

# DISTURBING THE MODERN PLANTATION: HOW COVID-19 IS REINFORCING THE FOOD SUPPLY CHAIN’S FUNCTION AS A SOCIAL SORTING TOOL

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## OVERVIEW

This Article confronts the moral vandalism of heaping admiration on food and agricultural workers while benefiting from their marginalization. It critiques the commercial and political imperatives using law in ways that deny choice to some while protecting the right of anti-lockdown protesters to express socially-harmful choices in absolutist terms. Whether we shop for groceries and prepare meals at home, eat at restaurants, find food trucks, opt for “drive-thru” service, or order food using our smartphones, each of us exists at the end of a food supply system. Such varied approaches to filling our stomachs engage discrete logistical arrangements connecting fields, factories, and forks. Most consumers are far removed from those who work within the input segments of our food supply chains to support our eating patterns. Planting, harvesting, sorting, transporting, quality control, and directing items to particular sectors—such as institutions, grocery stores, restaurants, and elsewhere—all depend on human participation. Truck drivers, logistics coordinators, wholesalers, and other intermediaries play a vital role in moving our food through production corridors linking processing facilities to markets. In the consumptive segments of this vast system, people restock grocery stores and serve as checkout clerks; employees in every conceivable foodservice environment toil away in kitchens, serve customers, clean tables, and wash dishes; and those within the “gig” economy work as shoppers or deliver fast food to our doorsteps. All of these workers derive their livelihood from food-based commodities moving from source to customer.

Most of the food we eat comes to us through supply chains—processes and structures that source and transform raw materials into intermediate or end products for sale in commercial or consumer markets.<sup>1</sup> While supply chain structures imply the existence of linear functions, thinking of them as a kind of bow tie may be more useful, given the wide variety of foods passing through processing facilities before fanning out to reach every conceivable setting where food is sold. Now the subject of training and research across a wide variety of institutional settings,<sup>2</sup> supply chains are complex, highly dynamic, and carefully coordinated to account for the wide range of potential disruptions that complicate domestic and international production<sup>3</sup>—or so we thought. A large body of

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<sup>1</sup> See Thi Mai Yen Pham & Thi Minh Khuyen Pham, *The Factors Affecting Green Supply Chains: Empirical Study of Agricultural Chains in Vietnam*, 7 J. MGMT. & SUSTAINABILITY 135, 135 (2017).

<sup>2</sup> Lucy Gongtao Chen & Srinagesh Gavimani, *Using Scheduled Ordering to Improve the Performance of Distribution Supply Chains*, 56 MGMT. SCI. 1615, 1615 (2010).

<sup>3</sup> Nicholas Ellis & Vanessa Miller, *Managing Supply Chain Risk*, 98 MICH. B.J. 28 (2019); Nicholas G. Hall & Zhixin Liu, *Capacity Allocation and Scheduling in Supply Chains*,

scholarship also exists to critique the human costs of designing supply chains around the quest for low-cost production. These writings offer up important insights into the behaviors that develop between buyers and sellers, such as: the treatment of human labor, particularly in regard to women and human trafficking;<sup>4</sup> consideration of environmental standards;<sup>5</sup> geopolitics;<sup>6</sup> agricultural sustainability;<sup>7</sup> conflict minerals;<sup>8</sup> con-

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58 OPERATIONS RES. 1711 (2010); Steph Tai, *Food Sustainability in the Age of Complex, Global Supply Chains*, 71 ARK. L. REV. 465, 466–468 (2018).

<sup>4</sup> Anita Chan, *Labor Standards and Human Rights: The Case of Chinese Workers under Market Socialism*, 20 HUM. RTS. Q. 886, 886–889 (1998) (discussing China’s mistreatment of its “rural-to-urban migrants [who] are subject to tight ‘immigration’ controls” excluding them from access to social welfare benefits, schooling for children, or rights to property ownership); Dong-Sook S. Gills, *Globalization of Production and Women in Asia*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 111 (2002) (“Asian women workers in global production are a special category of labor that is not only different from men in general but also different from women workers in the developed economies.”); Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445 (2017) (critiquing the use of employer-sponsored visa programs to import and exploit low-wage foreign workers in the United States); see also Zehra F. Arat, *Analyzing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals*, 24 HUM. RTS. Q. 177 (2002); Denis G. Arnold & Laura P. Hartman, *Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops*, 28 HUM. RTS. Q. 676 (2000); Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017); Elliott Brewer, *Closed Loophole: Investigating Forced Labor in Corporate Supply Chains Following the Repeal of the Consumptive Demand Exception*, 28 KAN. J.L. & PUB. POL’Y 86 (2018).

<sup>5</sup> Daniel Berliner & Aseem Prakash, *Signaling Environmental Stewardship in the Shadow of Weak Governance: The Global Diffusion of ISO 14001*, 47 LAW & SOC’Y REV. 345, 368 (2013) (arguing that firms in low-regulation jurisdictions are more likely to participate in voluntary environmental certification processes).

<sup>6</sup> Frederick Cooper, *What Is the Concept of Globalization Good for? An African Historian’s Perspective*, 100 AFR. AFF. 189, 190 (2001) (critiquing constructions of globalization in the African context that gloss over historical and spatial relationships. “Africanists . . . should be particularly sensitive to the time-depth of cross-territorial processes, for the very notion of ‘Africa’ has itself been shaped for centuries by linkages within the continent and across oceans and deserts—by the Atlantic slave trade, by the movement of pilgrims, religious networks, and ideas associated with Islam, by cultural and economic connections across the Indian Ocean.”); Peter Knorringa, *Responsible Production in Africa: The Rise of China as a Threat or Opportunity?*, in *THE NEW PRESENCE OF CHINA IN AFRICA 177–98* (Meine Pieter van Dijk ed., Amsterdam University Press 2009).

<sup>7</sup> Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 299 (2007) (arguing that “political conflicts about the regulation of global capitalism—and the embeddedness of these conflicts in neoliberal rules and scripts—generated institution-building projects that proved crucial to the rise of certification” as part of a process labelled “political construction of market institutions”); see also Peter Debaere, Holger Görg & Horst Raff, *Greasing the Wheels of International Commerce: How Services Facilitate Firms’ International Sourcing*, 46 CANADIAN J. ECON. 78 (2013); Travis Miller, *The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility*, 46 TEX. ENVTL. L.J. 219 (2017); Pham & Pham, *supra* note 1.

<sup>8</sup> Franziska Bieri & John Boli, *Trading Diamonds Responsibly: Institutional Explanations for Corporate Social Responsibility*, 26 SOC. F. 501 (2011) (discussing the origins of the Kimberley Process Certification Scheme used to certify rough diamonds as “conflict free”);

scious consumerism in developed countries;<sup>9</sup> corporate social responsibility;<sup>10</sup> and developing country control over economic development more broadly.<sup>11</sup> This Article reveals the wide sweep of relationships growing out of supply chain architecture.

Human capital is an essential feature of these systems insofar as labor-intensive work remains vital to getting products from their origins to processing facilities where they become intermediate or final goods.<sup>12</sup> But the legal and business environments used to procure necessary food and agricultural labor also shape the working cultures in low-wage sectors where US- and foreign-born workers are likely to comingle.<sup>13</sup> Until the pandemic's arrival, these workers drove much of the country's record-breaking economic growth without enjoying a commensurate share of its benefits.<sup>14</sup> Since making its appearance in late 2019, Covid-19—the disease caused by the novel coronavirus (2019-nCoV)—has profoundly altered the lives of people working to feed us.<sup>15</sup> Their work continues even though Covid-19 has mushroomed into a full-blown global

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Remi Moncel, *Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals*, 34 BERKELEY J. INT'L L. 216 (2016) (discussing how portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act required companies traded on the U.S. Stock Exchange to undertake due diligence assessments to identify the presence of conflict minerals in their international supply chains); see also Jasper Humphreys, *Resource Wars: Searching for a New Definition*, 88 INT'L AFF. 1065 (2012); Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUM. RTS. Q. 687 (2004).

<sup>9</sup> Tim Bartley & Curtis Child, *Shaming the Corporation: The Social Production of Targets and the Anti-Sweatshop Movement*, 79 AM. SOC. REV. 653, 653–54, 662 (2014) (discussing, generally, how transnational actors become targets of “naming and shaming” activism); Damani James Partridge, *Activist Capitalism and Supply-Chain Citizenship: Producing Ethical Regimes and Ready-to-Wear Clothes*, 52 CURRENT ANTHROPOLOGY, S97, 97 (2011) (linking the cumulative effects of “[ethical] production from design houses to factory floors, from showrooms to department stores, and from NGO monitoring agencies to consumer protest networks” in the formation of “Supply-Chain Citizenship”); see also Michele Micheletti & Dietlind Stolle, *Sustainable Citizenship and the New Politics of Consumption*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 88 (2012).

<sup>10</sup> Robert Neil Mefford & Payson Johnston, *The Evolution of Sustainability in a Global Firm and Its Supply Chain*, 6 J. MGMT. & SUSTAINABILITY 77, 78–79 (2016) (discussing how multinational entities are pushing expressions of corporate social responsibility imperatives through their supply chains).

<sup>11</sup> See Larry Catá Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 11 (2016) (discussing a new theory of developing country governance in response to the collapse of the Rana Plaza garment factory building, which killed over a thousand workers); see also Kenta Goto, *Competitiveness and Decent Work in Global Value Chains: Substitutionary or Complementary?*, 21 DEV. PRAC. 943 (2011).

<sup>12</sup> See discussion *infra* Part I.B.

<sup>13</sup> See discussion *infra* Part I.D.

<sup>14</sup> See discussion *infra* Part I.A.

<sup>15</sup> See discussion *infra* Part III.B.

pandemic.<sup>16</sup> The resulting public safety imperative has forced millions around the world to shelter in place as part of a broader strategy aimed at minimizing the risk of transmission, preventing healthcare systems from being overwhelmed, and determining preconditions for safely re-opening battered economies.<sup>17</sup> Potentially fatal health risks now reside within patterns of human interaction that used to bring us into close proximity with each other.<sup>18</sup> The resulting “life quakes” have been staggering in their scale—mass layoffs and skyrocketing unemployment claims; shuttered schools emptied of children trying to learn remotely while their parents work from home; financial, logistical, and emotional strain; and the dismantling of routines most of us previously took for granted.<sup>19</sup> But we have continued eating throughout all of this upheaval, albeit in different ways, and with the result that our consumptive patterns have reverberated across the economy.

These reverberations offer important revelations about our relationship to those whose labor sustains the food supply networks designed to feed us. The employment arrangements supplying labor to these networks function as modern-day overseers, exploiting a vulnerable cross-section of workers existing at society’s margins.<sup>20</sup> Consisting of US citizens, newly-arrived immigrants, guest workers authorized to work in the United States, and those living in the United States without legal authorization, these people lack the full range of autonomy enjoyed by the segments of a Covid-weary society now calling them “heroes.”<sup>21</sup> Prior to Covid-19’s arrival, they worked under dangerous or humiliating conditions—often contending with varying degrees of vulnerability in service of a labor system long known for prioritizing profit over people.<sup>22</sup> The pandemic has exacerbated hardships for a subset of people who must also work in settings where they risk exposure to Covid-19—all the while remaining trapped in a complicated place in our political econ-

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<sup>16</sup> See Jamie Ducharme, *World Health Organization Declares COVID-19 a “Pandemic.” Here’s What That Means*, TIME (Mar. 11, 2020, 12:39 PM), <https://time.com/5791661/who-coronavirus-pandemic-declaration/>.

<sup>17</sup> *Id.*

<sup>18</sup> See discussion *infra* Part III.A.

<sup>19</sup> See discussion *infra* Part III.A, B.

<sup>20</sup> See discussion *infra* Part III.B.

<sup>21</sup> For example, see *Celebrating School Food Service Workers*, NBC BOSTON (May 1, 2020, 6:48 AM), <https://www.nbcboston.com/news/local/celebrating-school-food-service-workers/2116836/>; Sarah Scoles, *‘We’re Not Heroes; We’re Sacrificial.’ Workers Carry the Burden of Colorado’s Food Supply Chain*, COLORADO PUBLIC RADIO (May 3, 2020), <https://www.cpr.org/2020/05/03/were-not-heroes-were-sacrificial-workers-carry-the-burden-of-colorados-food-supply-chain/>; Kate Taylor, *‘Thank-yous Don’t Pay my Bills’: Essential Workers Feeding America During the Coronavirus Pandemic Aren’t “Heroes” by Choice*, BUSINESS INSIDER (Apr. 8, 2020, 9:43 AM), <https://www.businessinsider.com/many-essential-workers-not-heroes-by-choice-in-america-2020-4>.

<sup>22</sup> See discussion *infra* Part III.B.

omy.<sup>23</sup> Contradictions abound in a pandemic where it is possible to be undocumented in a climate hostile to illegal aliens and also be an essential worker;<sup>24</sup> where the exercise of presidential power has required employees to continue working in places experiencing outbreaks of Covid-19;<sup>25</sup> and where workers must cope with angry, fearful customers crowding supermarkets and other retail spaces in direct contravention of public health guidelines.<sup>26</sup>

The law has played a role in supporting problematic social and political responses to Covid-19, entrenching existing social stratification, freezing opportunities for upward mobility, and consigning segments of the workforce to increasingly dangerous states of servitude in the service of meeting society's consumptive demand for food.<sup>27</sup> Once fully implemented, the combined effect of these policies will deny some of the pandemic's so-called "heroes" from having subsidized access to end points of a food supply system they are supporting while putting their lives at risk.<sup>28</sup>

This Article confronts the fallacy of valorizing those whose misery we depend on and perpetuate to fill our refrigerators. These arguments justify invoking comparisons to antebellum enslavement insofar as power, racism, and economic imperatives continue to strip human beings of their autonomy long after the formal ownership of human beings has given way to other social hierarchies formed to help some at the cost of others. The discussion below is organized as follows: Part I describes the

<sup>23</sup> See discussion *infra* Part III.B.

<sup>24</sup> Ray Sanchez, *Swept up in Historic Mississippi ICE Raids a Year Ago, These Undocumented Workers Are Now 'Essential,'* CNN (Aug. 9, 2020, 5:37 AM), <https://www.cnn.com/2020/08/09/us/mississippi-ice-raids-one-year-later/index.html>.

<sup>25</sup> Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic> (discussing President Trump's April 28 executive order defining slaughterhouse workers as essential, effectively compelling them to continue working despite outbreaks of Covid-19 in meat processing facilities).

<sup>26</sup> Robert Iafolla & Fatima Hussein, *No Mask, No Service Rules Leave Workers Open to Customer Abuse*, BLOOMBERG LAW (July 21, 2020, 5:32 AM), <https://news.bloomberglaw.com/daily-labor-report/no-mask-no-service-rules-leave-workers-open-to-customer-abuse>; Melissa Repko, *For Grocery Workers, the Need for Mental Health Care May Outlast Coronavirus Pandemic*, CNBC (Apr. 16, 2020, 2:53 PM), <https://www.cnbc.com/2020/04/16/grocery-store-workers-need-for-mental-health-care-may-outlast-pandemic.html>.

<sup>27</sup> See discussion *infra* Parts II.B, III.B.

<sup>28</sup> While this Article's scope narrowly focuses on workers located upstream in our supply food supply chains, experts are encouraged to apply the discussions below to adjacent contexts—especially in transportation and logistics sectors where consumers' online purchasing patterns are placing fulfillment center employees under intense pressure to meet customer demand. The present discussion focuses on agricultural and food processing inputs as a discrete and formative focal point in relation to our need to eat—even those who deliver food to our doorsteps function downstream from such critical inputs. Other sectors in which employees are deemed essential are also excluded—such as healthcare or the financial sector—where the discussion presumably requires a qualitatively different analysis.

workforces populating three segments of the food supply chain: agriculture, food processing, and hospitality. It provides data regarding wages and demographics to establish that people of color account for a disproportionate share of this labor sector, where they receive low pay and cope with dangerous working conditions. This Part also explains how the law serves the interest of employers through wage-setting frameworks and guest worker programs—both of which shape expectations of foreign and US workers alike—even as they worked in sectors that drove much of the country’s economic growth.

Part II briefly outlines two forces dominating the US political economy in the year preceding the pandemic—the impeachment controversy and China’s ongoing trade tensions with the United States. Though widely known to those currently living through the crisis, these details warrant retelling for the benefit of tomorrow’s researchers who will have sufficient context for understanding the slow US response to the pandemic and its corresponding impact on our food supply chains. This Part discusses how the President’s hostility towards federal civil servants, which intensified in the wake of his impeachment, converging with concerns about negotiating an end to trade hostilities with China, featured prominently in decisions to ignore early warnings about the growing threat of Covid-19.

This contextualizing extends into Part III, which examines relationships between the slow White House response to Covid-19’s entry into the US economy, the impact on our supply chains, and the resulting safety hazards for food and agricultural workers toiling under conditions where they were highly susceptible to Covid-19 transmission. It explains how the consumptive demand for food persisted despite drastic changes in our eating patterns, resulting in a misalignment between food suppliers and consumers. This Part of the Article also describes how the levers of public power worked to benefit private interests by reframing problems with inflexible food supply chains into a narrative about US consumers being at risk of experiencing food shortages. The resulting executive order declaring meat processing plants “essential” preserved demand and secured a vast, multi-state workforce compelled to work in plants experiencing outbreaks of Covid-19.

Part IV identifies contradictions inherent in the rhetoric of valorizing workers we are victimizing, arguing such language invites us to look past forces keeping food and agricultural workers trapped at the bottom of our social hierarchies. It also problematizes law’s role in crafting relationships between autonomy and social standing by signaling a preference for some expressions of choice over others. As Covid-19 continues to sweep through the US population, the varied and socially harmful nature of these expressions is undermining the only viable public

health responses available pending development of a vaccine. The Article concludes by arguing that the language of gratitude and appreciation, when standing alone, essentializes oppression by using the rhetoric of heroism to obscure the social standing of those conscripted to satisfy wider public needs. It maintains that such hollow virtue delivers nothing meaningful to those forced to address the needs of a society dependent on their economic entrapment.

