

The Jack Pemberton Lecture Series
March 2022

**A Pandemic of Division: Finding Justice
at Work in Challenging Times***

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Introduction

INFECTIONOUS DISEASE KNOWS NEITHER RACE NOR GENDER, and so the pandemic might have been a catastrophe that united our fractious society. Unfortunately, law played a tragic role in making COVID-19 a pandemic of division. In March 2020, when white collar workers retreated to Zoom at home, many blue collar, pink collar, and service workers continued to risk their lives at work. An estimated six in ten California workers had jobs that could not be done remotely; they either lost their jobs or were declared essential so they still had to go to work.¹

In Parts I and II of this Essay, I briefly sketch the disparate hardships visited on low-wage workers of color and women during the pandemic. In Part III, I show how the federal law that was intended by Congress to protect workers from illness and injury failed during the pandemic and how the U.S. Supreme Court institutionalized that failure in January 2022 by invalidating the Biden administration's safety measures intended to prevent the spread of COVID-19. In Part IV, I explore a few ways California is considering addressing, through legis-

* This Essay is based on the 17th Annual Jack Pemberton Lecture on Workplace Justice, which took place on March 31, 2022, at the University of San Francisco School of Law.

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1. Assemb. B. 2847, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

lation, some of the structural problems that made the pandemic so harsh for low-wage workers so that the next major calamity, or even just the hardships of low-wage work, will not disproportionately harm the most vulnerable among us.

I. Race-Based Discrimination

Those who suffered the hazards of in-person work were disproportionately Latino/a/x and Black. Studies have shown Black and Latino workers are more likely to work in occupations that provide fewer protections against COVID-19 infection.² Black workers were overrepresented, relative to their share of the workforce, in occupations with high potential risk of exposure to workplace infection and in settings where they could not maintain physical distancing.³ Latino workers likewise were overrepresented in occupations that required in-person work.⁴ The inability to work from home was found to have contributed to the high infection rates in Black and Latino communities.⁵

The most recent data, from spring of 2022, show that Indigenous Americans suffered from the highest rates of death from COVID-19 in the United States.⁶ After age adjustments, Indigenous, Latino, Pacific Islander, and Black Americans have the highest COVID-19 death rates, while white and Asian Americans have the lowest. Studies show that the public health interventions reduced the racial and ethnic disparities in COVID-19 deaths between 2020 and 2021.⁷

Nearly sixty years after the Civil Rights Act was supposed to have reduced racial, ethnic, and gender inequities in employment,⁸ and fifty years after the Occupational Safety and Health Act of 1970 (“OSH

2. Noreen Goldman et al., *Racial and Ethnic Differentials in COVID-19-Related Job Exposures by Occupational Standing in the US*, 16 PLOS ONE (Sept. 1, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256085#sec001> [<https://perma.cc/SFD2-LJXS>].

3. Abay Asfaw, *Racial Disparity in Potential Occupational Exposure to COVID-19*, J. RACIAL & ETHNIC HEALTH DISPARITIES (Aug. 5, 2021), <https://link.springer.com/article/10.1007/s40615-021-01110-8> [<https://perma.cc/5LL9-Q2SD>].

4. *Id.*

5. *Id.*

6. Elizabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, AM. PUB. MEDIA RSCH. LAB (Aug. 14, 2022), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/M3MA-9MHU>].

7. Benedict I. Truman et al., *Provisional COVID-19 Age-Adjusted Death Rates, by Race and Ethnicity—United States, 2020-2021*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (Apr. 22, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7117e2.htm> [<https://perma.cc/X46D-47N5>].

8. 42 U.S.C. § 2000e-2.

Act”) was supposed to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions,”⁹ the pandemic revealed the serious inequities and hazards that remain. It’s a bitter irony that the COVID-19 pandemic began in the year marking the fiftieth anniversary of the enactment of the OSH Act.¹⁰ In the first months of the pandemic, worker and public health advocates begged the Occupational Safety and Health Administration (“OSHA”) to do something to force employers to protect essential workers,¹¹ but OSHA (until a new administration took over in January 2021) simply issued voluntary guidance.¹²

The racial inequities in work during the pandemic were not just in who risked their lives to work. They also included who lost their jobs. As businesses that were not deemed essential closed, unemployment rocketed up to almost 15% nationally in April 2020, 16% in California, and a staggering 28.2% in Nevada.¹³ Unemployment was higher than at any time since the Great Depression.¹⁴ The Pew Research Center found that unemployment disparately affected women and people of color.¹⁵ Women’s unemployment rate in May 2020 of

9. 29 U.S.C. § 651.

10. *Id.*

11. Fatima Hussain & Robert Iafolia, *D.C. Circuit Rejects AFL-CIO Request for Emergency Virus Standard*, BLOOMBERG L. (June 11, 2020, 9:46 AM), <https://news.bloomberglaw.com/safety/d-c-cir-rejects-afl-cio-request-for-emergency-virus-standard> [http://perma.cc/4798-N8PQ]; *In re Am. Fed’n of Lab. and Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (per curiam).

12. *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP’T OF LAB.: OSHA (June 10, 2021), <https://www.osha.gov/coronavirus/safework> [https://perma.cc/JB7H-JKVV].

13. *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU OF LAB. STATS.: THE ECONS. DAILY (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [https://perma.cc/NJZ9-ZLYQ]; *43 States at Historically High Unemployment Rates in April 2020*, U.S. BUREAU OF LAB. STATS.: THE ECONS. DAILY (May 28, 2020), <https://www.bls.gov/opub/ted/2020/43-states-at-historically-high-unemployment-rates-in-april-2020.htm> [https://perma.cc/CGW2-35XU].

14. *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU OF LAB. STATS.: THE ECONS. DAILY (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [https://perma.cc/NJZ9-ZLYQ].

15. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 than it Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> [https://perma.cc/3L58-KAHP].

