well could be of less value than religion. And not only could it be of less value—it is. For to ordain that religion is at least as valuable as all that is secular but not the reverse is to value religion more than—and to treat religion better than—the secular.

In essence, then, the current doctrine of religious equality helps put into relief that for a rule of religious equality to be possible, it must either be a tautological rule that religion must be valued (and thus treated) equally to what it equals in value or, as all Justices on the Court and a coterie of scholars have unwittingly assumed, the radical supposition that religion is at least as valuable as all things secular and thus must be treated as well as all things secular, but not vice versa—the very opposite of equality.

IV. AN ALTERNATIVE

These problems render the Court's current doctrine of religious equality incoherent. Consequently, we must ask: Where can free exercise doctrine go from here? Is there an alternative to the rule of religious equality that now governs free exercise jurisprudence?

A natural candidate would be the religious liberty model the Court jettisoned in *Smith*. Indeed, returning to religious liberty might seem sensible given that the Court's equality "upgrade" remains mired in many of the same conceptual and doctrinal problems the Court recognized in

370. Unsurprisingly, courts refused to hear claims that interests other than religion should be treated "equally" during the pandemic. Charges of inequality among *secular* interest were dismissed out of hand. See, e.g., Nat'l Ass'n of Theatre Owners v. Murphy, No. 3:20-cv-8298 (BRM) (TJB), 2020 WL 5627145, at *1 (D.N.J. Aug. 18, 2020) (holding that the government may place more stringent social gathering requirements on movie theaters than on political gatherings).

Smith over three decades ago. But the fact that religious equality has not proven better than religious liberty does not mean *Smith* should be abandoned, especially considering the enduring relevance of the problems with the religious liberty paradigm that the *Smith* Court identified—including the difficulty (if not impossibility) of assessing religious burdens and balancing them.[371]

A second candidate worth considering picks up on an important strand in *Smith* itself, albeit one that has fallen by the wayside: the rule of anti-intentional religious discrimination. While this Part cannot fully defend that rule as the basis for a workable and conceptually sound free exercise doctrine, it gestures toward its advantages and justifications.

Prohibitions on intentional discrimination serve as the lynchpin of the vast majority of American antidiscrimination laws.[372] Philosophers and legal scholars debate extensively—and legislators and courts delineate—the specific bases the government and other actors may and may not use when making decisions. These are, at bottom, normative questions. The question of when it is wrong to discriminate is really a question of when it *should* be wrong to discriminate—and, like all questions of moral theory, answering it is hardly easy.[373]

Although based on normative judgments, the legal rule against intentional discrimination is fairly standardized. It has been codified in constitutional jurisprudence and in statutes and ordinances at all levels of American government, spanning practically all aspects of public-facing life, from education to employment and from healthcare to housing.[374] The prohibition is relatively straightforward: Certain predetermined characteristics, such as race, gender, and age cannot be the but-for cause of adverse treatment.[375] Of course, intentional discrimination can be hard

371. See supra notes 38–45 and accompanying text.

372. See, e.g., David A. Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935, 939 (1989) ("[T]he discriminatory intent standard came to be the central principle of the Equal Protection Clause.").

373. See Richard A. Posner, Reply to Critics of *The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1796, 1802 (1998) ("The discourse of moral theory is interminable because indeterminate.").

374. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018) (sex discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (age discrimination); Civil Rights Act of 1964, 42 U.S.C. § 2000e–e-17 (2018) (employment discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (same); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (gender discrimination); Loving v. Virginia, 388 U.S. 1, 2 (1967) (racial discrimination in marriage); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (racial discrimination in schools).

375. See, e.g., Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose[]' . . . implies more than intent as volition . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

to ferret out as an evidentiary matter[376] and is susceptible to conceptual and normative contestation.[377] But the Supreme Court has elaborated tests for weighing direct and circumstantial evidence of discriminatory intent, and in various statutory contexts it has developed a burden-shifting test that helps the factfinder determine discriminatory causation.[378]

A prohibition against religious discrimination could be defined along similar lines, which, in fact is how it was defined for nearly a century before the new rule of religious equality took hold.[379] For example, in one of the Religion Clauses' foundational cases, *Everson v. Board of Education*, the Supreme Court instructed that the "command[] that [a state] cannot hamper its citizens in the free exercise of their own religion" means a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[380] The Court in numerous other pre-*Smith* cases applied this norm of anti-intentional religious discrimination.[381]

The historical context of the First Amendment supports such an interpretation. Justice Robert Jackson perhaps put it best. The "First Amendment separately mention[s] free exercise of religion," he explained in 1943, because of "[t]he history of religious persecution"—that is, "because [religion] was [often] subject to attack" and thus needed specific protection.[382] At least some historians agree. Professor Vincent Munoz, for

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376. See Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 751–61 (2011) (discussing five ways in which proving intent by way of comparators can be difficult).