## I. THE POSITION OF FOOD SUPPLY CHAIN WORKERS WITHIN THE US ECONOMY

This Part uses relevant economic statistics to describe the plight of workers in three segments of our food supply system: agriculture, food processing, and hospitality services. Generated prior to Covid-19's arrival, the data capturing information about wages, working conditions, and racial composition of those working within this system support a set of problematic inferences. They also provide context for describing how lawmakers and agricultural employers work in concert to advance a zero-sum narrative that supports wage suppression and exploitative employment arrangements. This narrative harms workers' interests by normalizing low pay and poor working conditions and by treating any indication of their empowerment—such as wage increases—as something inimical to employers' success and to our broader society's needs. These political and economic forces also reveal a larger story about the workers who are less likely to benefit from the economic growth obtained by their labor.

### A. *Falling Unemployment Rates and Service Sector Job Growth*

By conventional standards, the US economy was relatively tranquil before Covid-19's arrival.<sup>29</sup> But the pace of recovery from effects of the 2008 recession was starting to cool, with a slowing of job gains, modest wage hikes, and an expansion of employment in low-paying, service-sector jobs.<sup>30</sup> The national unemployment rate hovered between 4.0 and 3.5 percent.<sup>31</sup> In September, these figures reached 3.9 percent and 5.5 percent for Non-White Hispanics and African-Americans, respectively.<sup>32</sup> These numbers were part of a downward trend that declined from a peak of 10 percent in October 2010, when the United States was emerging

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<sup>29</sup> Civilian Unemployment Rate, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> (last visited Oct. 11, 2020).

<sup>30</sup> Michael D. McCall, *Employment Expansion Continued in 2019, but Growth Slowed in Several Industries*, MONTHLY LABOR REVIEW, U.S. BUREAU OF LABOR STATISTICS (Apr. 2020), <https://doi.org/10.21916/mlr.2020.7>.

<sup>31</sup> U.S. BUREAU OF LABOR STATISTICS, *supra* note 29.

<sup>32</sup> *Id.*



from the Great Recession.<sup>33</sup> In the final weeks of the Obama presidency, the unemployment rate stood at 4.7 percent, a trend that continued into 2017 under the Trump administration.<sup>34</sup>

By the end of 2019, the US continued to experience the longest job expansion in its history, adding 2.1 million nonfarm jobs at an average of 178,000 per month.<sup>35</sup> But the pace of job growth softened compared to the previous year, which averaged 193,000 new jobs per month.<sup>36</sup> This slowdown in employment accompanied a drop in gross domestic product (GDP)—the value of all finished goods and services produced within a country's borders—which dipped from 2.9 percent to 2.3 percent between 2018 and 2019.<sup>37</sup> Much of the employment growth during this period occurred in the leisure and hospitality sectors, which added 369,000 jobs in 2019, an increase of 144,000 over the preceding year.<sup>38</sup> A total of 396,000 jobs were added to this sector between January 2018 and January 2019.<sup>39</sup> The strongest job gains were posted in establishments serving food and beverages—which account for almost 75 percent of the hospitality sector's employment figures—and where job gains increased from 146,000 in 2018 to 250,000 in 2019.<sup>40</sup> Throughout 2019, there was minimal movement in wages, which averaged \$1,139 and reached a high of \$1,185 in the fourth quarter,<sup>41</sup> an annual increase of \$40 over 2018 figures.<sup>42</sup> Compared to the national average across all occupational categories, seasonally-adjusted weekly wages in the leisure

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> McCall, *supra* note 30.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Employment Projections: Employment by Major Industry Section, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm> (last modified Sep. 1, 2020).

<sup>40</sup> *Id.*

<sup>41</sup> Quarterly Census of Employment and Wages (First Quarter 2019), U.S. BUREAU OF LABOR STATISTICS, [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=1&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=1&own=0&ind=10&supp=0); Quarterly Census of Employment and Wages (Second Quarter 2019), U.S. BUREAU OF LABOR STATISTICS, [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=2&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=2&own=0&ind=10&supp=0); Quarterly Census of Employment and Wages (Third Quarter 2019), U.S. BUREAU OF LABOR STATISTICS, [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=3&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=3&own=0&ind=10&supp=0); Quarterly Census of Employment and Wages (Fourth Quarter 2019), U.S. BUREAU OF LABOR STATISTICS, [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=4&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=4&own=0&ind=10&supp=0).

<sup>42</sup> Quarterly Census of Employment and Wages (Fourth Quarter 2019), U.S. BUREAU OF LABOR STATISTICS, [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=4&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=4&own=0&ind=10&supp=0); Quarterly Census of Employment and Wages, U.S. BUREAU OF LABOR STATISTICS (Fourth Quarter 2018), [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2018&qtr=4&own=0&ind=10&supp=0](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2018&qtr=4&own=0&ind=10&supp=0).

and hospitality sectors were relatively low and showed little change, growing slightly from \$463 in 2018 to \$482 the following year.<sup>43</sup>

*B. An Overview of the US Food Supply Chain, Its Workers, and Their Earnings*

The employment and earnings data described captures a portion of the highly compartmentalized workforce within US food supply chains. The roughly 16 million people employed in or adjacent to the system's consumptive segments are downstream from workers employed in food processing and agriculture.<sup>44</sup> In 2018, all food and agricultural sector employees accounted for 22 million full- and part-time jobs—roughly 11 percent of the US workforce.<sup>45</sup> In the same year, 1.7 million people within this sector worked in food processing facilities where they transformed raw agricultural goods into intermediate or final products,<sup>46</sup> with the largest proportion—29.3 percent—working in meat and poultry plants.<sup>47</sup> Average weekly wages in meat and poultry processing reached \$802 in 2018.<sup>48</sup>

Agricultural workers operate at our food supply chain's entry points. They typically consist of self-employed farmers and their families

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<sup>43</sup> Quarterly Census of Employment and Wages: Private, 1026 Leisure and Hospitality, All Counties 2018 Annual Averages, All Establishment Sizes, U.S. BUREAU OF LABOR STATISTICS (2018), [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2018&qtr=A&own=5&ind=1026&supp=1](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2018&qtr=A&own=5&ind=1026&supp=1); Quarterly Census of Employment and Wages: Private, 1026 Leisure and Hospitality, All Counties 2019 Annual Averages, All Establishment Sizes, U.S. BUREAU OF LABOR STATISTICS (2019), [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2019&qtr=A&own=5&ind=1026&supp=1](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2019&qtr=A&own=5&ind=1026&supp=1); see also *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/cps/seasfaq.htm> (last modified Oct. 16, 2001) (“Over the course of a year, the size of the labor force, the levels of employment and unemployment, and other measures of labor market activity undergo fluctuations due to seasonal events including changes in weather, harvests, major holidays, and school schedules. Because these seasonal events follow a more or less regular pattern each year, their influence on statistical trends can be eliminated by seasonally adjusting the statistics from month to month. These seasonal adjustments make it easier to observe the cyclical, underlying trend, and other nonseasonal movements in the series.”).

<sup>44</sup> *Ag and Food Sectors and the Economy: Agriculture and Its Related Industries Provide 11 Percent of U.S. Employment*, U.S. DEP'T OF AGRICULTURE [hereinafter *Ag and Food Sectors*], <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> (last updated May 4, 2020).

<sup>45</sup> *Id.*

<sup>46</sup> *Meat and Poultry Plants Employ About a Third of U.S. Food and Beverage Manufacturing Employees*, U.S. DEP'T OF AGRICULTURE, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58286> (last updated May 4, 2020).

<sup>47</sup> *Id.*

<sup>48</sup> *Private, NAICS 31161 Animal Slaughtering and Processing: All Counties 2018 Annual Averages, All Establishment Sizes*, U.S. BUREAU OF LABOR STATISTICS (2018), [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=1&year=2018&qtr=A&own=5&ind=31161&supp=1](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=1&year=2018&qtr=A&own=5&ind=31161&supp=1) (last modified Jan. 2, 2020).

or hired workers.<sup>49</sup> While the overall number of workers in this field reached nearly 1.2 million by 2019, the proportion of hired labor has increased over time.<sup>50</sup> The Office of Management and Budget's Standard Occupational Classifications (SOCs) subdivides agricultural work into six non-supervisory roles.<sup>51</sup> These include: graders and sorters of agricultural products; equipment operators; crop, nursery, and greenhouse workers; packers and packagers; farm, ranch, and aquaculture workers; and a residual category of general laborers.<sup>52</sup> This particular subset of workers accounted for 87 percent of the US agricultural workforce in 2019.<sup>53</sup> In 2018 and 2019, there was little variance in wages for nonsupervisory occupations, with the average hourly rate in 2019 being \$14.61 for equipment operators and \$13.03 for graders and sorters.<sup>54</sup> In 2019, these earnings were 60 percent of the country's mean hourly wage of \$23.51.<sup>55</sup>

While those working in the food supply chain's agriculture, food processing, and food service settings are part of a diverse workforce, variances in the racial composition within each of these sectors tell their own story. In 2018, Non-White Hispanics accounted for 64 percent of people in the most labor-intensive agricultural jobs—working as farm laborers, graders, and sorters—and 51 percent of all agricultural workers.<sup>56</sup> African-Americans accounted for 3 percent.<sup>57</sup> A quarter were women.<sup>58</sup> The 2019 figures capturing the racial composition of workers in food processing offer a different picture, with Non-White Hispanics making up 29.7 percent and African-Americans 14.3.<sup>59</sup> Of those employed in animal slaughtering and processing—which is particularly dangerous work—the number of Non-White Hispanics and African-Americans rose to 35.3 and 21.9 percent, respectively.<sup>60</sup> Within the leisure and hospitality sectors, the composition changed again, where 26.8

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<sup>49</sup> Farm Labor, *Size and Composition of the U.S. Agricultural Workforce*, U.S. DEP'T OF AGRICULTURE (last updated Apr. 22, 2020), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size>.

<sup>50</sup> *Id.*

<sup>51</sup> Farm Labor, *Wages of Hired Farmworkers*, U.S. DEP'T OF AGRICULTURE (last updated Apr. 22, 2020), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Farm Labor, *Demographic Characteristics of Hired Farmworkers*, U.S. DEP'T OF AGRICULTURE (last updated Apr. 22, 2020), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Labor Force Statistics from the Current Population Survey: Household Data Annual Averages, Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU OF LABOR STATISTICS (last modified Jan. 22, 2020), <https://www.bls.gov/cps/cpsaat18.htm>.

<sup>60</sup> *See id.*

percent of workers were Non-White Hispanics and 13.2 percent were African-American.<sup>61</sup>

### C. Occupational Hazard

In 2018, food and agricultural workers experienced slightly higher reported rates of injury and illness compared to the national average.<sup>62</sup> While the national average was 3.1 cases per 100 full-time or full-time equivalent employees, injury rates were higher across the agricultural and meat processing industries.<sup>63</sup> For example, agricultural workers experienced injury rates of 5.6 cases per 100 in crop production, 6.5 cases per 100 in animal production and aquaculture, and 4.6 cases per 100 in industries that support crop production.<sup>64</sup> In food manufacturing, workers experienced injury rates of 6.0 cases per 100 in seafood preparation and packaging, 4.3 cases per 100 in animal slaughtering, and 5.4 cases per 100 in rendering and meat byproduct processing.<sup>65</sup> Injury rates at food services and drinking places were relatively low, at 2.9 cases per 100.<sup>66</sup>

In 2018, there were 5,250 workplace fatalities across all occupational categories in the United States,<sup>67</sup> with 8 percent of these deaths occurring in the food and agricultural sectors.<sup>68</sup> There were 574 deaths in the agriculture, forestry, fishing, and hunting occupations<sup>69</sup>—with 78 percent of these fatalities occurring in crop production, animal production and aquaculture, and crop support.<sup>70</sup> Worker deaths in the animal slaughtering facilities accounted for 27 percent of all fatalities in food manufacturing, the single largest proportion of occupational fatalities in

<sup>61</sup> *Id.*

<sup>62</sup> Injuries, Illnesses, and Fatalities: TABLE 1. Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types, U.S. BUREAU OF LABOR STATISTICS (Nov. 7, 2019), [https://www.bls.gov/web/osh/summ1\\_00.htm](https://www.bls.gov/web/osh/summ1_00.htm); U.S. Department of Labor, *2018 Survey of Occupational Injuries & Illnesses Charts Package*, U.S. BUREAU OF LABOR STATISTICS (Nov. 7, 2019), <https://www.bls.gov/iif/soii-charts-2018.pdf>; *National Census of Fatal Occupational Injuries in 2018*, U.S. BUREAU OF LABOR STATISTICS (Dec. 17, 2019), <https://www.bls.gov/news.release/pdf/cfoi.pdf>.

<sup>63</sup> *Injuries, Illnesses, and Fatalities*: TABLE 1. Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types, U.S. BUREAU OF LABOR STATISTICS (Nov. 7, 2019), [https://www.bls.gov/web/osh/summ1\\_00.htm](https://www.bls.gov/web/osh/summ1_00.htm).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Food and drinking places include restaurants, other eating places, full-service restaurants, limited-service restaurants, cafeterias, grill buffets, buffets, snack and nonalcoholic beverage bars. *Id.*

<sup>67</sup> Census of Fatal Occupational Injuries (CFOI)—Current and Revised Data, TABLE A-3: Fatal Occupational Injuries to Private Sector Wage and Salary Workers, Government Workers, and Self-Employed Workers by Industry, All United States, 2018, U.S. BUREAU OF LABOR STATISTICS (last modified Dec. 17, 2019), <https://www.bls.gov/iif/oshwc/cfoi/cftb0324.htm>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

this segment.<sup>71</sup> Although the total number of service-sector deaths seems high—at 42 deaths in supermarkets and convenience stores and 129 deaths in food services and drinking places<sup>72</sup>—this represents a much smaller proportion of the 16 million workers in this segment of the food supply chain.<sup>73</sup> This contrasts with the number of deaths in agriculture, which represent a larger percentage of the total jobs at the input segment.

*D. Law's Role in Forming the Relationships Between Workers, Pay, and Conditions*

The foregoing datasets support a number of important inferences about the people who work to feed us. There is a different racial composition of workers within each of the input, processing, and service segments. But people of color are disproportionately working in more labor-intensive, dangerous occupations where there are relatively high injury rates and a significant number of deaths relative to industry totals. These wage structures and working conditions are features of a labor management landscape where employers have successfully leveraged immigration law to the detriment of foreign and US workers.<sup>74</sup>

Food and agricultural business paradigms depend in part on a poorly-paid immigrant workforce. This dependency exploits differences in the respective circumstances of foreign and US workers, particularly among agricultural and other workers. The H-2A and H-2B programs offer useful examples, both being successors to the H-2 guest worker system created under the Immigration and Nationality Act of 1952 (INA).<sup>75</sup> The H-2 program was created to admit foreign unskilled workers into the United States, effectively supplementing Bracero-era treaties with Mexico and Caribbean countries designed to fill labor shortages following the US entry into the Second World War.<sup>76</sup> Although the Bracero program ended in 1964,<sup>77</sup> the H-2 program continued until 1986 when it was transformed into the H-2A and H-2B systems.<sup>78</sup>

Under the INA, employers may procure workers from foreign countries to work in agricultural and nonagricultural jobs under the H-2A and

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Ag and Food Sectors, *supra* note 44.

<sup>74</sup> Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 10 (2017).

<sup>75</sup> See Immigration and Nationality Act, Pub. L. No. 82-414, 182 Stat. 66 (1952).

<sup>76</sup> Lee, *supra* note 74, at 23–36; MARC R. ROSENBLUM ET AL., CONG. RESEARCH SERV., R42560, MEXICAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 6–7 (2012), <https://fas.org/sgp/crs/row/R42560.pdf>.

<sup>77</sup> Lee, *supra* note 74, at 25.

<sup>78</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

H-2B visa programs.<sup>79</sup> Under the H-2A program, seasonal workers provide agricultural labor, in addition to some range herding and limited work with livestock.<sup>80</sup> There were 258,000 approved H-2A visa applications in 2019, representing the full-year equivalent of 114,000 jobs.<sup>81</sup> Seasonal workers employed under the H-2B program fill non-agricultural jobs.<sup>82</sup> In the first two quarters of 2020, almost 15 percent of the 126,656 approved H-2B visa requests were issued to non-agricultural workers in food-related occupations, such as working in meat processing plants, restaurants, or amusement parks.<sup>83</sup> None of the foregoing H-2A and H-2B figures capture the total number of undocumented immigrants working in any sectors. This leaves an important statistical gap in agriculture, for example, where undocumented immigrants are estimated to account for 50 to 70 percent of all workers.<sup>84</sup>

Laissez faire theory dictates that employers should be forced to offer higher wages as an inducement to those who might otherwise be reluctant to perform labor-intensive, hazardous work.<sup>85</sup> H-2A and H-2B offer ways to short-circuit this precept by seeking out foreign labor sources for workers willing to accept lower pay and poor working conditions. The H-2A program requires employers to pay the Adverse Effect Wage Rate (AEWR),<sup>86</sup> which represents the rate designed to ensure guest worker wages will not depress the wages of domestic workers in similar occupations.<sup>87</sup> The Department of Labor sets these rates based on data obtained from the US Department of Agriculture's (USDA) annual Farm Labor Survey, and is legally authorized to raise wage minimums, which are published annually in the federal register.<sup>88</sup> But this wage-

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<sup>79</sup> See Immigration and Nationality Act, 8 U.S.C. § 1188 (2020).

<sup>80</sup> *Id.*

<sup>81</sup> H-2A Temporary Agricultural Program, ECONOMIC REVENUE SERVICE, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#demographic>.