14.3% was higher than the rate for men at 11.9%, even though women were less likely than men to be unemployed in February 2020.¹⁶

Although unemployment fell rapidly as the economy rebounded, the effects of pandemic unemployment lingered and have disproportionately affected women with children in the home and people of color.¹⁷ While college-educated women with children at home struggled, data suggest they kept their jobs.¹⁸ But the pandemic has seriously affected the number of less-educated women in the workforce; 12.8% of women without high school diplomas left the workforce between the third quarter of 2019 and the third quarter of 2021, while only 4.9% of similarly educated men did.¹⁹ Similarly, 6.0% of women with only a high school degree left the workforce, while only 1.8% of men with only a high school degree left.²⁰

Black and Latino workers have also experienced a far slower jobs recovery than white workers. About 8% of Black workers and 6% of Latino workers were unemployed in October 2021, compared to 4.0% of white workers.²¹ Workers who were born outside the United States, including individuals who are now U.S. citizens, experienced larger job losses than U.S.-born workers.²²

16. *Id.* Even these high rates likely underestimate unemployment because of an error in the classification of certain workers as employed but absent from work instead of employed on temporary layoff. See Rakesh Kochhar, *Unemployment Rate is Higher than Officially Recorded, More So for Women and Certain Other Groups*, PEW RSCH. CTR. (June 30, 2020), <https://www.pewresearch.org/fact-tank/2020/06/30/unemployment-rate-is-higher-than-officially-recorded-more-so-for-women-and-certain-other-groups/> [https://perma.cc/68KB-EF96].

17. See *infra* notes 18–20 and accompanying text.

18. Claire Cain Miller, *The Pandemic Has Been Punishing for Working Mothers. But Mostly They've Kept Working*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/upshot/pandemic-working-mothers-jobs.html> [https://perma.cc/TJV9-S9A9] (reporting studies showing that employment rates of college-educated mothers of young children did not fall significantly in 2020 and 2021, even as employment of non-college-educated mothers did fall).

19. Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce During the Pandemic*, PEW RSCH. CTR. (Jan. 14, 2022), <https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/> [https://perma.cc/3KSM-5DVF].

20. *Id.*

21. *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 10, 2022), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and> [https://perma.cc/27HA-SY5M].

22. *Id.*

II. Gender-Based Discrimination

Women suffered disproportionately in the pandemic. COVID-19 brought the collapse of the childcare industry on which women's labor force participation depends.²³ Childcare centers and schools across the nation abruptly closed, leaving families with full-time caregiving responsibility for minor children, including facilitating remote learning for school-age children while often continuing to work full time.²⁴ The resulting stress on parents, especially women, was unprecedented.²⁵

In sum, the pandemic was a crisis of work, and its burdens divided sharply along class, race, and gender lines. OSHA failed in the moment when workers, especially the most subordinated workers, needed it most. The law's failures contributed to this "pandemic of division." In the next part of this Essay, I explore why and how OSHA failed for so long to protect the workers who most needed governmental safety protections. After the OSH Act was in effect, the Biden administration exercised its statutory power to protect workers from the spread of disease, yet the Supreme Court struck down OSHA's pandemic response, thereby inscribing into law a vision of the federal workplace safety agency rendering it powerless to prevent future crises.

III. OSHA and the Pandemic

A. OSHA Authority

OSHA needn't have been AWOL during the pandemic. Section 6 of the OSH Act authorizes OSHA to issue standards on an emergency basis.²⁶ The agency need only provide a statement of reasons for an

23. See, e.g., Sean Doocy et al., *California Child Care in Crisis: The Escalating Impacts of COVID-19 as California Reopens*, CTR. FOR THE STUDY OF CHILD CARE EMP. (July 22, 2020), <https://cscce.berkeley.edu/california-child-care-in-crisis-covid-19/> [<https://perma.cc/7BFW-8X96>].

24. Emily Sohn, *When Child Care Centers Close, Parents Scramble to Adapt*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/10/parenting/virus-day-care-bright-horizons.html> [<https://perma.cc/VDY2-2EYZ>].

25. Deb Perelman, *In the COVID-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*, N.Y. TIMES (OCT. 30, 2021), <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html> [<https://perma.cc/C5EP-76YW>]; Jessica Grose, *School's Out. Parental Burnout Isn't Going Away*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/06/23/parenting/parental-burnout-coronavirus.html> [<https://perma.cc/S67Y-X63P>]; Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html> [<https://perma.cc/8SS9-FGRZ>].

26. 29 U.S.C. § 655(c).

emergency standard and need not follow the lengthy notice and comment rulemaking process.²⁷ All OSHA needs to determine is that “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and the standard “is necessary to protect employees from such danger.”²⁸ Moreover, section 5 of the OSH Act imposes a general duty on employers to provide a workplace free of recognized hazards that cause or are likely to cause death or serious physical harm to employees.²⁹ So, OSHA could have done enforcement even without issuing a standard at all. Moreover, because an empirical study has shown that the mere existence of OSHA guidance or a standard prompts employer compliance even when there is little chance of enforcement action, it would have been helpful for OSHA to do anything—issue a citation, or issue enforcement guidance stating that the general duty clause required some virus abatement measures—to signal that the law required employers to mitigate the risks of COVID-19 transmission.³⁰

Emergency Temporary Standards (“ETS”) and the General Duty Clause are important because—thanks to the federal courts—the rulemaking process governing OSHA is so cumbersome and opposition to its standards is so intense that OSHA has taken an average of seven years and nine months to develop and issue a standard.³¹ One would think, therefore, that OSHA would often rely on its power to issue ETS.³² However, one would be wrong. OSHA has issued ETS only eleven times.³³ The courts fully stayed or vacated four of them and partially invalidated one.³⁴ Five of the emergency standards that were either not challenged in court or that were upheld in whole or in part were issued before 1980.³⁵ That’s important because it was in

27. See generally Thomas O. McGarrity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

28. 29 U.S.C. § 655(c)(1).

29. 29 U.S.C. § 654(a)(1).

30. David Weil, *If OSHA Is So Bad, Why Is Compliance So Good?* 27 THE RAND J. OF ECON. 618, 619 (1996).

31. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-330, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA’S STANDARD SETTING (2012).

32. 29 U.S.C. § 655(c).

33. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION: COVID-19 EMERGENCY TEMPORARY STANDARDS ON HEALTH CARE EMPLOYMENT AND VACCINATIONS AND TESTING FOR LARGE EMPLOYERS 18–19 (2022).