377. See Aziz Z. Huq, What Is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1265 (2018) ("The boundaries between conceptions of unlawful intent are ambiguous and contestable.").

378. See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–04 (1973) (establishing a burden shifting framework).

379. See supra sections I.A–.D.

380. 330 U.S. 1, 16 (1947).

381. See Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Free Exercise Clause . . . [says that] one's religion ought not affect one's legal rights or duties or benefits."); McDaniel v. Paty, 435 U.S. 618, 629 (1978) (invalidating law that disqualified members of the clergy from holding certain public offices); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("[We] must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."); Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953) (invalidating a law which discriminated among religious sects); Niemotko v. Maryland, 340 U.S. 268, 271–73 (1951) (finding discrimination following Maryland's decision not to grant Jehovah's Witnesses a license to access a space that other religious groups had access to).

382. Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in the result). Furthermore, adopting an anti-intentional religious discrimination interpretation of free exercise—asking whether, as Justice Scalia put it at oral argument in *Lukumi*

instance, has recently made the case that "the very core of the Founders' understanding of religious freedom" was limited to the principle that the government should not "hurt, molest, or restrain individuals on account of their religious worship, beliefs, or affiliation."[383] The Free Exercise Clause—which, from a "robust historical perspective" marked "a revolution in political philosophy and political authority"[384]—precluded the government from "outlawing a practice *on account* of its religious character";[385] it prevented the government from "punish[ing] or compel[ling] religious exercises and professions *as such*."[386]

The Supreme Court has repeatedly underscored this history. As the Court explained in 1947, the Founders knew well that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their . . . religious supremacy."[387] For example, as Justice Hugo Black recounted, Catholics and Puritans in sixteenth century England were subjected to laws enacted "to destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church."[388] While these religious conflicts played a significant role in spurring emigration to colonial America,[389] some colonies took to precisely the same persecution against "undesired" religions—a fact that was surely on the Founders' minds and one that the Supreme Court often noted in earlier times.[390] And not only in earlier times: Just a few years before *Smith* was decided, a plurality of the Court explained that it was the

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over thirty years ago, there is "any attempt to suppress the religion as such"—would more accurately reflect the doctrine the Court established in *Smith*, or, at the very least, the doctrine that lower courts, most scholars, and the Court itself in at least some of its cases for over three decades understood *Smith* as establishing. See *Lukumi* Transcript of Oral Argument, supra note 69, at 20; supra note 82.

383. See Vincent P. Munoz, Religious Liberty and the American Founding 56 (2022).

384. Id. at 58–59.

385. Id. at 59 (emphasis omitted in part).

386. Id. at 58 (emphasis added).

387. See Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947); see also Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 n.10 (1982) ("At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control." (citing Bernard Bailyn, Ideological Origins of the American Revolution 98–99 n.3 (1967))); Engel v. Vitale, 370 U.S. 421, 432–33 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

388. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 149 (1961) (Black, J., dissenting).

389. See Carl H. Esbeck, Protestant Dissent and the Virginia Disestablishment, 1776–1786, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009).

390. See *Everson*, 330 U.S. at 9–10.

"historical instances of religious persecution and intolerance [specifically] that gave concern to those who drafted the Free Exercise Clause."[391]

Finally, the text of the Free Exercise Clause itself—"Congress shall make no law . . . prohibiting the free exercise [of religion]"—lends support to this antipersecution interpretation of free exercise.[392] While much has been made of the term "free exercise,"[393] "prohibiting" has been mostly neglected by Justices and scholars.[394] But "prohibiting" is an important clue for unlocking the meaning of the Clause's sparse ten words. This muscular word implies intent and purpose.[395] To say that Congress shall not make any law "prohibiting the free exercise" of religion suggests that Congress is forbidden from making laws whose overt content prohibits one from engaging in religious conduct qua religious conduct. The government may not persecute religious sects by *prohibiting* their practice. In other words, those who drafted the First Amendment sought to ensure that the government would, as James Madison, the Amendment's principal architect, put it, be prevented from "proscribing all difference in Religious opinion."[396]

Additionally, "Congress shall make no law" sounds in absolutism. Recognizing its absolutist connotation, Justice Black (eventually) found it necessary to shrink the Free Exercise Clause's coverage to restrictions of religious practices qua religious practices.[397] Justice Jackson, who also

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391. See Bowen v. Roy, 476 U.S. 693, 703 (1986).