<sup>82</sup> See H-2B Temporary Non-Agricultural Workers, U.S. CITIZENSHIP AND IMMIG. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (last accessed Nov. 20, 2020).

<sup>83</sup> H-2B Temporary Non-Agricultural Program—Selected Statistics, Fiscal Year 2020, Q1 and Q2, Employment and Training, U.S. Dep't of Labor, Office of Foreign Labor Certification, [https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2020/H-2B\\_Selected\\_Statistics\\_FY2020\\_Q2.pdf](https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2020/H-2B_Selected_Statistics_FY2020_Q2.pdf).

<sup>84</sup> See Lee, *supra* note 74, at 10.

<sup>85</sup> See generally, MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993); Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 11 (1989); Ellery F. Reed, *The Problem of a Just Wage*, 3 J. SOC. FORCES 330 (1924–1925).

<sup>86</sup> 20 C.F.R. § 655.120(a) (2010).

<sup>87</sup> See 20 C.F.R. § 655.103(b) (2010); 2020 Adverse Effect Wage Rates for Non-Range Occupations, 84 Fed. Reg. 69,774 (Dec. 19, 2019).

<sup>88</sup> Lee, *supra* note 74, at 10; 2020 Adverse Effect Wage Rates for Non-Range Occupations, 84 Fed. Reg. 69,774 (Dec. 19, 2019).

setting process depends on inputs from agricultural employers who remain in control of the wages they pay workers, many of whom are undocumented immigrants working for undeclared wages that drive down overall wages.<sup>89</sup> The H-2B program is similarly problematic; it requires employers to pay foreign workers the prevailing wages for the jobs guest workers would fill.<sup>90</sup> According to the data already provided, prevailing wages in the food services sector are far lower than the national average;<sup>91</sup> factoring the presence of undocumented workers in, non-agricultural employment likely has a depressing effect on overall wages.

Both H-2A and H-2B programs endow employers with considerable power over foreign workers. They create a controlling role for employers who set the terms of employment, have the power to terminate workers without cause, and enjoy rights to extend the contracts at their discretion.<sup>92</sup> This produces three problematic results. The first effect places guest workers at the mercy of their employers who are free to extract exploitative work demands from laborers who have no incentive to complain. The second effect creates different expectations between US and foreign workers insofar as the latter are willing to accept difficult labor conditions, such as long hours at higher rates of productivity, without complaining, expecting overtime pay, or days off to see their families. This correlates with higher injury rates in agricultural and food processing jobs. Employers have lobbied to expand limits on the current number of visas issued each year as a means of escaping obligations associated with hiring US workers—a pattern commonly expressed as filling a labor shortage, without which industry cannot survive.<sup>93</sup> The third effect is to create lower wage norms that depress US workers' expectations for pay and working conditions, which become aligned with those of foreign workers.<sup>94</sup> All of these effects are likely to have amplified impacts on all foreign-born workers in the United States, who are more likely than native-born Americans to be employed in the same industries dependent on seasonal guest workers.<sup>95</sup>

It should come as no surprise that sectors experiencing wage increases frame the trend as some kind of economic threat rather than the closing of a wage gap that should not exist. For example, seasonally-

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<sup>89</sup> See Lee, *supra* note 74, at 10.

<sup>90</sup> *Id.*; see 20 C.F.R. § 655.10 (2015).

<sup>91</sup> See Lee, *supra* note 74, at 12.

<sup>92</sup> Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 535 (2007).

<sup>93</sup> See David J. Bier, *H-2A Farmers Will Benefit from House Reform Bill*, CATO INST. (Nov. 5, 2019), <https://www.cato.org/blog/h-2a-farmers-will-benefit-house-reform-bill>.

<sup>94</sup> See Lee, *supra* note 74, at 13.

<sup>95</sup> News Release, Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2019*, at 3 (May 15, 2020), <https://www.bls.gov/news.release/pdf/forbrn.pdf>.

adjusted agricultural wages remain at 60 percent of the national average even though they have risen steadily over the last decade.<sup>96</sup> The specter of farmworkers earning more pay for labor-intensive, hazardous work has not been well received. When the Department of Labor announced a six percent increase in the 2020 AEWR,<sup>97</sup> a bipartisan effort quickly mobilized to limit future AEWR adjustments.<sup>98</sup> One industry publication bemoaned the situation as a disadvantage for US farmers having to pay H-2A workers in an hour what their counterparts in Central and South America would be paid in a day.<sup>99</sup> In December 2019, the House passed the Farm Workforce Modernization Act of 2019,<sup>100</sup> which purports to control wages by freezing the 2020 AEWR<sup>101</sup> and by capping future AEWR increases at 3.25 percent and decreases at 1.5 percent over the next five years.<sup>102</sup> When combined with other forms of control over guest workers, legislatively-imposed wage controls create a business imperative where commercial survival (or success) precludes better wages for people working in the most labor-intensive, injury-prone segments of the food supply chain. The next Part examines Covid-19's effect on the political climate supporting these structural arrangements and their corresponding narratives.

## II. POLITICS AND BUSINESS IN THE “BEFORE TIMES”—PRECURSORS TO COVID’S ARRIVAL

This Part of the Article captures the state of political and business climates in late 2019 as the White House neglected warnings that the United States was in the crosshairs of a major pandemic.<sup>103</sup> Much of the conversation surrounding Covid-19's effects have rightly criticized failures to protect lives and our healthcare systems.<sup>104</sup> But public health cri-

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<sup>96</sup> See Farm Labor, *supra* note 49.

<sup>97</sup> 2020 Adverse Effect Wage Rates for Non-Range Occupations, 84 Fed. Reg. 69,774 (Dec. 19, 2019); Letter from the Agriculture Workforce Coalition to Mitch McConnell, Majority Leader, U.S. Senate, and Chuck Schumer, Minority Leader, U.S. Senate (Jan. 2, 2020), [http://www.agworkforcecoalition.org/wp-content/uploads/d3\\_AWC-AEWRLettertoSenate.pdf](http://www.agworkforcecoalition.org/wp-content/uploads/d3_AWC-AEWRLettertoSenate.pdf).

<sup>98</sup> See Bier, *supra* note 93.

<sup>99</sup> Allison Crittenden, *The Adverse Effect of the H-2A Wage Rate*, FARM BUREAU (Jan. 29, 2020), <https://www.fb.org/viewpoints/the-adverse-effect-of-the-h-2a-wage-rate>.

<sup>100</sup> Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong. (2019).

<sup>101</sup> Bier, *supra* note 93.

<sup>102</sup> *Id.*

<sup>103</sup> See Justine Coleman, *Trump Administration Ignored Pandemic Warning from White House Economists: Report*, THE HILL, (Apr. 1, 2020, 07:28 AM), <https://thehill.com/homenews/administration/490529-trump-administration-ignored-pandemic-warning-from-white-house>.

<sup>104</sup> For example, see Timothy Egan, *The World Is Taking Pity on Us*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/opinion/coronavirus-trump.html> (“As scientists note, you can’t stop an outbreak from happening, but you can stop it from becoming a catastrophe that brings down a society. The United States spends more on health care, per capita, than any other rich nation. And yet, here we are: a full-blown disaster, in lockdown with a narcissist



ses also produce economic harms, a fact evidenced by the ongoing opioid crisis, which has cost more than 400,000 lives in the United States, billions in social costs, and lost labor productivity.<sup>105</sup> The slow White House response to warnings about Covid-19 did more than violate basic Hobbesian norms that move governments to care for their citizens in times of dire need. It also constituted a failure of economic policy at a time when slowing job growth and unresolved trade tensions with China warranted vigilance about possible sources of damage to the economy—and when commentary in the popular press opined that stable indicators such as job growth, unemployment rates, stock markets, and GDP were central to the narrative that Trump’s fiscal policies remained fundamentally sound despite erstwhile impeachment controversies.<sup>106</sup>

Domestic and global business communities must also share responsibility for this failure, given western firms’ extensive presence in Wuhan—the Chinese city widely thought to be the site of the first major Covid-19 outbreak and a major manufacturing hub for multinational firms.<sup>107</sup> The city of 11 million boasts factories producing goods for General Motors, Nissan, Honda, and other well-known companies.<sup>108</sup> In an interesting parallel to labor patterns in segments of the US economy, migrant workers travel into Wuhan from inland provinces like Hubei, Shaanxi, Anhui, Hunan, and elsewhere to work in factories, where they live in cramped dormitories for much of the year until returning home to

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for a president. A country that turned out eight combat aircraft every hour at the peak of World War II could not even produce enough 75-cent masks or simple cotton nasal swabs for testing in this pandemic. A country that showed the world how to defeat polio now promotes quack remedies involving household disinfectants from the presidential podium. A country that rescued postwar Europe with the Marshall Plan didn’t even bother to show up this week at the teleconference of global leaders pledging contributions for a coronavirus vaccine. A country that sent George Patton and Dwight Eisenhower to crush the Nazis now fights a war against a viral killer with Jared Kushner, a feckless failed real estate speculator who holds power by virtue of his marriage to the president’s daughter.”)

<sup>105</sup> Meryl Kornfield, *The Death Toll of the Opioid Epidemic Is Higher than Originally Thought, Researchers Say*, THE WASH. POST (Feb. 28, 2020, 10:38 AM ), <https://www.washingtonpost.com/health/2020/02/28/opioid-deaths/>,

<sup>106</sup> Kenneth Rapoza, *Outlook 2020: Trump Faces Impeachment, but His Economy Is Safe*, FORBES (Dec. 10, 2019, 10:21 AM), <https://www.forbes.com/sites/kenrapoza/2019/12/10/outlook-2020-trump-faces-impeachment-but-his-economy-is-safe/#6f2a3d3cc5859>.

<sup>107</sup> Rosalie Chan, *Wuhan, the Center of the Deadly Coronavirus Outbreak, Is a Major Business Hub for Several International Corporations*, BUSINESS INSIDER (Jan. 25, 2020, 2:50 PM), <https://www.businessinsider.com/wuhan-coronavirus-outbreak-business-hub-2020-1>; Josephine Ma, *Coronavirus: China’s First Confirmed Covid-19 Case Traced Back to November 17*, S. CHINA MORNING POST (Mar. 13, 2020, 9:00 AM), <https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back> (“Of the first nine cases to be reported in November – four men and five women – none has been confirmed as being ‘patient zero’. They were all aged between 39 and 79, but it is unknown how many were residents of Wuhan, the capital of Hubei and the epicentre of the outbreak.”).

<sup>108</sup> Chan, *supra* note 107.

celebrate the Lunar New Year.<sup>109</sup> The notion that transnational firms based in the west either did not know or were unconcerned about Covid-19 infecting workforces toiling in their factories globalizes elements of the discussion that await in Part III.

#### A. *The Impeachment Fight as a Seedbed for Presidential Distrust*

By any measure, the late summer and fall of 2019 were a tumultuous time in US politics. President Trump became engulfed in an impeachment controversy centered on the circumstances surrounding a July 25, 2019 telephone call with his Ukrainian counterpart, Volodymyr Zelensky.<sup>110</sup> Months earlier, Congress had approved a military aid package for the Government of Ukraine<sup>111</sup>—\$250 million would come from the Pentagon and another \$141 million from the US State Department.<sup>112</sup> Beginning in the spring of 2019, President Trump expressed interest in delaying disbursement of these funds as a larger strategy undertaken to pressure President Zelensky into making two bogus announcements.<sup>113</sup> The first would publicize plans to investigate former Vice President Joseph R. Biden, Jr.—a possible Democratic contender for the 2020 presidential campaign—and his son, Hunter.<sup>114</sup> The second would focus on a high-profile investigation seeking to revive the widely-debunked theory that Ukraine had tried to interfere with the 2016 US presidential election.<sup>115</sup>

These priorities reflected Trump's concerns about the prospect of losing to Biden in the 2020 presidential elections,<sup>116</sup> and his displeasure

<sup>109</sup> Willy Shih, *Coronavirus and China Manufacturing: Why the Risk Is Far Larger than Just Wuhan's Factories*, FORBES (Jan. 30, 2020, 5:40 AM), <https://www.forbes.com/sites/willyshih/2020/01/30/wuhan-coronavirus-and-china-manufacturing-this-is-going-to-hurt/#4b33769755fb>.

<sup>110</sup> Memorandum of Telephone Conversation with President Zelensky of Ukraine and President Trump of the United States 3 (July 25, 2019) [hereinafter "July 25 Call Record"].

<sup>111</sup> Ukraine Foreign Assistance Integrity and Accountability Act of 2019, S. 2537, 116th Cong. § 5(a) (2019).

<sup>112</sup> Joe Gould & Howard Altman, *Here's What You Need to Know About the US Aid Package to Ukraine that Trump Delayed*, DEFENSE NEWS (Sept. 25, 2019), <https://www.defensenews.com/congress/2019/09/25/what-you-need-to-know-about-the-us-aid-package-to-ukraine-that-trump-delayed/>.

<sup>113</sup> See Rene Marsh, *Ukrainian President and Advisors Discussed Pressure from Trump Weeks Before Taking Office*, CNN (Oct. 23, 2019, 9:35 PM), <https://www.cnn.com/2019/10/23/politics/zelensky-trump-pressure-aides/index.html>.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*; Amanda Seitz, Eric Tucker & Richard Lardner, *As Trial Nears, Trump Keeps Discredited Ukraine Theory Alive*, AP News (Jan. 12, 2020), <https://apnews.com/article/893415ed7acb069604566149630abdb8>.

<sup>116</sup> As an example of Trump's effort to amplify negative stories about Biden using social media, see Donald J. Trump (@realDonaldTrump), TWITTER (May 2, 2019, 6:21 AM) (retweeting Kenneth P. Vogel & Iuliia Mendel, *Biden Faces Conflict of Interest Questions That Are Being Promoted by Trump and Allies*, N.Y. TIMES (May 1, 2019) (online and searchable at <https://www.thetrumparchive.com> (last accessed Nov. 21, 2019))).

over former FBI Director Robert Mueller's refusal to unequivocally exonerate him following a Special Counsel investigation into Russia's interference in the 2016 elections.<sup>117</sup> Trump pressed his demands during the now-infamous July 25 telephone conversation, during which he also made disparaging comments about Marie Yovanovitch, US Ambassador to Ukraine, whom he had removed from her post in May 2019.<sup>118</sup> Presumably, Yovanovitch's work fighting corruption potentially undermined the tactic of withholding congressionally-approved funds in the hopes of extracting commitments from President Zelensky.<sup>119</sup>

Trump's plans unraveled quickly. Fully expecting Trump to withhold badly needed aid, Zelensky scheduled a September 13 appearance on CNN's *Fareed Zakaria GPS* when he planned to announce the desired investigations,<sup>120</sup> but the interview was cancelled after a "whistleblower" complaint was filed on August 12 with the Senate and House intelligence committees.<sup>121</sup> Trump released the aid on September 11,<sup>122</sup> and details of the telephone call were first reported in the *Wall Street Journal* on September 21.<sup>123</sup> These revelations set off a series of events culminating in President Trump being impeached on December 18.<sup>124</sup> Given the Republican control of the Senate, impeachment pro-

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<sup>117</sup> See Sharon LaFraniere, *Mueller, in First Comments on Russia Inquiry, Declines to Clear Trump*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mueller-special-counsel.html> ("If we had had confidence that the president clearly did not commit a crime, we would have said so." (internal quotation marks removed)); Deb Riechman, *Trump Lashes Out After Mueller Says Report Doesn't Clear the U.S. President of Wrongdoing*, GLOBE & MAIL (May 30, 2019), <https://www.theglobeandmail.com/world/us-politics/article-trump-lashes-out-at-mueller-after-he-said-report-doesnt-clear-the-us/>.

<sup>118</sup> *Recalled US Ambassador Felt 'Threatened' by Trump*, BBC NEWS (Nov. 4, 2019), <https://www.bbc.com/news/world-us-canada-50293139>.

<sup>119</sup> Sarah D. Wire, *Trump Blasts Ambassador as She Testifies, Prompting Intimidation Warning from Schiff*, L.A. TIMES (Nov. 15, 2019, 1:47 PM), <https://www.latimes.com/politics/story/2019-11-15/democrats-ukraine-ambassador-marie-yovanovitch-impeachment-inquiry>.

<sup>120</sup> Andrew E. Kramer, *Ukraine's Zelensky Bowed to Trump's Demands, Until Luck Spared Him*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/world/europe/ukraine-trump-zelensky.html>.

<sup>121</sup> Caroline Kelly, *CNN Host Was Set to Interview Ukrainian President Until Scandal Took Shape*, CNN (Nov. 7, 2019, 9:12 PM), <https://www.cnn.com/2019/11/07/politics/volodymyr-zelensky-fareed-zakaria-ukraine-aid/index.html>; Tamara Keith, *Trump, Ukraine and the Path to the Impeachment Inquiry: A Timeline*, NPR (Oct. 12, 2019, 7:00 AM), <https://www.npr.org/2019/10/12/768935251/trump-ukraine-and-the-path-to-the-impeachment-inquiry-a-timeline>.

<sup>122</sup> Keith, *supra* note 121; Kevin Breuninger, *Trump Knew About Whistleblower Complaint Before He Released Ukraine Aid, Report Says*, CNBC (Nov. 27, 2019, 10:35 AM), <https://www.cnbc.com/2019/11/27/trump-knew-about-whistleblower-complaint-before-ukraine-aid-released.html>.

<sup>123</sup> Alan Cullison, Rebecca Ballhaus & Dustin Volz, *Trump Repeatedly Pressed Ukraine President to Investigate Biden's Son*, WALL ST. J. (Sept. 21, 2019, 10:35 AM), <https://www.wsj.com/articles/trump-defends-conversation-with-ukraine-leader-11568993176>.