34. *Id.* at 6.

35. *Id.*

1980 that the Supreme Court dramatically reduced OSHA's power to act in the face of scientific uncertainty.³⁶

OSHA did spring into action to address the pandemic after President Biden moved into the White House. Finally, in November 2021, OSHA issued ETS requiring employees of large employers to either wear a mask in the workplace and to get tested for COVID-19 weekly or to prove they are vaccinated.³⁷

Attorneys General from red states and certain large business groups promptly went to court. A district court stayed enforcement, and the Sixth Circuit reversed.³⁸ But the Supreme Court held, in an unsigned per curiam opinion, on a six-to-three vote along strictly partisan lines, that the standard should be stayed as it exceeded OSHA's authority.³⁹

B. The Supreme Court's Review of OSHA's COVID-19 Response

On January 13, 2022, the day the Supreme Court handed down its decision, more than 2,200 Americans died of COVID-19.⁴⁰ It was also the date that new COVID-19 cases peaked in the entire two-plus years of the pandemic.⁴¹ We may never know how many of the million-plus (as of this writing) U.S. COVID-19 deaths,⁴² or how many of the more than eighty-seven million cases⁴³ were attributable to work, but the number is surely very large. Let me explain how the Court could decide that COVID-19 was not a workplace hazard.

The Justices' cramped view of the power of the nation's workplace safety agency to protect workers reveals three disturbing things about the Court's perspective on the role of law in the workplace. The Court asserted that OSHA lacks the power to protect workers from

36. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

37. *COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402, 61404 (Nov. 5, 2021).

38. *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264 (6th Cir. 2021).

39. *Nat'l Fed. of Indep. Bus. v. Dept. of Lab., Occupational Safety & Health Admin. (NFB)*, 142 S. Ct. 661 (2022) (per curiam). The Court divided on ideological lines, with the six in the majority—Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett—concluding that OSHA lacks power to prevent workplace spread of COVID-19, over the dissent of the three Democratic appointees, Breyer, Sotomayor, and Kagan.

40. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/interactive/2021/us/covid-cases.html?name=Styln-coronavirus®ion=TOP_BANNER&block=storyline_menu_recirc&action=Click&pgtype=interactive&variant=show&is_new=false [<https://perma.cc/XBX2-8QT4>] (reporting COVID-19 data by day).

41. *Id.*

42. *Id.*

43. *Id.*

hazards that are not unique to the workplace, that Congress' command to OSHA to adopt health and safety standards is far more limited than a reasonable reading of the statute would suggest, and that it is for the Supreme Court Justices, rather than for OSHA's scientists and policymakers, to make tradeoffs between protecting worker health and safety and growing corporate profits.

1. Workplace Safety Standards

First, the Court asserted that Congress empowered OSHA "to set *workplace* safety standards, not broad public health measures."⁴⁴ COVID-19, the majority said, is a "universal risk [that] is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."⁴⁵ But, the Court acknowledged that OSHA could regulate COVID-19 infection risks for "researchers who work with the COVID-19 virus," or "in particularly crowded or cramped environments."⁴⁶ It's more than a little hypocritical for the Justices, who of course shut down their courthouse for well over a year to protect themselves and Court staff from COVID-19 exposure at work, to assert as a point of fact that COVID-19 is not a workplace hazard. Additionally, it was irony lost on no one that two lawyers argued the case remotely because they had tested positive and thus could not pass the Court's own rules for access to the building.⁴⁷

OSHA had anticipated this objection, and its ETS noted that courts of appeals had upheld its standards on noise exposure, sanitation, and blood-borne pathogens—all of which are risks not unique to the workplace.⁴⁸ Moreover, OSHA had estimated, based on data, that the ETS would save over 6,500 lives and prevent over 250,000 hospitalizations over the six months it would be in effect.⁴⁹ Those would have been lives saved by preventing workplace exposure, not lives saved by preventing other ways of transmission.

The Court's hostility to OSHA—an agency created a half century ago in bipartisan legislation signed by Richard Nixon—reflects a departure from the Court's precedent dealing with OSHA standards.

44. *NFIB*, 142 S. Ct. at 665.

45. *NFIB*, 142 S. Ct. at 665.

46. *NFIB*, 142 S. Ct. at 666.

47. Mark Walsh, *During Arguments Over COVID-19 Policy, Two Absent Lawyers and More Masks on the Bench*, SCOTUSBLOG.COM (Jan. 7, 2022, 9:03 AM), <https://www.scotusblog.com/2022/01/during-arguments-over-covid-19-policy-two-absent-lawyers-and-more-masks-on-the-bench/> [<https://perma.cc/5A82-KFTE>].

48. COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402, 61407–08 (Nov. 5, 2021).

49. *Id.* at 61408.

The Court has generally not been a fan of OSHA. Its first OSHA standards case, from 1980, struck down a standard seeking to lower workplace exposure to benzene because the Court found that OSHA had failed adequately to explain why it set the level of permissible exposure at one ppm rather than the ten ppm threshold that had been the industry consensus.⁵⁰ But the Court never doubted that OSHA could set a standard for occupational exposure to benzene, even though, as the Court recognized, people are exposed to benzene in many other ways, including every time they pump gas into their car at a filling station.⁵¹ Some OSHA standards that critics have long ridiculed, such as those governing the design of stairs or rungs on ladders, apply only to workplaces even though they regulate hazards found elsewhere.⁵²

OSHA based its standard on dozens of epidemiological studies, some conducted by state public health agencies and others published in peer-reviewed scientific journals, finding many thousands of cases of workplace transmission across a variety of industries, including manufacturing, retail, construction, agriculture, maritime, health care, and other sectors.⁵³ The Court did not bother to mention the evidence OSHA considered. The Court asserted that OSHA failed to account for the “crucial distinction—between occupational risk and risk more generally,”⁵⁴ but that is simply not true. OSHA had pages of data on exactly that.

50. *Indus. Union Dept., AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607 (1980). The OSH Act instructed OSHA to adopt, “as soon as practicable,” all national consensus standards unless the agency determined a particular standard “would not result in improved safety or health for specifically designated employees.” 29 U.S.C. § 655(a). OSHA heeded that direction in 1971 by adopting industry standards wholesale pending further study. Many of them have never been updated because of the difficulty of OSHA standard setting.