392. U.S. Const. amend. I.

393. For example, that it "makes clear that the clause protects religiously motivated conduct." See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488 (1990) [hereinafter McConnell, Origins]. And since religiously motivated conduct can be inhibited even without intent, so the word "exercise," it is argued, supports a religious *liberty* interpretation.

394. The word has gotten some attention, but only regarding the *kind* of liberty the Clause covers. According to the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, for example, given the word "prohibiting," the Clause covers only claims that one's religious beliefs require one to do or not do what the law commands, not just that the law "may make it more difficult to practice certain religions." See 485 U.S. 439, 450 (1988); see also McConnell, Origins, supra note 393, at 1486 (discussing the historical evidence for the *Lyng* Court's definition of prohibiting).

395. Of course, when a general regulation incidentally restricts religiously motivated activity, that activity has been prohibited. But it is a stretch to read the Clause's command passively, as: "Congress shall make no general laws that prohibit general conduct if its general prohibition sweeps in conduct that is religiously motived for select individuals such that, incidentally, some individuals' religiously motivated activity is 'prohibited.'"

396. Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Bd. of Educ., 330 U.S. 1, 63, 69 (1947) (Rutledge, J., dissenting).

397. See Tinsley E. Yarbrough, The Constitutional Faith of Mr. Justice Black, 15 J. Pol. Sci. 1, 76 (1987) (describing Justice Black's limiting of free exercise to religious beliefs and communications).

understood the First Amendment as a categorical limitation,[398] shared a similar view—general "activities," he explained, are "Caesar's affairs and may be regulated by the state so long as it does not discriminate against one *because* he is doing them for a religious purpose."[399] These Justices' interpretations of the First Amendment, motivated by its textual absolutism, make good sense. The Clause cannot be absolute—no ifs, ands, buts, or balancing—*and* apply to all laws that incidentally burden religiously motivated conduct, which is potentially every law. In contrast, a narrower prohibition on intentionally discriminating against religious exercise because it is religious exercise could be absolute, fitting well with the plain meaning of "shall make no law."

The point is not to provide a full-throated defense of interpreting the Free Exercise Clause as limited to forbidding intentional discrimination, premised on a principle of antireligious persecution. Nor does the Essay wish to suggest that such a norm would be perfectly workable and unquestionably desirable. This approach has its defects, too. But it is at least an alternative understanding of free exercise that seems more sensible than requiring that religion be valued equally to all that is secular.

CONCLUSION

Over three decades ago, the Supreme Court planted the seeds for a revolution in free exercise doctrine by abandoning religious liberty as the doctrine's touchstone and embracing religious equality in its stead. At first blush, this equality principle appeared modest. But in the hands of advocates and a motivated Court, the equality principle has been expanded radically: Now, if the government exempts from a vaccine mandate those who are medically contraindicated, it must also exempt those who are religiously contraindicated. Notwithstanding the radical reach of the current doctrine, its defenders maintain that the principle underwriting it is sound, while distancing themselves from some of its recent applications.

This Essay takes a different view. It argues that the equality principle is unworkable and incoherent. The Supreme Court will no doubt be forced to confront these defects, and, as this Essay has shown, it can always resort to leveraging the doctrine's malleability to ensure desired outcomes. But a more forthright approach would be to turn away from religious equality and adopt a straightforward rule of prohibiting religious persecution. Such a rule would be far from perfect, but, at the very least, it would be more coherent than the existing rule of religious equality. In

398. If the government was never authorized to have made such a law, Justice Jackson believed, the law was nullified. See Jay S. Bybee, Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment, 75 Tul. L. Rev. 251, 283 (2000).

399. See Prince v. Massachusetts, 321 U.S. 158, 178 (1944) (Jackson, J., dissenting) (emphasis added).

the confused world of free exercise doctrine, that shift would be a step forward.

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