<sup>124</sup> H.R. Res. 755, 116th Cong. (2019) (enacted); Zachary B. Wolf & Paul LeBlanc, *Trump Has Been Impeached, But He's Still President. What's Next?*, CNN (Dec. 19, 2020,

ceedings presented no serious expectation that Trump would be removed from office—markets seemed more concerned about China’s ongoing trade conflicts with the United States.<sup>125</sup> Business pundits speculated that the conduct giving rise to Trump’s impeachment had minimal bearing on traditional indicators he typically relied on to tout his prowess at managing the economy—such as stock markets, unemployment rates, and GDP.<sup>126</sup>

### B. *A Bruising, Futile Trade War’s Challenge on Re-Election Prospects*

On October 11, 2019—as the impeachment inquiry dragged on—the Trump administration announced the first phase of an agreement to de-escalate what had become a full-blown trade war with China.<sup>127</sup> This was a milestone in trade tensions that began in August of 2017 when the Trump administration commenced an investigation into China’s trade practices under Section 301 of the Trade Act of 1974.<sup>128</sup> This investigation was in fulfilment of promises to get tough on China, which were made during Trump’s presidential campaign.<sup>129</sup> These promises were part of a larger narrative that successfully tapped into grievances over globalization’s impact on the country’s working class.<sup>130</sup> While US consumers enjoyed the benefits of a global trading system that supplied them

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5:40 AM), <https://www.cnn.com/2019/12/18/politics/impeachment-watch-december-18/index.html>.

<sup>125</sup> Paul Davidson, *Stocks Shrug Off Trump’s Impeachment, but Could This Be Different From Clinton, Nixon Sagas?*, USA TODAY (updated Dec. 20, 2019, 11:53 AM), <https://www.usatoday.com/story/money/2019/12/19/impeachment-could-hurt-stocks-even-if-trump-isnt-removed/2697104001/>; Phillip Molnar, *Will Impeachment Hurt the Economy?*, SAN DIEGO TRIB. (Dec. 20, 2019, 6:00 AM), <https://www.sandiegouniontribune.com/business/economy/story/2019-12-20/will-impeachment-hurt-the-economy>; Rapoza, *supra* note 106; Erik Sherman, *How the Impeachment Process Could Impact the Stock Market*, FORTUNE (Sept. 25, 2019, 5:01 PM), <https://fortune.com/2019/09/25/trump-impeachment-news-stock-market-economy-impact/>.

<sup>126</sup> See Rapoza, *supra* note 106.

<sup>127</sup> James Politi & Christian Shepherd, *US and China Strike ‘Phase One’ Deal to De-escalate Trade War*, FIN. TIMES (Dec. 13, 2019), <https://www.ft.com/content/f82cdc4c-1db7-11ea-9186-7348c2f183af>.

<sup>128</sup> Trade Act of 1974 (Sections 301 through 310, 19 U.S.C. §§ 2411–2420) [hereinafter Trade Act]. (1974); Section 301 Investigation Fact Sheet, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/june/section-301-investigation-fact-sheet>.

<sup>129</sup> Nick Corasanti, Alexander Burns, & Binyamin Appelbaum, *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html>.

<sup>130</sup> Stephen Wilks, *A Complicated Alchemy: Theorizing Identity Politics, and the Politicization of Migrant Remittances Under Donald Trump’s Presidency*, 50 CORNELL INT’L L.J. 285, 295-96 (2017).

with cheap goods, they paid a steep price.<sup>131</sup> This became evident in the declining fortunes of workers across America's industrial heartland and the corresponding deterioration of their communities due to shrinking tax bases.<sup>132</sup>

The combined effects of trade liberalization and globalization produced other devastating effects on the working class.<sup>133</sup> Growing wealth gaps and the social cleaving along lines of education, particularly among White, middle-aged men, produced a host of attitudinal changes.<sup>134</sup> A swath of voters became increasingly receptive to political candidates who openly expressed an affinity for racism and xenophobia, and who had a hardening of attitudes towards legal and illegal immigration.<sup>135</sup> But these shifting sentiments differed from the worldview of 80s-era conservative movements. Columnist David Frum described the phenomenon this way:

The rise of these nationalist parties is forcing a rearrangement of the political grammar of the developed world. The conservative parties of the 1980s defended markets and were skeptical of economic redistribution. The nationalist movements of the 2010s are skeptical of markets and defend economic redistribution, provided that the redistribution benefits people of the correct ethnic stock and cultural outlook.<sup>136</sup>

Much like nationalist movements throughout the western world, Trump's campaign exploited this shifting zeitgeist, which included promises to confront Chinese trade practices.<sup>137</sup> After winning the presidential election, Trump's posture toward China reflected a mix of legitimate grievances and political contrivance.

While challenging China's trade practices afforded Trump the chance to project power on the global stage and demonstrate fealty to

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<sup>131</sup> See Mike Collins, *Pros and Cons of Globalization*, FORBES (May 6, 2015, 3:06 PM), <https://www.forbes.com/sites/mikecollins/2015/05/06/the-pros-and-cons-of-globalization/#609a4cbccce0>.

<sup>132</sup> For example, see Robert Ginsburg, *What Plant Closings Cost a Community: The Hard Data*, 1 LAB. RES. REV. 73 (1994); Wendy Patton & Zach Schiller, *Hard Times at City Halls: Ohio Communities Struggle with Damaged Tax Base and State Cuts*, POL'Y MATTERS OHIO (Jan. 7, 2015), <https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/policy/hard-times-at-city-halls-localities-struggle-with-damaged-tax-base-state-cuts>.

<sup>133</sup> Wilks, *supra* note 130, at 286, 301.

<sup>134</sup> *Id.* at 295–296.

<sup>135</sup> *Id.*

<sup>136</sup> David Frum, *Faith, Reason, and Immigration*, ATLANTIC (Mar. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/david-frum-reacts-immigration-responses/585391/>.

<sup>137</sup> Corasaniti et al., *supra* note 129.

blue-collar voters, the project had been plagued by a history of equivocal commitments to trade rule compliance on the part of China, the United States, and private business. In the late 1970s Deng Xiaoping embarked on a series of ambitious reforms to open up China's economy.<sup>138</sup> He sought to re-establish ties to the international trading system for the first time since its 1950 withdrawal from the General Agreement on Tariffs and Trade (GATT).<sup>139</sup> This multi-year project began with negotiating investment treaties with thirty-seven GATT/ World Trade Organization (WTO) countries over a fifteen-year period ending in 1999 and culminated with China's accession to the WTO in 2001.<sup>140</sup> Preconditions to China's accession required commitments to open its market, improve intellectual property protections, adopt a most-favored-nation (MFN) protocol that would end differential treatment it extended to developing countries,<sup>141</sup> and agree to an extensive list of terms under accession protocols.<sup>142</sup>

Just over a year before China's accession to the WTO, the United States enacted Section 421 of the Trade Act of 1974.<sup>143</sup> This provision tracked language in Section 406, which targeted imports from "Communist countries," aiming to prevent them from disrupting US markets.<sup>144</sup> Section 406 owes its origins to Section 201 of the Trade Act of 1974, under which the President may impose import controls or take other action where the US International Trade Commission (ITC) determines certain imported goods are a "substantial cause of serious injury, or [ ]

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<sup>138</sup> Simon Lester & Huan Zhu, *The U.S.-China Trade War: Is There an End in Sight?*, 40 CATO J. 15, 16 (2020). Unfortunately, the scope of this discussion leaves insufficient time to discuss China's seventeenth- and eighteenth-century experience with western powers forcing their way into Chinese markets. For a useful discussion of how this history overshadows China's contemporary trade negotiations with the United States, see Alan Rappeport, *19th Century 'Humiliation' Haunts China-U.S. Trade Talks*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/politics/china-opium-wars-trade-talks.html>.

<sup>139</sup> Henry Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SINGAPORE YEAR BOOK OF INT'L L. 41, 43-44 (2007).

<sup>140</sup> Lester & Zhu, *supra* note 138, at 16; *China and the WTO*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm).

<sup>141</sup> Under the WTO rules, a most-favored-nation (MFN) clause requires signatories to grant concessions, privileges, or immunities granted to one nation in a trade agreement to all member countries. See *Principles of the Trading System*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm).

<sup>142</sup> See *How to Become a Member of the WTO*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/acc\\_e/acces\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/acces_e.htm) (last visited Oct. 3, 2020) ("The Protocol of Accession of the new entrant a Protocol of Accession annexed to the Report which states that the country accedes to the WTO Agreement, defines the Schedules and outlines final provisions for timing of acceptance of the Protocol and full membership of the WTO."). The Accession Protocols generated in connection with China's WTO entry can be found at: *Annex 8 (Revised) to the Draft Protocol on the Accession of China*, WORLD TRADE ORG., GATT Doc. WT/ACC/CHN/42 (June 18, 2001).

<sup>143</sup> Trade Act of 1974 § 423(c), 19 U.S.C. § 2451b(c) (2000).

<sup>144</sup> See 19 U.S.C. § 2436(a) (1999).

threat” to a domestic industry producing similar or competitive products.<sup>145</sup> Section 421 codified terms timed to coincide with China’s entry into the WTO and created presidential authority to grant MFN tariff treatment once accession was complete.<sup>146</sup> Taken together, these domestic and international provisions were expected to have liberalizing effects on China’s economy by putting it on a path towards better integration with Western markets.<sup>147</sup>

Hopes that China would live up to the spirit of WTO rules never materialized. While the Chinese government lowered tariffs and eliminated import quotas, it embarked on a program of state intervention that favored both private domestic firms and state-owned entities.<sup>148</sup> These strategies operated in tandem with a series of rent-seeking behaviors—such as requiring foreign firms to hand over technical expertise and intellectual property as a condition of entering its markets.<sup>149</sup> China was not the only party willing to look past non-compliance with WTO rules. Although China was involved in 44 WTO complaints between 2006 and 2015,<sup>150</sup> Faustian bargains also served to undermine WTO compliance. The willingness to strike these bargains would shape the trajectory of government and private business behavior for decades. While economic incentives made US multinational firms anxious to avoid a full-blown trade war with China, American trade diplomats feared a wave of Section 421 challenges would put pressure on the federal government to re-establish tariffs and hinder the cross-border flow of goods.<sup>151</sup> Foreign businesses operating inside China could still enjoy major profits despite being forced to surrender their intellectual property, technological know-how, and much of their Chinese market share.<sup>152</sup>

Under the shadow of this history, China and the United States held unsuccessful trade talks in the summer of 2017.<sup>153</sup> A wave of tariffs and retaliatory measures ensued, starting with (1) US tariffs on imported

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<sup>145</sup> See generally S. REP. NO. 93-1298, at 7263–64 (1974).

<sup>146</sup> Trade Act, *supra* note 128; JEANNE J. GRIMMETT, CONG. RESEARCH SERV., R40844, CHINESE TIRE IMPORTS: SECTION 421 SAFEGUARDS AND THE WORLD TRADE ORGANIZATION (WTO) 10 (2011).

<sup>147</sup> See GRIMMETT, *supra* note 146.

<sup>148</sup> Paul Blustein, *The Untold Story of How George W. Bush Lost China*, FOREIGN POL’Y (Oct. 2, 2019), <https://foreignpolicy.com/2019/10/04/the-untold-story-of-how-george-w-bush-lost-china/>.

<sup>149</sup> *Id.*

<sup>150</sup> Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261, 262–63 (2016).

<sup>151</sup> See Blustein, *supra* note 148.

<sup>152</sup> *Id.*

<sup>153</sup> *US, China fail to agree on trade, casting doubt on other issues*, CNBC (July 19, 2017, 9:10 PM), <https://www.cnbc.com/2017/07/19/us-china-comprehensive-economic-dialogue-disagreement-over-how-to-reduce-trade-deficit-official-says.html>.

washing machines and solar panels;<sup>154</sup> and (2) 25 percent tariffs on imported steel and 10 percent on imported aluminum.<sup>155</sup> China retaliated by imposing 25 percent tariffs on 128 products.<sup>156</sup> Over the next eighteen months, the two countries engaged in a string of “tit-for-tat” measures, creating problems for US firms obtaining raw materials from foreign sources and selling goods to Chinese markets.<sup>157</sup> The dispute’s scope widened to include US allegations that a Chinese firm, telecommunications giant Huawei Technologies Co., Ltd. (Huawei), was selling hardware and software applications that could support a wide range of industrial and military spying.<sup>158</sup> In August of 2018, Congress passed a law freezing Huawei out of contract opportunities with any U.S. federal agencies.<sup>159</sup> Additionally, the Federal Communications Commission (FCC) banned Huawei from participating in programs created to subsidize access to telecommunications infrastructure across the United States.<sup>160</sup>

While certain historical aspects of Trump’s trade fight may have been righteous, they were overshadowed by resulting job losses,<sup>161</sup> supply chain disruptions,<sup>162</sup> and increased costs to manufacturers and consumers.<sup>163</sup> Weeks after the first phase of dispute settlements concluded in

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<sup>154</sup> Richard Gonzales, *Trump Slaps Tariffs on Imported Solar Panels and Washing Machines*, NPR (Jan 22, 2018, 9:18 PM), <https://www.npr.org/sections/thetwo-way/2018/01/22/579848409/trump-slaps-tariffs-on-imported-solar-panels-and-washing-machines>.

<sup>155</sup> Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018); Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018).

<sup>156</sup> Heather Timmons, *Timeline: Key Dates in the U.S.-China Trade War*, REUTERS (Jan. 15, 2020, 6:08 AM), <https://www.reuters.com/article/us-usa-trade-china-timeline/timeline-key-dates-in-the-u-s-china-trade-war-idUSKBNIZE1AA>.

<sup>157</sup> See David Dollar & Peter A. Petri, *Why it’s Time to End the Tit-for-Tat Tariffs in the U.S.-China Trade War*, BROOKINGS (Oct. 5, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/10/05/why-its-time-to-end-the-tit-for-tat-tariffs-in-the-u-s-china-trade-war/>.

<sup>158</sup> *Open Hearing on Worldwide Threats: Hearing Before the Select Comm. on Intelligence of the U.S. S.*, 115th Cong. 64–65 (2018) (statement of Christopher Wray, Director, Federal Bureau of Investigation).

<sup>159</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889(a), (f)(3)(A), 132 Stat. 1636, 1917–18 (2018).

<sup>160</sup> *In re Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 34 F.C.C.R. 11423, 11433 (2019).

<sup>161</sup> Katia Dmitrieva, *Factory Job Losses Send New Warning Signal to Trump on Trade War*, BLOOMBERG (Oct. 6, 2019, 8:30 AM), <https://www.bloomberg.com/news/articles/2019-10-06/factory-job-losses-send-new-warning-signal-to-trump-on-trade-war>; Jon Basil Utley, *Trump’s Trade War Has Dire Consequences*, THE AM. CONSERVATIVE (Nov. 6, 2019, 12:01 AM), <https://www.theamericanconservative.com/articles/trumps-trade-war-has-consequences/>.

<sup>162</sup> Anthony Rowley, *How Trump’s Trade War Has Morphed into an Attack on Global Tech Supply Chain Networks*, S. CHINA MORNING POST (June 3, 2019, 1:00 AM), <https://www.scmp.com/comment/opinion/article/3012656/how-trumps-trade-war-has-morphed-attack-global-tech-supply-chain>.

<sup>163</sup> David Lawder, *Drag from Trump’s Trade Wars Continues to Ripple Through U.S. Economy*, REUTERS (Jan. 14, 2020, 2:10 PM), <https://www.reuters.com/article/us-usa-trade-china-effects/drag-from-trumps-trade-wars-continues-to-ripple-through-u-s-economy->



October 2019, the Federal Reserve system released a study finding that Trump's trade disputes with China produced few benefits to the economy.<sup>164</sup> As discussed below, the White House's reluctance to further strain relations with China, the President's distrust of federal civil servants, and his preoccupation with an impeachment trial would produce a slow response to a public health crisis that would severely damage the US economy.

### III. COVID-19'S IMPACT ON THE US ECONOMY AND ITS FOOD SUPPLY SYSTEM

This Part describes how several forces converged to pass through US food supply chains. While the US trade war with China transmitted solidarity with nationalist sentiment among Trump's supporters, it delivered more problems than benefits—especially to the agriculture sectors that saw the loss of important foreign markets and required billions in bailouts.<sup>165</sup> Although Trump headed into the impeachment trial enjoying increased support among farmers,<sup>166</sup> the proceedings—combined with the Mueller investigation's findings—reinforced his distrust of federal civil servants.<sup>167</sup> Trump's inclination to dismiss advice coming from experts inside government and a reluctance to derail negotiations to end

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idUSKBN1ZD2GU; Kathryn Russ, *What Trump's Tariffs Have Cost the U.S. Economy*, PBS (Oct. 11, 2019, 5:35 PM), <https://www.pbs.org/newshour/economy/making-sense/what-trumps-tariffs-have-cost-the-u-s-economy>; Shawn Tully, *Trump's Tariffs Were Supposed to Ding China, but the U.S. Economy Is Getting Hit 2.5x Harder*, FORTUNE (Oct. 8, 2019, 12:55 PM), <https://fortune.com/2019/10/08/trump-china-tariffs-trade-war-us-economy-impact/>.

<sup>164</sup> Aaron Flaaen & Justin Pierce, *Disentangling the Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector*, Finance and Economics Discussion Series 2019-086. Washington: Board of Governors of the Federal Reserve System, at 3 (Dec. 23, 2019), <https://doi.org/10.17016/FEDS.2019.086>. (“We find that tariff increases enacted in 2018 are associated with relative reductions in manufacturing employment and relative increases in producer prices. In terms of manufacturing employment, rising input costs and retaliatory tariffs each contribute to the negative relationship, and the contribution from these channels more than offsets a small positive effect from import protection. For producer prices, the relative increases associated with tariffs are due solely to the rising input cost channel. We find little evidence for a relationship between industrial production and any of the three tariff channels considered.”).