51. *Id.* at 615.

52. For example, the OSHA standard on ladders requires employers to ensure that ladder rungs, steps, and cleats are parallel, level, and uniformly spaced, are spaced safely, and are otherwise safely designed and adequately maintained, as specified in the standard. OSHA Standard 1910.23, Walking and Working Surfaces. 29 C.F.R. § 1910.23 (2016). As for criticism of OSHA standards, a Google search for “ridiculous OSHA standards” produces a number of entries, including a YouTube video and associated commentary about the OSHA violations in *Willy Wonka’s Chocolate Factory*. See *How Many OSHA Violations does Willy Wonka’s Factor in the Move Have? And Just How Much Does He Owe with All of Those Violations?*, QUORA, <https://www.quora.com/How-many-OSHA-violations-does-Willy-Wonka-s-factory-in-the-movie-have-And-just-how-much-does-he-owe-with-all-of-those-violations> [<https://perma.cc/TRW8-U9MB>].

53. COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402, 61412–17 (Nov. 5, 2021).

54. *NFIB*, 142 S. Ct. at 666.

2. Textual Analysis of the OSH Act

Second, for a Court that proclaims itself to be textualist, the OSHA opinion is remarkably free of analysis of the statute's text. The statute authorizes OSHA to issue "occupational safety and health standards" to protect "employees" from "grave danger."⁵⁵ The Court's textual analysis consisted simply of italicizing the words *occupational* and *employees*, and made an entirely conclusory and data-free assertion that COVID-19 transmission is a "public health" problem, not a workplace health hazard that affects employees.⁵⁶

Moreover, it is impossible to reconcile the Court's cramped interpretation of the OSH Act with its expansive reading of the power Congress gave to the Department of Health and Human Services ("HHS") to adopt a vaccine mandate for health care workers as part of the federal funding of Medicaid and Medicare. On the same day the Court ruled that OSHA lacks power to prevent workplace transmission of COVID-19, a five-to-four majority upheld the power of an HHS agency to issue a more draconian regulation covering health care employees.⁵⁷ In *Biden v. Missouri*, Justices Roberts and Kavanaugh switched sides and joined Justices Breyer, Sotomayor, and Kagan in upholding a rule requiring vaccination (with no mask-test alternative) for ten million health care workers (as opposed to the eighty-four million covered by the OSHA standard).⁵⁸

The statutory authorization for OSHA to act is clearer than for HHS. The OSH Act specifically refers to workplace safety, harmful agents, and the danger of illness; the Medicaid/Medicare reimbursement legislation simply refers generally to the "health and safety" of patients.⁵⁹

Although the decisions were handed down the same day, the Court did not try to reconcile them. Absent any reasoning, we are left to speculate why Chief Justice Roberts and Justice Kavanaugh found the HHS authority sufficient but not OSHA's authority. One can only conclude that they accept the wisdom of compulsory vaccines in the interest of the health and safety of patients, but not of workers.

Justices Thomas, Alito, and Gorsuch dissented in the HHS case because they thought the statutory language did not authorize the agency to issue health and safety regulations, or at least not a vaccine

55. 29 U.S.C. § 655(c)(1).

56. *NFIB*, 142 S. Ct. at 665.

57. *Biden v. Missouri* (Biden), 142 S. Ct. 647 (2022) (per curiam).

58. *Biden*, 142 S. Ct. at 656 (Thomas, J., dissent).

59. *Biden*, 142 S. Ct. at 650 (quoting 42 U.S.C. § 1395x, among other statutes).

mandate, but instead authorized the agency only to regulate the management of the funding programs.⁶⁰ To that extent, I suppose, they are consistent—they think the federal government lacks power to protect all workers and patients from COVID-19. But they were not consistent in some reasoning. They professed alarm at the ten million health care workers who must “undergo an unwanted medical procedure” or be fired.⁶¹ But, they expressed no concern at all for those workers who fear death or illness caused by being infected by an unvaccinated co-worker.

More troubling still is the concurring opinion in the OSHA case, which characterizes the majority as recognizing a sweeping principle of administrative law. The concurring opinion says, “[t]he Court rightly applies the major questions doctrine” to conclude that the ETS was not authorized.⁶² But the term “major questions” does not appear anywhere in the majority’s opinion. Administrative law scholars dispute the idea that there is a “major questions doctrine” or that the Constitution requires Congress to “speak clearly” (whatever that might mean) if it wishes to assign to an executive agency decisions of “vast economic and political significance.”⁶³ In the view of the concurring opinion, either OSHA could not act because Congress had not empowered it to protect against this hazard, or “if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.”⁶⁴ In short, the major federal workplace safety agency is powerless to address the most widespread work safety issue of the last century, and Congress couldn’t have given it the power to do so even if Congress wanted to, unless perhaps Congress specifically mentioned airborne viruses in the enabling legislation.

There are a huge number of workplace hazards that the OSH Act does not specifically mention. Excessive heat kills outdoor workers every year, which will get worse as the climate warms.⁶⁵ Algorithmic management forces workers to sustain a punishing pace of work,

60. *Biden*, 142 S. Ct. at 656 (Thomas, J., dissent).

61. *Biden*, 142 S. Ct. at 657 (Thomas, J., dissent).

62. *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

63. *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring).

64. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (emphasis in original).

65. Eric McDaniel, *Outdoor Workers Could Face Far More Dangerous Heat by 2065 Because of Climate Change*, NPR (Aug. 17, 2021, 5:12 PM), <https://www.npr.org/2021/08/17/1028552251/outdoor-workers-could-face-far-more-dangerous-heat-by-2065-because-of-climate-ch#:~:text=The%20consequences%20of%20that%20extreme,doubled%20since%20the%20early%201990s> [https://perma.cc/N8NQ-PJ8E].

which encourages workers to do things like ignore hazards or drive like maniacs.⁶⁶ These are hazards that Congress could not have predicted in 1970. Why on earth would we want the nation's workplace safety agency to be powerless to address them?