<sup>165</sup> Dan Charles, *Farmers Got Billions from Taxpayers in 2019, and Hardly Anyone Objected*, NPR (Dec. 31, 2019, 4:13 PM), <https://www.npr.org/sections/thesalt/2019/12/31/790261705/farmers-got-billions-from-taxpayers-in-2019-and-hardly-anyone-objected>.

<sup>166</sup> John Herath, *Farmer Support for Trump Climbs as Impeachment Vote Nears*, AG WEB (Dec. 17, 2019, 11:15 AM), <https://www.agweb.com/article/farmer-support-trump-climbs-impeachment-vote-nears>.

<sup>167</sup> Evan Osnos, *Trump vs. The “Deep State”*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state>; Tom Porter, *‘The Deep State Is 100% True’: Trump Is Launching an All-out Assault on the US Intelligence Community*, BUSINESS INSIDER (Feb. 21, 2020, 7:04 AM), <https://www.businessinsider.com/trump-all-out-assault-on-us-intelligence-community-apparent-revenge-2020-2>.

trade tensions with China shaped the early US response to Covid-19.<sup>168</sup> By the summer of 2020, the lingering effects of trade conflicts and drastically different food consumption patterns were rippling through the food supply system—a situation complicated by the use of executive power that forced people to work under dangerous conditions for the benefit of a society who called them heroes without treating them as such.

#### A. *The White House's Response to Covid-19*

Covid-19 is caused by severe acute respiratory syndrome 2.<sup>169</sup> According to the Centers for Disease Control and Prevention (CDC), symptoms are wide ranging and can include “[f]ever or chills, [c]ough, [s]hortness of breath or difficulty breathing, [f]atigue, [m]uscle or body aches, [h]eadache, [n]ew loss of taste or smell, [s]ore throat, [c]ongestion or runny nose, [n]ausea or vomiting, [and d]iarrhea.”<sup>170</sup> People who are asymptomatic can also transmit the virus.<sup>171</sup> Patients with more acute symptoms may experience severe breathing problems and other complications that result in death.<sup>172</sup> The virus is transmissible among people in close physical proximity through coughing, sneezing, or talking.<sup>173</sup> As is the case with other airborne diseases, transmission is also possible through the ingestion of droplets that remain suspended in the air over extended periods of time.<sup>174</sup>

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<sup>168</sup> John Gans, *How Can Trump Fight the Pandemic When He's Chasing Experts Out of Government?*, WASH. POST (Mar. 23, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/03/23/trump-firing-coronavirus-experts/> (“Even though the White House has rightly promised a “whole-of-government” pandemic response, which requires all agencies—including national security departments—working together, the government is far from whole. More than two-thirds of the top jobs at the Department of Homeland Security, which plays a key role in domestic response, are vacant or filled by acting officials. The Department of Health and Human Services and other agencies are similarly shorthanded. A hunt for disloyalty makes it harder to find qualified people to fill these jobs and keep the other positions filled: It’s no wonder the White House has resorted to hiring college students.”).

<sup>169</sup> *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963#:~:text=the%20virus%20is%20now%20known,COVID%2D19%20outbreak%20a%20pandemic.>

<sup>170</sup> *Coronavirus Disease 2019 (COVID-19): Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

<sup>171</sup> *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>172</sup> *Coronavirus Disease 2019 (COVID-19): Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>173</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 171.

<sup>174</sup> Ravinder Thaper, Letter to the Editor, *Transmission of SARS-CoV-2 Through the Air*, 10 CURRENT MED. RES. & PRAC. 196 (2020).

Amidst commentary on US-China trade conflicts and ongoing impeachment fight controversies, Covid-19's emergence continued largely unnoticed. According to media reports, the US military's National Center for Medical Intelligence (NCMI) issued an internal report warning that an unknown virus was sweeping through the Wuhan region.<sup>175</sup> The report's precise date of authorship is unclear, but its release came sometime between November of 2019 and January of 2020.<sup>176</sup> The result of covert surveillance, the NCMI report described wholesale changes to life patterns and business activity in the Wuhan region.<sup>177</sup> This surveillance took place around the time a fifty-five-year-old patient from Hubei was being treated for what would later become known as the first recorded case of Covid-19.<sup>178</sup> The mysterious virus would mushroom into an outbreak by December 31, when China finally alerted the World Health Organization (WHO).<sup>179</sup>

By mid-January—when health officials in the Canadian province of Alberta had already mobilized to acquire Personal Protective Equipment (PPE) and other supplies in response to stories coming out of the Wuhan region<sup>180</sup>—President Trump was downplaying Covid-19's threat despite repeated warnings from intelligence analysts and public health experts through the federal government.<sup>181</sup> Two problems were now converging. The first related to Trump's inclination to view federal civil servants with suspicion and distrust—even though their ranks included an interdisciplinary group of desperately needed experts.<sup>182</sup> The second and more difficult problem arose from fears that focusing on Covid-19's origins would further erode trade relations with China.<sup>183</sup> Each of these

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<sup>175</sup> Josh Margolin & James Gordon Meek, *Intelligence Report Warned of Coronavirus Crisis as Early as November: Sources*, ABC NEWS (Apr. 8, 2020, 9:55 PM), <https://abcnews.go.com/Politics/intelligence-report-warned-coronavirus-crisis-early-november-sources/story?id=70031273>.

<sup>176</sup> *Id.*; see also Eric Lipton et al., *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (updated Oct. 2, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>.

<sup>177</sup> Margolin & Meek, *supra* note 175.

<sup>178</sup> Ma, *supra* note 107.

<sup>179</sup> Dweepobotee Brahma, Sikim Chakraborty & Aradhika Menokee, *The Early Days of a Global Pandemic: A Timeline of COVID-19 Spread and Government Interventions*, BROOKINGS (Apr. 2, 2020), <https://www.brookings.edu/2020/04/02/the-early-days-of-a-global-pandemic-a-timeline-of-covid-19-spread-and-government-interventions/>.

<sup>180</sup> David Staples, *Masterminds Behind Alberta's Medical Supplies Surge to Meet COVID-19 Crisis*, EDMONTON J. (Apr. 11, 2020), <https://edmontonjournal.com/opinion/columnists/david-staples-masterminds-behind-albertas-medical-supplies-surge-to-meet-covid-19-crisis>.

<sup>181</sup> Lipton et al., *supra* note 176.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

considerations coalesced around Trump's gamble that he could win re-election on the basis of a growing US economy.<sup>184</sup>

As the crisis continued to evolve, the President meandered from statements of denial to trivializing risk and ultimately to a more involved response when it must have been clear that the continued economic growth he hoped would secure his re-election was disintegrating. Trump discussed Covid-19 for the first time during a January 22 CNBC interview, saying, "It's one person coming in from China, and we have it under control. It's going to be just fine."<sup>185</sup> During a February 10 rally in New Hampshire, he declared, "Looks like by April, you know, in theory, when it gets a little warmer, it miraculously goes away."<sup>186</sup> The WHO formally named the new coronavirus "COVID-19" the following day.<sup>187</sup> On February 24, Trump sent out a tweet, saying, "The Coronavirus is very much under control in the USA. . . . Stock Market starting to look very good to me!"<sup>188</sup> The Dow Jones plummeted more than a 1000 points that day.<sup>189</sup> At a news conference three days later, he said, "It's going to disappear. One day it's like a miracle, it will disappear."<sup>190</sup> By this time, health officials in the State of California had recorded the first non-travel related cases of Covid-19.<sup>191</sup>

By early March, when US Covid-19 cases had reached 153, Trump characterized the situation as one that would minimally impact most Americans, maintaining that "Some people will have this at a very light level and won't even go to a doctor or hospital, and they'll get better. There are many people like that."<sup>192</sup> By March 9th, when the US cases

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<sup>184</sup> *Id.*

<sup>185</sup> *In His Own Words: Trump and the Coronavirus*, REUTERS (Oct. 2, 2020, 2:45 AM), <https://www.reuters.com/article/uk-health-coronavirus-usa-trump-comments/in-his-own-words-trump-and-the-coronavirus-idUKKBN26N0VF>.

<sup>186</sup> Harry Stevens & Shelly Tan, *From 'It's Going to Disappear' to 'WE WILL WIN THIS WAR'*, WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/graphics/2020/politics/trump-coronavirus-statements/>.

<sup>187</sup> Robin Muccari, Denise Chow & Joe Murphy, *Coronavirus Timeline: Tracking the Critical Moments of COVID-19*, NBC NEWS (updated Jul. 8, 2020, 11:40 AM), <https://www.nbcnews.com/health/health-news/coronavirus-timeline-tracking-critical-moments-covid-19-n1154341>.

<sup>188</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2020, 4:42 PM), <https://twitter.com/realdonaldtrump/status/1232058127740174339?lang=en>.

<sup>189</sup> Martha C. White & Lucy Bayly, *Dow Closes Down 1,000 Points as Coronavirus Fears Slam Wall Street*, NBC NEWS (Feb. 24, 2020, 9:32 AM), <https://www.nbcnews.com/business/markets/dow-plunges-950-points-fears-coronavirus-will-tank-global-economic-n1141546>.

<sup>190</sup> Maegan Vazquez & Caroline Kelly, *Trump Says Coronavirus Will 'Disappear' Eventually*, CNN (Feb 27, 2020, 10:12 PM), <https://www.cnn.com/2020/02/27/politics/trump-coronavirus-disappear/index.html>.

<sup>191</sup> Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY REP. 680, 680 (June 5, 2020), <http://dx.doi.org/10.15585/mmwr.mm6922e1>.

<sup>192</sup> Stevens & Tan, *supra* note 186.

surpassed 600 and stock markets had plummeted, Trump's narrative changed again, this time insisting that "The Fake News Media and their partner, the Democrat Party, is doing everything within its semi-considerable power . . . to inflame the CoronaVirus situation."<sup>193</sup> The next day, US cases reached nearly 960, and the President declared, "We're prepared, and we're doing a great job with it. And it will go away. Just stay calm. It will go away."<sup>194</sup>

By March 14, Trump slowly began changing his posture, saying, "We're using the full power of the federal government to defeat the virus, and that's what we've been doing."<sup>195</sup> Three days later, when the number of confirmed US cases surpassed 6,400, he said, "I felt it was a pandemic long before it was called a pandemic."<sup>196</sup> Shortly after his March 24 desire that the US economy would reopen by Easter, Trump completed his pivot towards a wartime posture, insisting that "Nothing would be worse than declaring victory before the victory is won."<sup>197</sup> By then, the number of US Covid-19 deaths had surpassed 2,400.<sup>198</sup>

Absent a vaccine, public health officials determined that the best response was to socially distance and shelter in place—which meant staying home.<sup>199</sup> The resulting disruption to social patterns was swift and stunning, shutting down schools, workplaces, houses of worship, gyms, sporting venues, and other gathering places.<sup>200</sup> Major events, such as concerts, conventions, and sporting events were cancelled.<sup>201</sup> But the efficacy of social distancing and sheltering in place depended on sufficient degrees of widespread societal cooperation, and the President showed no interest in promoting any kind of national strategy to advance such an

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Anne Schuchat & CDC COVID-19 Response Team, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24-April 21, 2020*, 69 MORBIDITY & MORTALITY WKLY REP. 551, 554 (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e2-H.pdf>.

<sup>200</sup> Emma Bowman, *CDC Recommends Against Gatherings of 50 or More; States Close Bars and Restaurants*, NPR (Mar. 15, 2020, 9:03 PM), <https://www.npr.org/2020/03/15/816245252/cdc-recommends-suspending-gatherings-of-50-or-more-people-for-the-next-8-weeks>.

<sup>201</sup> See Meredith Cash, *The Sports World Is Coming to a Grinding Halt Because of Coronavirus, and Now the NBA, MLB, NHL, and NCAA Are Canceling Their Seasons. Here's the Full List*, INSIDER (Mar. 12, 2020, 2:41 PM), <https://www.insider.com/which-sports-seasons-canceled-coronavirus-mlb-nba-nhl-full-list-2020-3>; Irina Ivanova & Thom Craver, *Closed Due to Coronavirus: List of Activities and State Shutdowns over COVID-19 Outbreak Concerns*, CBS NEWS (Mar. 18, 2020, 8:49 AM), <https://www.cbsnews.com/news/closed-due-to-coronavirus-list-of-activities-and-state-shutdowns-over-covid-19-outbreak-concerns/>.

effort.<sup>202</sup> Indeed, the slow White House response and the now-infamously-bizarre press briefings—featuring the world’s leading public health experts who were afraid of contradicting the President<sup>203</sup>—added much confusion about how best to respond to the virus in a political climate already plagued with highly politicized disinformation.<sup>204</sup>

Besides sending incoherent signals, the Trump administration wreaked havoc in the global marketplace where there was intensifying demand for PPE and much-needed ventilators.<sup>205</sup> Trump invoked powers under the Defense Production Act to compel multinational conglomerate The 3M Company (3M) “to send to the United States [N95] masks made in factories overseas and to stop exporting masks the company manufactures in the United States.”<sup>206</sup> In the face of growing demand for medical supplies needed to cope with the crises, hospital systems and public officials at state and local levels found themselves having to compete with the federal government for medical supplies.<sup>207</sup>

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<sup>202</sup> See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to Covid-19*, *NEW ENG. J. MED.* (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006740>.

<sup>203</sup> Philip Rucker, Yasmeen Abutaleb, Josh Dawsey & Robert Costa, *The Lost Days of Summer: How Trump Fell Short in Containing the Virus*, *WASH. POST* (Aug. 8, 2020, 7:23 PM), [https://www.washingtonpost.com/politics/trump-struggled-summer-coronavirus/2020/08/08/e12ceace-d80a-11ea-aff6-220dd3a14741\\_story.html](https://www.washingtonpost.com/politics/trump-struggled-summer-coronavirus/2020/08/08/e12ceace-d80a-11ea-aff6-220dd3a14741_story.html).

<sup>204</sup> Rashaan Ayesh, *Trish Regan Exits Fox Business After Calling Coronavirus a “Scam” on Air*, *AXIOS* (Mar. 28, 2020), <https://www.axios.com/trish-regan-fox-business-coronavirus-e15cadac-72cd-4967-9324-5caeb58d8f08.html>; Libby Cathey, *With String of Attacks on Doctors and Experts, Trump Takes Aim at Science*, *ABC NEWS* (Aug. 6, 2020, 6:35 PM), <https://abcnews.go.com/Politics/string-attacks-doctors-experts-trump-takes-aim-science/story?id=72170408>; Malaka Gharib, *Fake Facts Are Flying About Coronavirus. Now There’s a Plan to Debunk Them*, *NPR* (Feb. 21, 2020, 11:33 AM), <https://www.npr.org/sections/goat-sandsoda/2020/02/21/805287609/theres-a-flood-of-fake-news-about-coronavirus-and-a-plan-to-stop-it>; Dan Kennedy, *Commentary, In the Age of Pandemic, Fox News Is Threatening Our Safety, Our Health and Our Lives*, *WGBH NEWS* (Apr. 22, 2020), <https://www.wgbh.org/news/commentary/2020/04/22/in-the-age-of-pandemic-fox-news-is-threatening-our-safety-our-health-and-our-lives>.

<sup>205</sup> Nahal Toosi, *‘Lord of the Flies: PPE Edition’: U.S. Cast as Culprit in Global Scrum over Coronavirus Supplies*, *POLITICO* (Apr. 3, 2020, 6:07 PM), <https://www.politico.com/news/2020/04/03/ppe-world-supplies-coronavirus-163955>.

<sup>206</sup> Defense Production Act of 1950, Pub. L. 81-774, 64 Stat. 798; Ana Swanson, Zolan Kanno-Youngs & Maggie Haberman, *Trump Seeks to Block 3M Mask Exports and Grab Masks from Its Overseas Customers*, *N.Y. TIMES* (May 26, 2020), <https://www.nytimes.com/2020/04/03/us/politics/coronavirus-trump-3m-masks.html>.

<sup>207</sup> Sergei Klebnikov, *Illinois Gov. Pritzker Secretly Bought Medical Supplies from China. And the White House Is Not Happy*, *FORBES* (Apr. 18, 2020, 5:00 PM), <https://www.forbes.com/sites/sergeiklebnikov/2020/04/18/illinois-gov-pritzker-secretly-bought-medical-supplies-from-china-and-the-white-house-is-not-happy/#16acb4387891> (reporting that Illinois Governor Jay Pritzker secretly orchestrated a supply flight carrying medical supplies directly from China); Ariel Shapiro, *Maryland Gov. Hogan Takes Extraordinary Steps to Keep Feds from Confiscating COVID Tests*, *FORBES* (Apr. 30, 2020, 3:45 PM), <https://www.forbes.com/sites/arielshapiro/2020/04/30/maryland-gov-hogan-takes-extraordinary-steps-to-keep-feds-from-confiscating-covid-tests-trump/#6dbe1f3175d3> (describing how Maryland Governor Larry Hogan arranged a clandestine flight carrying 500,000 test kits from

*B. Covid-19's Effect on Our Eating Habits and Those Working in Our Food Supply Systems*

By the summer of 2020, Covid-19's economic impact had come into clear focus. Americans were experiencing mass layoffs—particularly in the service sectors discussed in Part I—that put millions out of work and drove up unemployment claims to levels not seen since the Great Depression.<sup>208</sup> The GDP contracted at a rate of 32.9 percent.<sup>209</sup> Throughout all of this upheaval, Americans continued eating—as humans are wont to do. As they sheltered in their homes, US consumers adopted new patterns in the way they obtained food, sometimes in ways that were not always logical.<sup>210</sup> This change was evident in Covid-19's impact on places where people normally ate and shopped. As communities experienced local outbreaks of the virus, restaurant bookings plummeted.<sup>211</sup> While restaurants unable to provide “drive thru” or takeout service were especially hard hit,<sup>212</sup> grocery store profits soared.<sup>213</sup> According to one study, traffic at “bulk-buy” retailers—like Sam's Club and Costco—jumped 39 percent in New York City, Seattle, San Francisco, and Los Angeles between February 19 and March 13.<sup>214</sup> Over roughly the same period, downloads for Instacart, the grocery delivery

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South Korea and deployed the National Guard to a secret location where they were kept secured to prevent seizure by the federal government; and how New England Patriots' owner Robert Kraft used the team's plane to locate and ship a million masks from China after officials in Massachusetts had a prior shipment of three million masks confiscated by the U.S. government in the Port of New York).

<sup>208</sup> Rachel Siegel & Andrew Van Dam, *U.S. Economy Contracted at Fastest Quarterly Rate on Record from April to June as Coronavirus Walloped Workers, Businesses*, WASH. POST (July 30, 2020, 6:50 PM), <https://www.washingtonpost.com/business/2020/07/30/gdp-q2-coronavirus/>.

<sup>209</sup> *Id.*

<sup>210</sup> See Stephanie Preston, *COVID-19: Why Hoarding Supplies Is Human Nature, According to a Psychologist*, WORLD ECON. F. (Apr. 2, 2020), <https://www.weforum.org/agenda/2020/04/evolution-coronavirus-covid19-panic-buying-supplies-food-essentials/>; Hope Yen & Aamer Madhani, *Trump Calls on Americans to Cease Hoarding Food, Supplies*, CTV NEWS (Mar. 15, 2020, 11:57 PM), [https://www.ctvnews.ca/health/coronavirus/trump-calls-on-americans-to-cease-hoarding-food-supplies-1.4854040?cache=yes%3FclipId%3D375756%3FautoPlay%3Dtrue%3FautoPlay%3Dtrue%3FautoPlay%3Dtrue](https://www.ctvnews.ca/health/coronavirus/trump-calls-on-americans-to-cease-hoarding-food-supplies-1.4854040?cache=yes%3FclipId%3D375756%3FautoPlay%3Dtrue%3FautoPlay%3Dtrue%3FautoPlay%3Dtrue;);

<sup>211</sup> Vince Dixon, *By the Numbers: COVID-19's Devastating Effect on the Restaurant Industry*, EATER (Mar. 24, 2020), <https://www.eater.com/2020/3/24/21184301/restaurant-industry-data-impact-covid-19-coronavirus> (describing declines in restaurant bookings in regions on the west coast in the wake of Covid-19 outbreaks).

<sup>212</sup> *Id.*

<sup>213</sup> See Mikaela Lefrak, *One Type of Business That's Thriving During Coronavirus? Locally Owned Grocery Stores*, NPR (Mar. 17, 2020), <https://www.npr.org/local/305/2020/03/17/817166724/one-type-of-business-that-s-thriving-during-coronavirus-locally-owned-grocery-stores>; Melissa Repko, *Kroger Stuns with 92% E-commerce Gain, but It Has To Prove It's Not a Coronavirus Blip*, CNBC (June 18, 2020, 2:39 PM), <https://www.cnbc.com/2020/06/18/kroger-stuns-with-92percent-e-commerce-gain-but-it-has-to-prove-its-not-a-coronavirus-blip.html>.

<sup>214</sup> Dixon, *supra* note 211.

service, increased by 215 percent.<sup>215</sup> State-ordered prohibition of dine-in restaurant service reinforced demand for these and other technology-driven services, like Grubhub, Uber Eats, and others.<sup>216</sup>

Changes in US food consumption also exposed problematic relationships between hardening social hierarchies and underlying commercial imperatives, the effects of which would ripple through food supply systems. The newly-unemployed joined the “gig” economy—a service-intensive field populated by freelance labor—crowding into an already marginalized segment of the workforce.<sup>217</sup> Much of this shift occurred in food-related sectors, thanks to technology-driven applications like Instacart, which are on track to hire a total of 550,000 additional workers.<sup>218</sup>

Mass unemployment also created greater food insecurity, eliciting legislative responses in which there was greater bipartisan support for food banks than for expanding food stamp enrollment.<sup>219</sup> In March, Congress enacted The Families First Coronavirus Response Act (Families First Act)<sup>220</sup> and the Coronavirus Aid, Relief, and Economic Security Act (CARES)<sup>221</sup> as part of an economic relief program providing relief payments to Americans impacted by the pandemic. Among other things, the program provided for direct payments to qualifying Americans and increased nutritional benefits for food stamp recipients.<sup>222</sup> While these measures helped restore consumer spending back to pre-pandemic levels, they were temporary and produced little change in demand for in-person services.<sup>223</sup> The expanded food stamp coverage also excluded immi-

<sup>215</sup> *Id.*

<sup>216</sup> Lana Bandoim, *How Food Delivery Apps Are Responding to the Coronavirus*, FORBES (Mar. 20, 2020, 11:23 PM), <https://www.forbes.com/sites/lanabandoim/2020/03/20/how-food-delivery-apps-are-responding-to-the-coronavirus/#7ce1254a55dc>.

<sup>217</sup> Alana Semuels, *‘It’s a Race to the Bottom.’ The Coronavirus Is Cutting into Gig Worker Incomes as the Newly Jobless Flood Apps*, TIME (May 15, 2020, 8:05 AM), <https://time.com/5836868/gig-economy-coronavirus/> (“Put simply, with at least 36 million newly jobless people in America alone as of mid-May, there are now too many would-be workers to make the gig economy viable for many of them, and this may be irreversible as companies adapt to the reality of a global recession. By keeping head counts low, they’ll drive more desperate people into the gig economy, expanding the potential labor pool for jobs and driving down the prices that workers can command.”).

<sup>218</sup> *Id.*

<sup>219</sup> See Stephanie Armstrong, Ed Yowell, & SFUSA Food & Farm Policy Working Grp., *Food and AG in the CARES Act*, SLOW FOOD USA, <https://slowfoodusa.org/food-and-ag-in-the-cares-act/> (last visited Sept. 27, 2020).

<sup>220</sup> Families First Coronavirus Response Act, Pub. L. No. 116–127, 134 Stat. 177 (2020).

<sup>221</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>222</sup> Erica Werner, Mike DeBonis, Paul Kane & Jeff Stein, *Senate, White House Reach \$2 Trillion Stimulus Deal to Blunt Coronavirus Fallout*, WASH. POST (Mar. 25, 2020, 7:26 AM), <https://www.washingtonpost.com/us-policy/2020/03/24/trump-coronavirus-congress-economic-stimulus/>.

<sup>223</sup> Chetty, et al., *The Economic Impacts of Covid-19: Evidence from a New Public Database Built from Private Sector Data* (Nov. 2020) (unpublished) (download available at



grants and a wide swath of enrollees.<sup>224</sup> By July, 26 million US adults reported not having enough to eat.<sup>225</sup> According to findings published by the Hamilton Project in early July of 2020, there were children in nearly one-in-three households that experienced food insecurity over the preceding month.<sup>226</sup> Another study yielded worse figures for Black and Hispanic households with children, about 40 percent of whom were reportedly struggling to feed their families.<sup>227</sup>

The pandemic also exposed the fragile and inflexible nature of the food supply chain in a country where hunger and food surpluses were both on the rise. While millions of Americans lacked enough food to eat, farmers were unable to sell surplus goods bound for clients shuttered by the pandemic.<sup>228</sup> Despite bipartisan support for directing the USDA to purchase some of this food for service organizations,<sup>229</sup> such diversions were not enough to prevent farmers from dumping milk, plowing under

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Opportunity Insights, [https://opportunityinsights.org/wp-content/uploads/2020/05/tracker\\_paper.pdf](https://opportunityinsights.org/wp-content/uploads/2020/05/tracker_paper.pdf)) (“Stimulus payments made to households in mid-April 2020 increased spending among low-income households sharply, nearly restoring their spending to pre-COVID levels by late April . . . [M]ost of this increase in spending was in sectors that require limited physical interaction: purchases of durable goods surged, while consumption of in-person services increased much less. As a result, little of the increased spending flowed to businesses most affected by the COVID-19 shock, potentially limiting the capacity of the stimulus to increase economic activity and employment because of diminished multiplier effects.”).

<sup>224</sup> Sharon Parrott et al., *More Relief Needed to Alleviate Hardship*, CTR. ON BUDGET & POL’Y PRIORITIES (July 21, 2020), at 3–4, <https://www.cbpp.org/sites/default/files/atoms/files/7-21-20pov.pdf> (“ . . . the SNAP benefit boost now in place entirely misses the poorest 40 percent of SNAP households, including at least 5 million children. And the fiscal relief to date for states, localities, territories, and tribes falls far short of projected revenue shortfalls, leaving states and other governments with little choice but to plan for major budget cuts that will, among other harmful impacts, result in layoffs of teachers and other public sector workers as well as workers in businesses and nonprofit agencies that depend on government for business or for funding.”).

<sup>225</sup> *Id.* at 7.

<sup>226</sup> Lauren Bauer, *About 14 Million Children in the US Are Not Getting Enough to Eat*, HAMILTON PROJECT BLOG (July 9, 2020), [https://www.hamiltonproject.org/blog/about\\_14\\_million\\_children\\_in\\_the\\_us\\_are\\_not\\_getting\\_enough\\_to\\_eat](https://www.hamiltonproject.org/blog/about_14_million_children_in_the_us_are_not_getting_enough_to_eat).

<sup>227</sup> Diane Schanzenbach & Abigail Pitts, *How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey*, NW. INST. FOR POL’Y RES. 3 (June 10, 2020), <https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf>.

<sup>228</sup> Ula Chrobak, *Why Farmers Are Forced to Let Food Rot During the Shutdown While Others Go Hungry*, POPULAR SCI. (Apr. 16, 2020), <https://www.popsci.com/story/environment/food-rotting-covid-shutdown/>; Laura Reiley, *Full Fields, Empty Fridges*, WASH. POST (Apr. 23, 2020), <https://www.washingtonpost.com/business/2020/04/23/fixing-food-dumping-food-banks/?arc404=true> [hereinafter Reiley, *Full Fields*].

<sup>229</sup> *USDA Announces Coronavirus Food Assistance Program*, U.S. DEP’T OF AGRICULTURE, Release No. 0222.20 (Apr. 17, 2020), <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program> (“President Trump directed USDA to craft this \$19 billion immediate relief program to provide critical support to our farmers and ranchers, maintain the integrity of our food supply chain, and ensure every American continues to receive and have access to the food they need.”).

crops, and euthanizing animals.<sup>230</sup> One *Washington Post* article succinctly captured the underlying problem:

. . . the effort must overcome the challenges that led to the disconnect in the first place: Fresh produce and dairy must be transported from farms to food banks in refrigerated trucks. Refrigerator and freezer storage space must be available on the receiving end to accommodate a surge of frozen meat. Food that originally was slated for restaurant supply must be repackaged for home use. And all of this must occur while maintaining social distancing and without increasing the demand for labor because food banks, while running low on supplies, are running even lower on volunteers.<sup>231</sup>

The food supply chain's inflexibility added to these problems. Absent a vaccine or any forecast regarding the prospective duration or efficacy of sheltering in place, farmers, brokers and other intermediaries could not make the necessary "make or buy" decisions that inform the design of distribution networks.<sup>232</sup> This made diverting inventory to match changing consumption patterns impossible.<sup>233</sup> With varying degrees of success, restaurants attempted makeshift transformations into grocery stores.<sup>234</sup> But these efforts have proven to be of limited effect because a restaurant's value proposition comes from preparing and serving food rather than selling the culinary equivalent of raw materials.<sup>235</sup> The roughly 16,000 permanent restaurant closures as of July 24, 2020,

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<sup>230</sup> Reiley, *Full Fields*, *supra* note 228.

<sup>231</sup> *Id.*

<sup>232</sup> See Jill E. Hobbs, *Food Supply Chains During the Covid-19 Pandemic*, 68 *CANADIAN J. AGRIC. ECON.* 171, 171–72 (Apr. 15, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/cjag.12237>.

<sup>233</sup> See Laura Reiley, *The Industry Says We Have Enough Food. Here's Why Some Store Shelves Are Empty Anyway*, *WASH. POST* (Apr. 14, 2020, 5:00 AM), <https://www.washingtonpost.com/business/2020/04/14/grocery-stores-empty-shelves-shortage/>.

<sup>234</sup> Camila Domonoske, *A Pound of Flour to Go? Restaurants Are Selling Groceries Now*, *NPR* (Apr. 13, 2020, 4:54 PM), <https://www.npr.org/2020/04/13/831635629/a-pound-of-flour-to-go-restaurants-are-selling-groceries-now>; Hannah Goldfield, *The Restaurants Transforming into Grocery Stores*, *NEW YORKER* (May 8, 2020), <https://www.newyorker.com/magazine/2020/05/18/the-restaurants-transforming-into-grocery-stores>; Kate Krader, *To Reopen, Restaurants Are Doubling Down on Becoming Grocery Stores*, *BLOOMBERG* (May 20, 2020, 5:40 AM), <https://www.bloomberg.com/news/articles/2020-05-20/how-will-restaurants-reopen-after-coronavirus-as-grocery-stores>.

<sup>235</sup> Rachel Siegel, *Cheeseburger with a Side of Toilet Paper and Dog Food: Restaurants Pivot to Groceries to Stay in Business*, *WASH. POST* (Apr. 11, 2020, 2:32 PM), <https://www.washingtonpost.com/business/2020/04/11/restaurant-grocery-sell-coronavirus/> ("A restaurant's value add—and chance to make a profit—doesn't come from selling sliced bread and avocados but from plated avocado toast.").

reveal the extent to which the restaurant-turned-grocery store model was not a viable option for all eating and drinking establishments.<sup>236</sup>

As the pandemic continued sweeping across the country, agricultural workers continued toiling on farms, planting, picking, and packing produce with few precautions in place to contain the spread of Covid-19.<sup>237</sup> Prior to Covid19's appearance, farmworkers had long lived and labored under difficult conditions. Published in 2009, a 2007 survey of 255 migrant workers, about two-thirds reported having access to water for hand washing;<sup>238</sup> half reported having access to soap and only 40 percent had disposable towels for drying their hands;<sup>239</sup> 36 percent reported using facilities where eight or more workers shared a bathroom;<sup>240</sup> roughly 25 percent reported eight or more workers sharing the same showerhead;<sup>241</sup> and 20 percent reported sharing the same washtub or washing machine or having no place to wash their clothes.<sup>242</sup> Most farm workers remain excluded from protections available to most employees under the National Labor Relations Act of 1935<sup>243</sup> and the Fair and Labor Standards Act of 1938,<sup>244</sup> While the Migrant and Seasonal Agricultural Worker Protection Act (MSAWA)<sup>245</sup> articulates guidelines for establishing employment standards related to wages,<sup>246</sup> transportation,<sup>247</sup> housing,<sup>248</sup> disclosures,<sup>249</sup> and recordkeeping,<sup>250</sup> sadly, compliance problems have added to the power imbalances discussed in Part II to erode the MSAWA's efficacy.<sup>251</sup> They also sustain lingering vestiges of a US agricultural system conceived to support hierarchies that cleave

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<sup>236</sup> Kelley McCarthy, *Nearly 16,000 Restaurants Have Closed Permanently Due to the Pandemic, Yelp Data Shows*, ABC NEWS (Jul. 24, 2020, 9:19 PM), <https://abcnews.go.com/Business/16000-restaurants-closed-permanently-due-pandemic-yelp-data/story?id=71943970>.

<sup>237</sup> Mónica Ramírez & Meena Harris, *Farmworkers Deemed 'Essential' but Are Left Unprotected During Coronavirus Pandemic*, FORTUNE (Apr. 3, 2020, 3:00 PM), <https://fortune.com/2020/04/03/farmworkers-coronavirus-essential-workers-covid-19-agriculture/>.

<sup>238</sup> Lara E. Whalley et al., *Migrant Farmworker Field and Camp Safety and Sanitation in Eastern North Carolina*, 14 J. AGROMEDICINE 421, 421, 427 (2009).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

<sup>244</sup> Fair Labor Standards Act, 29 U.S.C. § 203 (2018).

<sup>245</sup> Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (1983).

<sup>246</sup> 29 U.S.C. § 1831(a)(1)(B); 29 C.F.R. §§ 500.75 (b)(2) (1996).

<sup>247</sup> 29 U.S.C. § 1831(a)(1)(E).

<sup>248</sup> 29 U.S.C. § 1821(a)(5).

<sup>249</sup> 29 U.S.C. § 1821.

<sup>250</sup> *Id.*

<sup>251</sup> Fedline Ferjeste, *The Agricultural Worker Protection Act & Florida's Migrant Worker: The Hands that Feed Florida*, 1 AM. U. LAB. & EMP. L.F. 279, 283 (2011) (describing how growers try to circumvent statutory requirements by treating workers or their crew leaders as independent contractors); Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213,

along racial lines.<sup>252</sup> Today's farmworkers continue to operate under conditions that interfere with protocols that might slow the spread of Covid-19. They tend to work in close proximity, travel in groups between jobs, and live in crowded housing.<sup>253</sup>

While the scaling back or shutting down of food and drinking establishments decimated workers at the output and input segments, those working in meat processing plants are trapped at the nexus of three dangerous problems. The first problem is related to the nature of meat processing facilities. These settings lend themselves to Covid-19 transmission because they are cold, damp, indoor settings where noisy machinery forces people to shout while standing in close proximity to each other.<sup>254</sup> Many of those working inside these plants are also H-2A guest workers—discussed in Part I—who are living in crowded, employer-provided accommodations.<sup>255</sup> This relationship between context and transmission was borne out in data published by the CDC in July 2020.<sup>256</sup> The study was based on the results of survey data collected from 239 meat and poultry processing facilities in twenty-three states in April and May, which reported 16,233 cases—87 percent occurring among racial and ethnic minorities—and 86 deaths.<sup>257</sup>

Media commentary documenting managerial attitudes about establishing workplace safety protocols reveals a priority of profit over people

216 (1990) (describing how growers try to transform workers into “contractors” to shift risks of agricultural employment).