3. The Court's "Tradeoffs" Consideration

That brings me to my third point, the most disturbing one of all. At the conclusion of its opinion staying enforcement of the ETS, the Court noted the tradeoffs. On the one hand, employers claimed it would "force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs."⁶⁷ On the other hand was the 6,500 lives and 250,000 hospitalizations.⁶⁸ The Court said, "[i]t is not our role to weigh such tradeoffs," but is the "responsibility of those chosen by the people through democratic processes."⁶⁹ Yet, the same paragraph asserted OSHA is not authorized to make that choice,⁷⁰ which of course means the Court assumed the power for itself.

This is a Court with complete disregard for the limits on its own power and disdain for the power and wisdom of other branches of government. OSHA is the agency charged by Congress with making tradeoffs between costs and health.⁷¹ Despite OSHA's failings, occupational injuries and illnesses contracted in the workplace have declined in the fifty years since the OSH Act was enacted⁷². In the first year of OSHA's existence, thirty-eight workers were killed on the job daily.⁷³ By 2020, with a workforce twice as large, daily work fatalities had fallen to fourteen.⁷⁴ Thus, OSHA has some success stories.

66. Adrián Todolí Signes, *Making Algorithms Safe for Workers: Occupational Risks Associated with Work Managed by Artificial Intelligence*, 27 *TRANSFER EUR. REV. OF LAB. & RSCH.* 433, 438 (2021).

67. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

68. *NFIB*, 142 S. Ct. at 670 (Breyer, J., dissenting).

69. *NFIB*, 142 S. Ct. at 666.

70. *NFIB*, 142 S. Ct. at 666.

71. *See Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) (discussing OSHA's authority to make cost-benefit analyses and upholding OSHA's standard reflecting a weighing of costs and benefits).

72. *Commonly Used Statistics*, U.S. DEP'T. OF LAB.: OSHA, <https://www.osha.gov/data/commonstats#:~:text=OSHA%20is%20Making%20a%20Difference&text=Worker%20deaths%20in%20America%20are,2.8%20per%20100%20in%202019> [https://perma.cc/WX2P-6HK9].

73. *Id.*

74. *Id.*

Yet, still, over 5,000 people were killed on the job each year before the pandemic.⁷⁵ And the number of occupational fatalities has stopped falling.⁷⁶ Occupational injuries and illnesses are disproportionately concentrated on lower-wage workers of color.⁷⁷

Ultimately, the most troubling aspect of the Supreme Court's decision is the disregard the majority showed for the lives lost and the suffering endured on account of workplace COVID-19 exposure. Whatever may be the occupational portion of the over one million Americans who have died of COVID-19, or the eighty-four million cases (and counting), it is a staggering toll of suffering.⁷⁸ A vision of law that deprives the agency charged with preventing workplace illness and injury of the power to do so in the face of such an enormous threat is a vision that shows a shocking disregard for the value of human life.

IV. An Alternative Vision of Workplace Safety, Social Safety Nets, and Building Worker Power

A. Pandemic Response: A First Step for Vulnerable Workers

COVID-19 hit the United States during a time of unprecedented economic inequality. Low-wage workers face economic insecurity in every aspect of life. They have precarious jobs from which they can be fired at a moment's notice. They struggle to find affordable housing in high-cost urban areas. The absence of government-provided health care and other social safety net protections hits the most vulnerable workers most harshly. The most vulnerable workers do not have access to employment-connected sources of social welfare such as health insurance, pensions, and paid sick and family leave.⁷⁹ The pandemic revealed both the human cost of the weak social safety net and the public health and macroeconomic arguments for improving access to

75. *Census of Fatal Occupational Injuries Summary, 2020*, U.S. BUREAU OF LAB. STATS., (Dec. 16, 2021, 10:00 AM), <https://www.bls.gov/news.release/cfoi.nr0.htm> [https://perma.cc/8DPK-33KE].

76. *Id.*

77. *Table 1. Fatal Occupational Injuries by Selected Demographic Characteristics, 2016–2020*, U.S. BUREAU OF LAB. STATS., (Dec. 16, 2021), <https://www.bls.gov/news.release/cfoi.t01.htm> [https://perma.cc/W29P-LKGJ].

78. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, JOHNS HOPKINS CORONAVIRUS RES. CTR. (July 24, 2022, 4:20 PM), <https://coronavirus.jhu.edu/map.html> [https://perma.cc/EX5R-UWME].

79. Catherine R. Albiston & Catherine L. Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 BERKELEY J. EMP. & LAB. L. (forthcoming 2021) (manuscript at 38), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690686 [https://perma.cc/P7SX-W5KV].

unemployment benefits and paid leave. It also, as I will explain below, created the political will to enact legislation plugging some of the holes in social insurance protections. The pandemic response legislation included some social safety net protections that worker and family protection organizers had been advocating for years.⁸⁰ Unfortunately, many of those federal protections lapsed at the end of 2021.

The pandemic response legislation temporarily and partially mended holes in the social safety net. Although most of the protections the legislation adopted lapsed and have not been renewed, at least it showed that growing inequality from the pandemic was not inevitable. Rapid and effective policy responses reduced the inequality-amplifying effects of the pandemic downturn.

In particular, the relief legislation that Congress enacted in spring 2020 mitigated some of the harm. In the Families First Coronavirus Response Act of March 18, 2020, Congress provided the first-ever federal guarantee of paid sick leave and partially paid family leave in the United States.⁸¹ It lowered the employee service tenure requirement to be eligible for sick leave to thirty days from the twelve months required under the Family and Medical Leave Act. But only leave for family care related to COVID-19, not any other condition, was paid. The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) of March 27, 2020, increased unemployment benefits and expanded eligibility for such benefits to groups that previously had been ineligible, particularly independent contractors.⁸² Together, these two pieces of legislation finally brought the United States at least partway into the company of every other advanced economy on the planet that provides paid leave for illness and family care.⁸³

B. Halting Next Steps, Until Congress Stumbled

The Build Back Better Act⁸⁴ attempted to institutionalize some of the programs that were adopted on an emergency basis in the pan-

80. *See id.*

81. *Id.* (manuscript at 38–40).

82. *Id.* (manuscript at 38–41).

83. *See, e.g., Global Map: Is Paid Leave Available for Mothers of Infants?*, WORLD POL’Y CTR., <https://www.worldpolicycenter.org/policies/is-paid-leave-available-for-mothers-of-infants> [<https://perma.cc/3H5F-DJ5Y>]; *see also Global Map: Are Workers Entitled to Paid Sick Leave from the First Day of Illness?*, WORLD POL’Y CTR., <https://www.worldpolicycenter.org/policies/are-workers-entitled-to-paid-sick-leave-from-the-first-day-of-illness> [<https://perma.cc/X9MF-2KJK>].

84. H.R. 5376, 117th Cong. (2d Sess. 2022).

demic relief legislation, thereby addressing the longstanding struggles of working class families, high rates of child poverty, and other failures of the U.S. social safety net.⁸⁵ It would have addressed working families' child care struggles by dramatically expanding affordable child care and offering universal, free preschool for three- and four-year-old children, which the White House claimed would have been the largest expansion of universal and free public education since the creation of public high schools a century ago.⁸⁶ It would have expanded health care subsidies, closed a gap in Medicaid eligibility for poor people, and expanded the coverage of Medicare to include hearing benefits for elderly people. It would have expanded the Earned Income Tax Credit for an estimated seventeen million low-wage workers.⁸⁷ Although the Build Back Better Act passed the House, it died in the Senate.⁸⁸ Efforts to pass a more modest package through the filibuster-free budget reconciliation process still have not succeeded.

Even after Build Back Better died, far more modest changes have also been stymied by the Senate's refusal to act on any of President Biden's social agenda. The House of Representatives, in March 2022, enacted, with only five no votes, a reform to the way that 401(k) plans are administered.⁸⁹ If the Senate passes the bill (known as the Securing a Strong Retirement Act of 2022) and President Biden signs it, the bill will make it easier for workers to keep track of 401(k) plans when they switch jobs and will allow workers' student loan payments to count as plan contributions for purposes of employer matching contributions.⁹⁰ These will help address what demographers predict will be an enormous shortfall in retirement income. Yet the bill is still awaiting a vote in the Senate.⁹¹

Enormous gaps remain in the nation's social safety net. Immigrant workers and their families are excluded from most social safety net programs, and undocumented workers (an estimated 4.4% of the

85. CBPP Staff, *Policymakers Should Craft Compromise Build Back Better Package*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 1, 2022), <https://www.cbpp.org/research/poverty-and-in-equality/policymakers-should-craft-compromise-build-back-better-package> [https://perma.cc/RWN2-UVDK].

86. *The Build Back Framework: President Biden's Plan to Rebuild the Middle Class*, THE WHITE HOUSE, <https://www.whitehouse.gov/build-back-better/> [https://perma.cc/X6YQ-48FT].

87. *Id.*

88. H.R. 5376, 117th Cong. (2d Sess. 2022).

89. H.R. 2954, 117th Cong. (2d Sess. 2022).

90. *Id.*

91. *Id.*

U.S. workforce) are excluded from virtually all of them.⁹² Independent contractors are also excluded from most programs, as are many part-time workers. In addition, most of the important federal COVID-19 relief legislative innovations in sick leave, family leave, and unemployment insurance lapsed on December 31, 2021.⁹³ States can step up to fill these gaps. Moreover, the Supreme Court said in its decision to stay the OSHA ETS that states and localities have primary responsibility for public health, which is an obvious invitation for state legislation to prevent the spread of infectious disease.⁹⁴

C. California Makes the Road by Walking

Although the U.S. Senate has thwarted the Biden administration's efforts to expand the social safety net, California is pressing ahead. The California Legislature is currently considering two bills that could provide a model for other states to address the suffering of low-wage workers. One would expand social safety net programs to include undocumented workers, and another would establish a framework to allow franchised fast-food workers to negotiate jointly with state regulatory officials, franchisees, and franchisors to address the structural causes of wage and other minimum labor standards violations. Together, these two reforms, if enacted, will begin to reduce the causes of poverty and workplace hazards that the pandemic revealed to be especially prevalent and destructive.

1. Expanding Health Care and Unemployment Insurance to Cover Undocumented People

California is considering an enlargement of two major social safety programs to cover all Californians, regardless of immigrant status. First, Assembly Bill 2847, the Excluded Workers Pilot Program, would expand the coverage of unemployment insurance ("UI") benefits to workers excluded from UI because of their immigration status.⁹⁵ Immigrants excluded from UI constitute an estimated 6.25% of

92. Nicole Prchal Svajlenka, *Protecting Undocumented Workers on the Pandemic's Front Lines*, CTR. FOR AM. PROGRESS (Dec. 2, 2020), <https://www.americanprogress.org/article/protecting-undocumented-workers-pandemics-front-lines-2/> [https://perma.cc/LJ9H-EXBC].

93. *COVID-19 Relief and Assistance for Individuals and Families*, CAL. STATE CONTROLLER, (Jan. 12, 2022), <https://www.sco.ca.gov/covid19ReliefAndAssistanceIF.html> [https://perma.cc/Y255-A4FS].

94. *NFIB*, 142 S. Ct. at 667.

95. Assemb. B. 2847, 2021–22 Leg., Reg. Sess. (Cal. 2022).

the California workforce.⁹⁶ This group of workers are parents (one in three undocumented California residents is a parent).⁹⁷ And 12.5% of school-aged children in California have at least one undocumented parent.⁹⁸ AB 2847 would establish the Excluded Workers Pilot Program and would make certain noncitizen California workers eligible to receive \$300 per week for each week of unemployment in calendar year 2023, and would require the state agency to make recommendations to the governor and the legislature for making the program permanent.⁹⁹

The proposed Excluded Workers Pilot Program is also premised on the idea that unemployment benefits have macroeconomic benefits for communities; the legislation recites a finding that UI benefits paid during the Great Recession of 2008–2011 produced \$2 of economic impact for every \$1 of benefits.¹⁰⁰ The fact that the U.S. economy rebounded so quickly and strongly from the catastrophically high levels of unemployment in the spring and summer of 2020 suggests that the unprecedentedly large amounts of pandemic financial assistance worked.¹⁰¹

The bill has complex provisions to prevent fraud while ensuring the data gathered to determine eligibility is not misused to target and detain or deport immigrants. It treats the information as confidential under the California Public Records Act,¹⁰² and prohibits sharing it with any state or federal agency or official.¹⁰³

The second safety net program that has expanded is Medi-Cal, which provides health insurance for low-income people. Effective May 1, 2022, California has expanded eligibility for otherwise qualifying people aged fifty and over, regardless of immigration status.¹⁰⁴ California already extended Medi-Cal coverage to people under age twenty-

96. *Id.* § 1(d).