<sup>252</sup> Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 127 (2011) (“The original southern desire to preserve an exploited, economically deprived non-white agricultural labor force pinned to the bottom of the social and economic hierarchy continues to manifest itself full-force. Although estimates of the size of the farmworker population vary, there are approximately two to three million agricultural workers. The huge majority, approximately eighty-three percent, are Latino. They live in terrible poverty; the median annual income for migrant farm workers is about \$7,500. Thirty percent of all farm workers live below the national poverty level, despite being employed. Statutory exclusions originally intended to keep blacks impoverished and subservient now keep Latino farm and domestic workers subservient.” (citations removed)).

<sup>253</sup> Ramírez & Harris, *supra* note 237.

<sup>254</sup> Anthony Reuben, *Coronavirus: Why Have There Been so Many Outbreaks in Meat Processing Plants?*, BBC NEWS (June 23, 2020), <https://www.bbc.com/news/53137613>.

<sup>255</sup> *Id.*

<sup>256</sup> Michelle A. Waltenburg et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 887 (2020), <http://dx.doi.org/10.15585/mmwr.mm6927e2> (“Distinctive factors that increase meat and poultry processing workers’ risk for exposure to SARS-CoV-2, the virus that causes COVID-19, include prolonged close workplace contact with coworkers (within 6 feet for =15 minutes) for long time periods (8–12 hour shifts), shared work spaces, shared transportation to and from the workplace, congregate housing, and frequent community contact with fellow workers. Many of these factors might also contribute to ongoing community transmission.”).

<sup>257</sup> *Id.*

and a casual disregard for employees. In mid-March, the CEO of Smithfield Foods—a major meat processing firm—sent a letter to the Governor of Nebraska expressing concern that stay-at-home orders might dissuade his employees from showing up to work.<sup>258</sup> The letter went on to describe social distancing as “a nicety that makes sense only for people with laptops.”<sup>259</sup> Major food processor Tyson Foods (Tyson) took a more aggressive posture after an outbreak of Covid-19 at its plant in Wilkesboro, North Carolina.<sup>260</sup> After county health officials took notice, Tyson privatized employee testing and withheld more than 80 percent of the results.<sup>261</sup> When the state public health officials threatened legal action, Tyson released testing results indicating that a fifth of the plant’s workers—almost 600 people—had tested positive for Covid-19.<sup>262</sup> Often occurring in small, rural locations, these business practices also jeopardized communities that could be easily overwhelmed by a health crisis.<sup>263</sup>

The second problem related to Covid-19’s contribution to pre-existing problems in the meat processing business is that Covid-19 transformed the focus on workplace conditions and heightened health risks into debates about how a pandemic-stricken society could continue feeding itself despite wide-scale disruption.<sup>264</sup> In addition to facing high rates of injury and death relative to counterparts in the larger food processing sector, workers in the industry’s poultry plants are particularly vulnerable.<sup>265</sup> Often large multinational firms, their employers have worked to replace unionized labor with contract workers—often immigrants supplied through temp agencies.<sup>266</sup> Subject to less regulatory scrutiny under a Trump presidency in which corporate prosecutions were generally declining,<sup>267</sup> these firms also rely on undocumented labor with few enforcement consequences.<sup>268</sup>

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<sup>258</sup> Michael Grabell, Claire Perlman & Bernice Young, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020, 2:04 PM), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants>.

<sup>259</sup> *Id.* (internal quotation marks removed).

<sup>260</sup> *See id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> Renea Merle, *As Workplace Raids Multiply, Trump Administration Charges Few Companies*, WASH. POST (Aug. 9, 2019, 5:45 PM), <https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies/>.

<sup>265</sup> *See discussion supra* Part I.

<sup>266</sup> Mayer, *supra* note 25.

<sup>267</sup> Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 114–15 (2020) (discussing the decline in corporate prosecutions in the first eighteen months of the Trump administration and that cases resulting in larger penalties were “legacies” initiated and investigated under the Obama administration).

<sup>268</sup> Merle, *supra* note 264.

In a public relations strategy that played on fears in a marketplace where grocery stores were imposing consumer purchasing limits to prevent hoarding,<sup>269</sup> Tyson CEO John H. Tyson ran full-page ads in *The Washington Post*, *The New York Times*, and *Arkansas Democrat-Gazette*, framing the need for its plants to remain open as a matter of national urgency.<sup>270</sup> “The food supply chain is breaking,” he said, insisting, “We have a responsibility to feed our country. It is as essential as healthcare. This is a challenge that should not be ignored. Our plants must remain operational so that we can supply food to our families in America.”<sup>271</sup> Tyson’s claims were syndicated across several media outlets across the country.<sup>272</sup> Already rattled by the pandemic’s massive disruptions, news of the climbing number of cases, climbing death tolls, and wholesale upending of their lives, panicked consumers were unlikely to appreciate any distinction between a supply chain that was broken or lacking the agility needed to meet new consumption patterns.<sup>273</sup> A day after Tyson’s media blitz, President Trump issued an executive order declaring meat processing plants an essential service—effectively compelling their employees to show up for work.<sup>274</sup>

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<sup>269</sup> Ann Maloney, *Go Grocery Shopping Every Two Weeks? You Can—and Without Hoarding.*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/news/voraciously/wp/2020/04/01/go-grocery-shopping-every-two-weeks-you-can-and-without-hoarding/>; Hanna Ziady, *Panic Buying is Forcing Supermarkets to Ration Food and Other Supplies*, CNN (Mar. 18, 2020, 1:52 PM), <https://www.cnn.com/2020/03/18/business/supermarkets-rationing-coronavirus/index.html>.

<sup>270</sup> Katie Shepherd, *‘The Food Supply Chain Is Breaking’: Tyson Foods Raises Coronavirus Alarm in Full-Page Ads, Defends Safety Efforts*, WASH. POST (Apr. 27, 2020, 6:58 AM), <https://www.washingtonpost.com/nation/2020/04/27/tyson-food-supply-coronavirus/>.

<sup>271</sup> *Id.* (internal quotation marks removed).

<sup>272</sup> Daniel Arkin, *Tyson Foods Chairman Warns ‘the Food Supply Chain Is Breaking’*, NBC NEWS (Apr. 27, 2020, 10:16 AM), <https://www.nbcnews.com/news/us-news/tyson-foods-chairman-warns-food-supply-chain-breaking-n1193256>; Zack Budryk, *Tyson Foods Takes Out Full-Page Ad: ‘The Food Supply Chain Is Breaking’*, HILL (Apr. 27, 2020, 9:05 AM), <https://thehill.com/policy/healthcare/494772-tyson-foods-takes-out-full-page-ad-the-food-supply-chain-is-breaking>; Kenya Evelyn, *Major US Meat Producer Warns ‘Food Supply Chain Is Breaking’*, GUARDIAN (Apr. 27, 2020), <https://www.theguardian.com/us-news/2020/apr/27/tyson-foods-coronavirus-food-supply-chain>; Kate Gibson, *‘Food Supply Chain Is Breaking,’ Tyson Foods Chairman Warns Amid Meat Plant Shutdowns*, CBS NEWS (Apr. 27 2020 7:53 PM), <https://www.cbsnews.com/news/tyson-foods-chairman-food-supply-chain-breaking-meat-plant-shutdowns-coronavirus-pandemic/>; Ron McLean, *‘The Food Supply Chain Is Breaking,’ Tyson Says as Plants Close*, CNN (Apr. 26, 2020, 11:11 PM), <https://www.cnn.com/2020/04/26/business/tyson-foods-nyt-ad/index.html>.

<sup>273</sup> Jim Vinoski, *Tyson’s Chairman Said ‘The Food Supply Chain Is Breaking.’ Here’s Why He’s Wrong.*, FORBES (Apr. 30, 2020, 12:58 PM), <https://www.forbes.com/sites/jimvinoski/2020/04/30/tysons-chairman-said-the-food-supply-chain-is-breaking-heres-why-hes-wrong/#2b98b4955155> (describing how “the dumping of milk and plowing under of vegetables” was caused by food chains that were inflexible rather than broken. “Our supply chains aren’t broken—they’re adapting to those new realities.”).

<sup>274</sup> Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

Dangerous working conditions converged with a corporate-driven narrative exploiting public fear to produce a third problem, namely the deployment of executive state power to deem them so indispensable to the project of fulfilling their society's needs. In successfully reframing the problem of inflexible supply chains into a narrative about the potential for nation-wide meat shortages, Tyson preserved demand for his products while protecting his industry's economic interests.<sup>275</sup> But he also gave credence to the notion that using government power to curtail the autonomy of "essential" workers was the only viable way for the United States to feed its populace—no matter the human cost.<sup>276</sup> Buffeted by the effects of an ill-conceived trade war, the President's mistrust of government, and a slow response to the pandemic, food and agricultural workers were conscripted into a dangerous form of public service. As discussed in Part IV, to attribute heroic qualities to those whom society has strategically marginalized is to summon instincts far worse than pernicious folly.

#### IV. CRITIQUING THE HOLLOW RHETORIC OF HEROISM IN A TIME OF SELECTIVE CONSCRIPTION

This Part of the Article critiques contradictions inherent in the rhetoric of valorizing workers whom we are victimizing, arguing such language invites us to look past forces keeping food and agricultural workers trapped at the bottom of our social hierarchies. It also problematizes law's role in crafting relationships between autonomy and social standing by signaling a preference for some expressions of choice over others. As Covid-19 continues to sweep through the US population, the varied and socially harmful nature of these expressions undermines the only viable public health responses available pending development of a vaccine.

While much of the US populace shelters in place during the pandemic, workers in occupational classes deemed "essential" continue providing goods and services ranging from healthcare to commercial transportation.<sup>277</sup> As of May 2020, there were 55 million essential workers in the United States.<sup>278</sup> Almost 11.4 million worked in food and agriculture, accounting for the second largest cohort of essential workers

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<sup>275</sup> Vinoski, *supra* note 273.

<sup>276</sup> Peter Coy, *The Human Cost of Cheap Meat Gets Higher in the Pandemic*, BLOOMBERG (last updated May 4, 2020), <https://www.bloombergquint.com/businessweek/meat-plant-workers-face-more-dangerous-conditions-in-coronavirus>.

<sup>277</sup> Celine McNicholas & Margaret Poydock, Working Econ. Blog, *Who Are Essential Workers?*, ECON. POL'Y INST. (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates>.

<sup>278</sup> *Id.*

after healthcare professionals.<sup>279</sup> Half were people of color.<sup>280</sup> These workers have been praised as heroes for keeping the country fed despite working under intensely stressful conditions and at heightened risk of Covid-19 exposure.<sup>281</sup> But these heroes exist in a climate where declaring occupational classes essential in the Covid-19 context is both a legal and social sorting device.

Presidential declarations deeming workers “essential” are colloquialisms used to describe specific levels of power rooted in congressional authority and in the US Constitution. While Article II of the Constitution vests the federal government’s executive power in the Office of the President,<sup>282</sup> congressional authority provides more specific and context-dependent basis for action in times of crisis.<sup>283</sup> The Executive Order issued to “declare meat and poultry processing essential,” for example, was derived from the Defense Production Act of 1950 (DPA).<sup>284</sup> Enacted following the outbreak of the Korean War to ensure the United States had sufficient defense supplies, the DPA gives the President power to ensure US industries produce material in aid of national defense.<sup>285</sup> Congress has reauthorized the DPA more than 50 times, including in 2018.<sup>286</sup>

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<sup>279</sup> *Id.* at tbl. 1.

<sup>280</sup> *Id.* at tbl. 2.

<sup>281</sup> Jonah Braverman, *Unsung Heroes: Food Workers During the Covid Crisis*, MORNING-SIDE CTR. (Apr. 27, 2020), <https://www.morningsidecenter.org/teachable-moment/lessons/unsung-heroes-food-workers-during-covid-crisis>; Tyne Morgan, *Saluting Unsung Heroes of the COVID19 Crisis: The Food Supply Chain.*, AG WEB (Apr. 6 2020, 4:00 PM), <https://www.agweb.com/article/saluting-unsung-heroes-covid-19-crisis-food-supply-chain>; Taylor Telford & Kimberly Kindy, *As They Rushed to Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, WASH. POST (Apr. 25, 2020, 4:28 P.M.), <https://www.washingtonpost.com/business/2020/04/25/meat-workers-safety-jbs-smithfield-tyson/>.

<sup>282</sup> U.S. CONST. art. II, § 1.

<sup>283</sup> Michael H. Cecire & Heidi M. Peters, CONG. RESEARCH SERV., R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS* (2020).

<sup>284</sup> Pub. L. No. 81-774 50 U.S.C. 4501 (1950) et seq.; Ana Swanson & David Yaffe-Bellany, *Trump Declares Meat Supply ‘Critical,’ Aiming to Reopen Plants*, N.Y. TIMES (updated Apr. 29, 2020), <https://www.nytimes.com/2020/04/28/business/economy/coronavirus-trump-meat-food-supply.html>.

<sup>285</sup> See *Defense Production Act Authority and Functions of the FEMA Administrator*, FED. EMERGENCY MGMT. AGENCY (last updated June 30, 2020), <https://www.fema.gov/disasters/defense-production-act/dpa-authority-and-functions>; Salvador Rizzo, *What to Know About the Defense Production Act*, WASH. POST (Mar. 25, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/03/25/is-trump-using-defense-production-act/>.

<sup>286</sup> Cecire & Peters, *supra* note 283. The use of DPA powers has long been the subject of intense debate centered on questions about the proper scope of executive power. This debate is a legacy of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a landmark case that successfully challenged President Truman’s decision to seize a steel mill in response to a labor strike. In limiting the President’s power to seize private property, the court placed limits on the scope of executive power when exercised in the name of national security. For a useful discussion of the doctrinal developments resulting from this ruling, see Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer*



Despite ongoing strain from the pandemic's economic and structural disruptions and the mounting Covid-19 death toll across the United States, the President has been reluctant to use his DPA powers—invoking them only four times since the crisis began.<sup>287</sup> Ignoring pleas from members of Congress, Trump has preferred to signal concern for commercial imperatives perceiving DPA action as a nationalization mechanism.<sup>288</sup> However, using federal powers such as those found in the DPA proved beneficial to larger private interests. By securing control over workforces disbursed across dozens of states, these orders allowed their corporate beneficiaries to sidestep state-level governments taking different responses to the pandemic.<sup>289</sup> This was an important benefit that came at the cost of limiting choices available to employees who might have been apprehensive about working under dangerous conditions made more so by the threat of contracting Covid-19.

The President deployed his selective, restrained use of power in tandem with expressions of solidarity with protestors challenging states acting within the remit of their constitutional power.<sup>290</sup> US constitutional law entrusts state-level elected governments with the task of protecting

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*in National Security Jurisprudence*, 16 J.L. & POL. 1 (2000); Stephen D. Marcus, *The Presidency Crisis—A Study of Power Allocation in United States Government*, 4 LOY. U. CHI. L.J. 319, 322 (1973).

<sup>287</sup> Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (April 28, 2020) (delegating authority under the DPA with respect to food supply chain resources during the national emergency caused by the outbreak of COVID-19); Exec. Order No. 13,911, 85 Fed. Reg. 18403 (Mar. 27, 2020); Memorandum on an Order Under the Defense Production Act of 1950 Regarding 3M Company (Apr. 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/> (regarding authority under the DPA to acquire N-95 respirators from subsidiary or affiliate of 3M Company); Exec. Order No. 13,910 85 Fed. Reg. 17,001 (Mar. 23, 2020) (preventing hoarding of health and medical resources to respond to the spread of COVID-19); Exec. Order. No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020) (prioritizing and allocating health and medical resources to respond to the spread of COVID-19).

<sup>288</sup> Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not with Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html> (“You know, we’re a country not based on nationalizing our business . . . Call a person over in Venezuela, ask them how did nationalization of their businesses work out? Not too well.” (internal quotation marks removed)).

<sup>289</sup> See Bruce Rolfsen & Fatima Hussein, *Trump’s Meatpacking-Plant Decree Set to Collide with State Laws*, BLOOMBERG (Apr. 30, 2020, 2:33 PM), [https://www.bloomberglaw.com/document/XB7H3AQK000000?bna\\_news\\_filter=safety&jcsearch=BNA%252000000171c693d896a5fbded3a6d30001#jcite](https://www.bloomberglaw.com/document/XB7H3AQK000000?bna_news_filter=safety&jcsearch=BNA%252000000171c693d896a5fbded3a6d30001#jcite).

<sup>290</sup> See Bill Hutchinson, *Protests Against Coronavirus ‘Stay-at-Home’ Orders Spread Across the Country*, ABC NEWS (Apr. 20, 2020, 4:40 PM), <https://abcnews.go.com/US/protests-coronavirus-stay-home-orders-spread-country/story?id=70242988>; Editorial Board, *Why Trump Ordering Meat Plants to Stay Open Is Worrisome*, WASH. POST (April 29, 2020, 5:43 PM), [https://www.washingtonpost.com/opinions/trump-wont-use-the-defense-production-act-for-medical-supplies-but-hell-use-it-for-meat/2020/04/29/2ed2b170-8a4d-11ea-8ac1-bfb250876b7a\\_story.html](https://www.washingtonpost.com/opinions/trump-wont-use-the-defense-production-act-for-medical-supplies-but-hell-use-it-for-meat/2020/04/29/2ed2b170-8a4d-11ea-8ac1-bfb250876b7a_story.html).

the “[t]he safety and the health of the people.”<sup>291</sup> Citing *Marshall v. United States*,<sup>292</sup> a majority of the US Supreme Court recently reaffirmed this principle in the Covid-19 context, maintaining that state-level officials enjoy particularly broad discretion when acting in areas “fraught with medical and scientific uncertainties” and where highly dynamic circumstances continue to shape their response.<sup>293</sup> The majority also took the view that an unelected federal judiciary’s primary concern was to assess adherence to the limits of this discretion, rather than second-guess state-level decision-making in matters in which it lacked the subject matter competence to address.<sup>294</sup> State-wide restrictions closing schools and parks, shutting down non-essential businesses, and limiting the number of public gatherings prompted litigation across the country.<sup>295</sup> Religious freedom arguments have animated most of these claims, with the notable exception of a successful challenge to lockdown restrictions in Wisconsin.<sup>296</sup>

Litigation challenging state restrictions occurred alongside protests across the country,<sup>297</sup> reflecting a near-absolutist construction of personal autonomy deemed incompatible with any legal oversight. The most dramatic protests took place in Michigan, where heavily-armed protestors entered the State Capitol building<sup>298</sup>—a dramatic strategy only possible owing to the absence of legislation prohibiting the public from carrying

<sup>291</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

<sup>292</sup> 414 U.S. 417, 427 (1974).