97. *Id.*

98. *Id.*

99. *Id.* § 2025(a).

100. *Id.* § 1(e).

101. See Edward Flores et al., *Essential Fairness: The Case for Unemployment Benefits for California's Undocumented Immigrant Workers*, UNIV. OF CAL., MERCED, CMTY. & LAB. CTR. 1, 2 (Mar. 2022), https://clc.ucmerced.edu/sites/clc.ucmerced.edu/files/page/documents/essential_fairness.pdf [<https://perma.cc/VG66-2BNY>].

102. CAL. GOVT. CODE § 7920.000 *et seq.* (2021).

103. Cal. Assemb. B. 2847.

104. *Older Adult Expansion*, CAL. DEP'T. OF HEALTH CARE SERVS. (July 14, 2022, 10:41 AM), <https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/OlderAdultExpansion.aspx#:~:text=Beginning%20May%201%2C%202022%2C%20a,income%20limits%2C%20will%20still%20apply> [<https://perma.cc/P4SP-EKFK>].

six regardless of immigration status.¹⁰⁵ Medi-Cal expansion is especially significant for workers in low-wage jobs that typically do not provide health benefits and who earn too little to purchase individual coverage under the Affordable Care Act.¹⁰⁶ The pandemic made many aware of what poor people, health care providers, and epidemiologists have known for decades: The availability of health care is a humanitarian imperative and is in the interest of all because it is often necessary to prevent the spread of disease.

2. Enacting the Fast Food Accountability and Standards Recovery Act

As noted above, when in the early days of the pandemic, many workers could protect themselves and their communities from infection while still doing their job and earning a paycheck by working remotely, many food-service workers lost their jobs as their place of employment was shuttered. Many food-service workers were declared essential and kept working. Not surprisingly, food-sector jobs became vectors of infection. In the lowest wage sectors of the industry, franchise fast-food, workers were the most powerless to protect themselves, their families, and their communities because they lacked bargaining power on the job to force their employers to take safety precautions and they are paid too little to have the savings that would allow them to quit. California is seeking to address the structural causes of low pay and safety hazards in franchised fast-food work, and—more significantly—is creating a model for how a state can build worker power through enabling sectoral negotiation of minimum labor standards.¹⁰⁷

105. See *Young Adult Expansion*, CAL. DEP'T. OF HEALTH CARE SERVS. (Dec. 21, 2021, 9:24 AM), <https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/youngadultexp.aspx> [<https://perma.cc/KA6S-YN9E>]; *SB 75 - Full Scope Medi-Cal for All Children*, CAL. DEP'T. OF HEALTH CARE SERVS. (Mar. 23, 2021, 3:55 PM), <https://www.dhcs.ca.gov/services/medical/eligibility/Pages/SB-75.aspx> [<https://perma.cc/CR2K-A3NG>].

106. See Tyche Hendricks, *Newsome Wants to Expand Medi-Cal to All Undocumented Immigrants by 2024. Advocates Say They Need It Sooner*, KQED (May 23, 2022), <https://www.kqed.org/news/11914800/newsom-wants-to-expand-medi-cal-to-all-undocumented-immigrants-by-2024-advocates-say-they-need-it-sooner> [<https://perma.cc/36A6-GVX7>].

107. Assemb. B. 257, 2021–22 Leg., Reg. Sess. (Cal. 2022); Alejandro Lazo & Jeanne Kuang, *California May Give Fast Food Workers Power to Bargain with Their Industry*, CALMATTERS (June 2, 2022), <https://calmatters.org/california-divide/2022/06/california-fast-food-workers/> [<https://perma.cc/84SP-WQT5>]; see Christina N. Chung, *The Fast Food Accountability and Standards Recovery Act (Assembly Bill 257): Strengthening the Bill to Protect the Floor on Labor Standards and Establish Franchisor Liability*, BERKELEY CTR. ON L. & WORK 1, 1–2 (June 9, 2022), https://csls.berkeley.edu/sites/default/files/general/claw_law_policy_note_ab_257_6.9.2022.pdf [<https://perma.cc/SMJ9-KPAH>]; Catherine L. Fisk & Amy W. Reavis, *Pro-*

Endemic wage theft, discrimination, harassment, and safety violations afflict workers in the fast-food sector.¹⁰⁸ To understand why California's proposed solution is necessary, it helps to understand how the franchised fast-food industry operates. Most of the global fast-food corporations franchise their operations by contracting with small businesses to operate restaurants.¹⁰⁹ These brand-name corporations control the product prices and most of the restaurants' operations. The franchisees who operate the restaurants, many of whom are small businesses, have no way to make a profit while meeting the corporate directives about opening hours and customer service other than by cutting labor costs. It comes as no surprise, then, that many operators fail to pay legal minimum wages or overtime, deny sick leave, and ignore harassment, safety hazards, and disease transmission.¹¹⁰ Corporate franchisors have little incentive to ensure that their franchisees have the resources they need to operate safely, responsibly, and in compliance with laws meant to protect employees. Studies have shown that it is the franchising relationship—not the nature of restaurant work generally or fast-food work in particular—that accounts for the noncompliance with labor standards.¹¹¹ The probability of noncom-

protecting Franchisees and Workers in Fast Food Work, AM. CONST. SOC'Y ISSUE BRIEF 1, 1 (Dec. 2021), <https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf> [<https://perma.cc/X6LC-3CYU>].