<sup>293</sup> *Id.*; *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) [hereinafter *South Bay United Pentecostal Church*] (An unsuccessful application to enjoin California Governor Gavin Newsom’s Executive Order imposing restrictions on the number of people who may gather in public places to slow the spread of Covid-19).

<sup>294</sup> *South Bay United Pentecostal Church*, *supra* note 293, at 1613–14; *see also* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545–46 (1985).

<sup>295</sup> *Jacob Gershman, Lawsuits Pile Up Against Coronavirus Lockdown Measures*, WALL ST. J. (Apr. 25, 2020, 5:30 AM), <https://www.wsj.com/articles/lawsuits-pile-up-against-coronavirus-lockdown-measures-11587807000>; *Eric Posner, You Can Sue to Stop Lockdowns, but You Can’t Sue to Get Them. That’s Dangerous.*, WASH. POST (May 4, 2020, 6:00 AM), [https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9d9c71fc\\_story.html](https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9d9c71fc_story.html).

<sup>296</sup> *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 905 (Wis. 2020) (finding that the state’s Department of Health Services designee failed to comply with state rulemaking requirements under Wis. Stat. § 227.24 (2017–2018) when she issued an order requiring everyone to stay home, closing all “non-essential” businesses, prohibiting private gatherings of any number of people who are not part of a single household, and forbidding all “non-essential” travel).

<sup>297</sup> *Dakin Andone, Protests Are Popping Up Across the US Over Stay-at-Home Restrictions*, CNN (Apr. 17, 2020, 12:44 PM), <https://www.cnn.com/2020/04/16/us/protests-coronavirus-stay-home-orders/index.html>; *Aleem Maqbool, Coronavirus: The US Resistance to a Continued Lockdown*, BBC NEWS (Apr. 17, 2020), <https://www.bbc.com/news/world-us-canada-52417610>.

<sup>298</sup> *Jason Slotkin, Protesters Swarm Michigan Capitol Amid Showdown Over Governor’s Emergency Powers*, NPR (May 1, 2020, 12:55 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/01/849017021/protesters-swarm-michigan-capitol-amid-showdown-over-governors-emergency-powers>.

weapons into Michigan’s state legislative buildings.<sup>299</sup> While intimidating to some state lawmakers, their choice to include weapons in a protest over sheltering in place implied a subjective admission that their grievances were not compelling enough on their own to merit legitimacy without brandishing firearms.<sup>300</sup> But the President fortified the appeal of these claims by calling the protestors “very good people,”<sup>301</sup> echoing similar language he used in August of 2017 following a white supremacist rally in Charlottesville, Virginia.<sup>302</sup>

Trump’s support for anti-lockdown protests transcended a desire to exploit the crisis for political gain—gradually morphing into a pattern of wielding power *through* the pandemic itself. This became manifest in the marriage between his distrust of experts within government and pre-existing disdain for “elites” who, as Paul Krugman argued, “claim to know more than guys in diners—which, on technical subjects like epidemiology, they do.”<sup>303</sup> Public health experts who favored social distancing, the wearing of masks, and sheltering in place were either silenced or pres-

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<sup>299</sup> Dayna Nessel, Michigan Attorney General, legal opinion on the Michigan State Capitol Commission’s authority to prohibit firearms in the areas under its control, [https://www.michigan.gov/documents/ag/Capitol\\_Firearms\\_Opinion\\_to\\_AG\\_v\\_2\\_690110\\_7.pdf](https://www.michigan.gov/documents/ag/Capitol_Firearms_Opinion_to_AG_v_2_690110_7.pdf), at 2–3 (May 11, 2020) (concluding that “[t]he absence of such restrictions has led to unscreened, armed persons congregating on the Capitol grounds and entering the Capitol building and seating themselves in the public galleries above the chambers of the Legislature. This has occurred even during times of protest and demonstration outside the Capitol building and moments of controversial debate on the legislative floors inside the Capitol building—situations when emotions and passions are known to run high”).

<sup>300</sup> Another scholar put the argument in similar terms. See Firmin DeBrabander, *The Great Irony of America’s Armed Anti-Lockdown Protesters*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/guns-protesters/611560/> (“That they carried guns suggests they were less than confident in the manifest justice of their cause or the seriousness of their passion, which they needed to amplify. It also indicates a kind of desperation and ignorance—they either don’t know about the tradition and practice of civic protest, or decided to largely abandon it.”). For a contrary view that explores protesters’ framing the shutdowns as a dismissal of their interests and the silencing of their opinions on social media, see Rachel Meade, *The Movement Against Coronavirus Lockdowns Is Still Going—and Still Angry*, WASH. POST (Aug. 10, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/08/10/movement-against-coronavirus-lockdowns-is-still-going-still-angry/>.

<sup>301</sup> Ann Gearan & John Wagner, *Trump Expresses Support for Angry Anti-Shutdown Protesters as More States Lift Coronavirus Lockdowns*, WASH. POST (May 1, 2020, 8:21 PM), [https://www.washingtonpost.com/politics/trump-expresses-support-for-angry-anti-shutdown-protesters-as-more-states-lift-coronavirus-lockdowns/2020/05/01/25570dbe-8b9f-11ea-8ac1-bfb250876b7a\\_story.html](https://www.washingtonpost.com/politics/trump-expresses-support-for-angry-anti-shutdown-protesters-as-more-states-lift-coronavirus-lockdowns/2020/05/01/25570dbe-8b9f-11ea-8ac1-bfb250876b7a_story.html).

<sup>302</sup> *Id.* Trump said there were “very fine people on both sides” in response to this rally where thirty-two-year-old Heather Heyer was killed after a motorist deliberately drove into a crowd of protestors. Rosie Gray, *Trump Defends White-Nationalist Protestors: ‘Some Very Fine People’ on Both Sides*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

<sup>303</sup> Paul Krugman, *The Right Sends in the Quacks*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/coronavirus-conservatives.html> (internal quotation marks removed).

sured to alter their message to align with the President's preferred narrative that re-opening the economy was safe.<sup>304</sup> Beyond undermining the shared public commitment necessary to slow the spread of Covid-19, this strategy dovetailed with specious oppression narratives and civil rights arguments demanding greater freedom of movement in response to lockdowns.<sup>305</sup> The resulting juxtaposition of state-level public health restrictions and libertarian sentiment has produced two kinds of absolutist demands: the first challenges restrictions to stay at home or to suspend business operations,<sup>306</sup> and the second imagines an inherent right to be in retail spaces, restaurants, and other private, commercial settings without adhering to state-mandated safety protocols such as wearing masks or socially distancing.<sup>307</sup> Both positions imply an expansive set of spatial relationships insofar as they assert unqualified rights to be anywhere without government restraint, no matter the societal consequences.

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<sup>304</sup> Jessica Flores, Ryan W. Miller & Joel Shannon, *Coronavirus Updates: CDC Finds "Prolonged Illness" Is Common; Experts Call for Shut Down; Daily Global Cases Break Another Record*, USA TODAY (Jul. 24, 2020, 10:57 PM), <https://www.usatoday.com/story/news/health/2020/07/24/covid-update-trump-cancels-florida-portion-gop-convention-cdc-school/5495991002/> (discussing public health expert recommendations to resume shut downs due to states' decisions to prematurely re-open their economies); Kevin Liptak & Nick Valencia, *Trump Now in Open Dispute with Health Officials as Virus Rages*, CNN (July 8, 2020, 5:09 PM), <https://www.cnn.com/2020/07/08/politics/trump-fauci-cdc-redfield-experts-coronavirus/index.html>; Lena H. Sun & Josh Dawsey, *CDC Feels Pressure from Trump as Rift Grows Over Coronavirus Response*, WASH. POST (Jul. 9, 2020, 7:02 PM), [https://www.washingtonpost.com/health/trump-sidelines-public-health-advisers-in-growing-rift-over-coronavirus-response/2020/07/09/ad803218-c12a-11ea-9fdd-b7ac6b051dc8\\_story.html](https://www.washingtonpost.com/health/trump-sidelines-public-health-advisers-in-growing-rift-over-coronavirus-response/2020/07/09/ad803218-c12a-11ea-9fdd-b7ac6b051dc8_story.html) (describing a June 28 email accusing the CDC's director of "undermining the President" by putting out a report about Covid-19's risks to pregnant women; the President's criticism of CDC recommendations to implement steps to reduce Covid-19 risks in schools; and White House officials perceiving the CDC's recommendations to "keep things closed" as contrary to re-election campaign narrative dependent on economic recovery (internal quotation marks removed)).

<sup>305</sup> Max Boot, *The Anti-Quarantine Protesters Aren't Rosa Parks. They're More Like Typhoid Mary.*, WASH. POST (Apr. 20, 2020, 2:34 PM), <https://www.washingtonpost.com/opinions/2020/04/20/anti-quarantine-protesters-arent-rosa-parks-theyre-more-like-typhoid-mary/> (critiquing a Trump advisor's comparison of protestors to Rosa Parks in their opposition to lockdown restrictions); Meagan Flynn & Hannah Knowles, *Dallas Hair Salon Owner Chose Jail Rather Than Close Her Doors. She Was Just Released.*, WASH. POST (May 7, 2020, 5:56 PM), <https://www.washingtonpost.com/nation/2020/05/06/dallas-salon-owner-jailed-coronavirus/> (quoting Texas State Representative Briscoe Cain who described a salon owner's refusal to comply with local orders to shut down her business as "an act of civil disobedience" (internal quotation marks removed)).

<sup>306</sup> Andone, *supra* note 297; Maqbool, *supra* note 297; Slotkin, *supra* note 298.

<sup>307</sup> Jonah Engel Bramwich, *Fighting Over Masks in Public Is the New American Pastime*, N.Y. TIMES (Jun. 30, 2020), <https://www.nytimes.com/2020/06/30/style/mask-america-freedom-coronavirus.html>; Tara McKelvey, *Coronavirus: Why Are Americans so Angry About Masks?*, BBC NEWS (July 20, 2020), <https://www.bbc.com/news/world-us-canada-53477121>.

### A. *Heroism as Cultural Balm*

Heroes—both real and mythical—have long enjoyed a special place in American cultural expression.<sup>308</sup> But heroic figures dwell in the troubled space between society and its circumstances, channeling sentiment born of a crisis, a political climate, or some inflection point that moves us to seek out someone who personifies our zeitgeist. Whether conceived through comic books, movies, street protests, internet memes, journalism, or choreographed institutional practice, heroism symbolizes a composite of unmet needs poured into figures who speak to our anxieties. Writing from the perspective of science fiction, two scholars describe the origin of our need for heroes this way:

The disturbances constitutive of the disaster are moral and emotional as well as material. People are left without the mental or physical abilities they need to cope. Government is absent or useless. We find ourselves in what amounts to . . . a (Hobbesian) second state of nature—where government is inoperative and chaos (moral, social, political, personal) reigns.<sup>309</sup>

Americans witnessed the relationship between insecurities and icons during the Cold War-era “space race” when the US government worked with the press to craft an “all-American” image of astronauts whose private lives bore no resemblance to their public personae. According to one author, astronauts

were ordinary men who had heroism thrust upon them by a press and public whose patriotic fervor was a reaction to the Cold War. Behind the scenes they were cheating on their wives, getting drunk, angling for the first flight, trying to get enough money to move into a nice neighborhood, and grouching about the way they were being treated.<sup>310</sup>

Whatever their personal failings, these men were at the center of a campaign to convince the public they personified “qualities in which Americans of that era wanted to believe: bravery, honesty, love of God and

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<sup>308</sup> For earlier writings expressing constructs of heroism as reflections of American character, see HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (Harv. Univ. Press, 1950); DIXON WECTOR, *THE HERO IN AMERICA: A CHRONICLE OF HERO-WORSHIP* (New York: Charles Scribner’s Sons, 1941).

<sup>309</sup> Laura D’Olimpio & Michael P. Levine, *Reluctant Heroes and Itchy Capes: The Ineluctable Desire to Be the Savior*, 53 J. AESTHETIC EDUC. 71, 73 (2019).

<sup>310</sup> John M. Thompson, *The Right Stuff: Embarrassed Hero Worship*, 32 AIR UNIV. REV. 95, 96 (1981).

country, and family devotion.”<sup>311</sup> More than just a charm offensive, this exercise sought to engender public trust in the US government and its relatively young National Aeronautics and Space Administration.<sup>312</sup> The astronauts usefully occupied the fissures between US angst and its desire to project power in its posture toward the Soviets.

Today’s pandemic-ravaged society has created its own heroes in response to disorienting upheaval, seeking to fill fissures formed by profound structural disruption.<sup>313</sup> We are used to specific forms of state action in the wake of extreme weather, mass shootings, and other cataclysmic events deemed serious enough to transcend ideological debates about the proper extent of government in our lives.<sup>314</sup> But chaotic and dysfunctional governmental responses<sup>315</sup> have displaced basic Hobbesian functions, undermining the communal spirit society needs and giving credence to toxic expressions of individualism. Regardless of whether our choice of food and agricultural workers was more accidental than planned, their selection reveals unflattering truths. They allow us to look past our society’s failures by focusing on those who bring us immediate comfort rather than our implicit assumption that their miseries are the necessary cost of our prosperity.

In the present context, valorizing food and agricultural workers complements and normalizes the selective conscription placing them at the bottom of society where we expect them to live and work in aid of preserving our comfort. The laws deeming them indispensable to the economy force them into workplaces where they are exposed to the threat of violent confrontations with members of the public who refuse to wear masks in grocery stores, restaurants, and other establishments selling or serving food.<sup>316</sup> Ongoing consumptive demands for food have exacerbated these tensions while continuing to strain everyone working

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<sup>311</sup> Roger D. Launius, *Heroes in a Vacuum: The Apollo Astronaut as Cultural Icon*, 87 FLA. HIST. Q. 174, 177 (2008).

<sup>312</sup> *Id.*

<sup>313</sup> Ruth Marcus, *These Are the Heroes of the Coronavirus Pandemic*, WASH. POST (Mar. 27, 2020, 6:11 PM), <https://www.washingtonpost.com/opinions/2020/03/27/nurses-doctors-are-heroes-this-moment/>; Lynn Lorenz, *Commentary: Pandemic Makes Clear Who the Real Heroes Are*, LA TIMES, (Apr. 8, 2020, 1:36 PM), <https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-08/commentary-pandemic-makes-clear-who-the-real-heroes-are>.

<sup>314</sup> See Garrett M. Graff, *The Grief Americans No Longer Share*, ATLANTIC (Sept. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/america-loses-its-capacity-common-grief/616234/>.

<sup>315</sup> See Joe Scarborough, *Americans Have Long Been Blind to Future Disasters. But We See This Storm Coming.*, WASH. POST (Sept. 18, 2020, 6:33 PM), [https://www.washingtonpost.com/opinions/americans-have-long-been-blind-to-future-disasters-but-we-see-this-storm-coming/2020/09/18/ec1ab686-f9e9-11ea-a275-1a2c2d36e1f1\\_story.html](https://www.washingtonpost.com/opinions/americans-have-long-been-blind-to-future-disasters-but-we-see-this-storm-coming/2020/09/18/ec1ab686-f9e9-11ea-a275-1a2c2d36e1f1_story.html).

<sup>316</sup> Neil MacFarquhar, *Who’s Enforcing Mask Rules? Often Retail Workers, and They’re Getting Hurt*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html> (“A Target employee in Van Nuys, Calif., ended up with a broken left arm after helping to remove two customers who refused to wear masks. A cashier

inside our food supply chains, including those coping with far more restrictions on their autonomy than those experienced by anti-lockdown protesters.<sup>317</sup> Consumers, politicians, business leaders and journalists continuing to use the language of heroism must be challenged to reorient their discourse towards marrying cause with context. Doing so would help to counter the toxic individualism amplifying Covid-19's effects and giving voice to false constructions of oppression.

#### CONCLUSION

None of the libertarian claims described above accord with the practice of calling food and agricultural workers “heroes” within a framework that considers the fullest expressions of their humanity. Much like the seventeenth-century relationships linking demand for cotton with the economic imperative of enslaved labor, present-day demand for access to the incidents of consumptive power are understood as requiring language to rationalize a set of zero-sum relationships existing at the cost of those at the bottom of our hierarchies where their lives exist in plantations reconfigured for the modern age. The solution to this problem will not originate from law, but from a fundamental reengineering of social forces that normalize the subordinating of others as the only pathway to advancing societal interests in times of crisis—and in finding ways to reshape dysfunctional forms of personal choice.

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told a man refusing to wear a mask that he could not buy a pack of cigars at a convenience store in Perkasio, Pa. He punched her three times in the face.”).

<sup>317</sup> For example, see Dareh Gregorian, *Anti-Lockdown Demonstrators Trade Guns for Scissors at Michigan 'Haircut' Protest*, NBC News (May 20, 2020, 3:28 PM), <https://www.nbcnews.com/politics/politics-news/anti-lockdown-demonstrators-trade-guns-scissors-michigan-haircut-protest-n1211366>.