108. A 2014 study surveyed 1,088 fast food employees nationwide, and 90% of the employees reported being forced to work off the clock, denied breaks, or refused overtime pay. Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds*, L.A. TIMES (Apr. 1, 2014, 5:00 AM), <https://www.latimes.com/business/la-fi-mo-wage-theft-survey-fast-food-20140331-story.html> [<https://perma.cc/7EHL-NXWV>]. A 2016 study surveyed 1,217 women fast-food employees nationwide and found that 30% of them had experienced unwanted sexual behaviors on the job. Hart Research Associates, *Key Findings from a Survey of Women Fast Food Workers* 1, 1 (Oct. 5, 2016), <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf> [<https://perma.cc/K6HC-BKSU>]. Hart Research Associates, *Key Findings from a Survey on Fast Food Worker Safety* 1, 1 (Mar. 16, 2015), https://www.coshnetwork.org/sites/default/files/FastFood_Workplace_Safety_Poll_Memo.pdf [<https://perma.cc/LSD8-QCW8>].

109. Hsu, *supra* note 108.

110. *Id.*; Hart Research Associates, *Key Findings from a Survey of Women Fast Food Workers* 1, 1 (Oct. 5, 2016), <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf> [<https://perma.cc/K6HC-BKSU>]. Hart Research Associates, *Key Findings from a Survey on Fast Food Worker Safety* 1, 1 (Mar. 16, 2015), https://www.coshnetwork.org/sites/default/files/FastFood_Workplace_Safety_Poll_Memo.pdf [<https://perma.cc/LSD8-QCW8>].

111. *See* DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 122–158 (Harvard University Press 2017) (explaining how franchising leads to poor labor practices by enabling franchisors to control restaurant operations and to maximize and extract profits while avoiding liability for labor violations; liability rests with the franchisee, which is typically undercapitalized and

pliance with wage laws is about 24% higher among franchisee-run outlets than among otherwise similar company-run fast food outlets.¹¹²

The pandemic has illuminated the tragic consequences of the franchising relationship. Medical researchers at the University of California, San Francisco found that California line cooks faced a 60% increase in mortality associated with the pandemic—the highest of any occupation—and Latino and Latina food service workers saw a 39% increase in mortality.¹¹³ Physicians for Social Responsibility found that 89% of fast food restaurants failed to comply with public health guidelines for preventing workplace transmission.¹¹⁴ The public costs of COVID-19 transmission in fast food work have been estimated at \$1.2 billion in Los Angeles county alone.¹¹⁵

The Fast Food Accountability and Standards Recovery Act (“FAST Recovery Act”) would create a structure to improve compliance with law in an industry structured to avoid corporate accountability.¹¹⁶ It would create a Fast Food Sector Council composed of representatives of the franchisor brands, franchisee restaurant operators, workers, and public labor agencies.¹¹⁷ The council would regularly recommend and issue statewide standards on wages and working conditions for fast food restaurants.¹¹⁸ It is a form of tripartite negotiated rulemaking for working conditions in the franchised fast food sector.¹¹⁹

The FAST Recovery Act would strengthen opportunities for public input in rulemaking by bringing the expertise of public agencies, workers in the industry, franchisees, and franchisors into the regula-

unable to make a profit while complying with labor standards laws and with the terms of the franchise agreement).

112. Fisk & Revis, *supra* note 107.

113. Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18-65 Years of Age, by Occupational Sector and Occupation: March Through December 2020*, PLOS ONE (June 4, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0252454> [<https://perma.cc/Z4X5-U7M8>].

114. *New Study: Rapid COVID-19 Spread in CA Linked to Unsafe Working Conditions at Fast-Food Restaurants*, PHYSICIANS FOR SOC. RESP. L.A. (Apr. 19, 2021), <https://www.psr-la.org/new-study-rapid-covid-19-spread-in-ca-linked-to-unsafe-working-conditions-at-fast-food-restaurants/> [<https://perma.cc/Z97Q-3HEX>].

115. KUOCHIH HUANG ET AL., UC BERKELEY LAB. CTR., *THE FAST FOOD INDUSTRY & COVID-19 IN LOS ANGELES 2* (2021), <https://laborcenter.berkeley.edu/wp-content/uploads/2021/05/The-Fast-Food-Industry-and-COVID-19-in-Los-Angeles-v2.pdf> [<https://perma.cc/3YCP-YS5D>].

116. *See* Assemb. B. 257, 2021–22 Leg., Reg. Sess. (Cal. 2022).

117. *Id.*

118. *Id.* § 1471(f).

119. On the promise of tripartite negotiation of minimum labor standards, *see* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 10 (2016).

tory process. Although an early version of the Act would have ensured franchisor accountability by making the franchisors, and not just franchisees, jointly and severally liable for violations of various state worker and public health and safety laws, the joint employer provision was deleted during the legislative process.¹²⁰ Although the council is an innovative solution to longstanding problems in fast food, it is based on well-settled principles of law like those established in the California Energy Commission and the California Coastal Commission.¹²¹ It would ensure input from diverse stakeholders to address important problems and find solutions that work for everyone.

The FAST Recovery Act passed the California Legislature on August 29, 2022.¹²² It now goes to California Governor Gavin Newsom for his signature by the end of the legislative calendar year in September 2022.

Whether the FAST Recovery Act becomes law in California in 2022 or not, it is a model for how states can address the structural causes of low wages, wage theft, and other poor working conditions across a significant economic sector. There is no immutable law of nature or economics that determines that fast food work, or service sector jobs, or jobs disproportionately filled by Black, Brown, female, and/or immigrant workers have to be “bad jobs,” i.e., paid poorly, lack access to social safety net protections such as health insurance, unemployment benefits, sick leave, disability, and retirement benefits; and to provide no career ladders, nor regular and manageable schedules, nor health and safety protections. Scholars have shown that laws play a powerful role in determining which jobs are bad jobs and which are “good jobs.”¹²³ The FAST Recovery Act is a legislative priority of worker advocates, including unions that are unlikely in the near term to gain a single new dues-paying member from its enactment, because it is a promising model to address the structural causes of bad jobs

120. Cal. Assemb. B. 257; Sean P. Redmond, *California Passes Radical AB 257 Fast-Food Legislation*, U.S. CHAMBER OF COM. (Sept. 1, 2022), <https://www.uschamber.com/employment-law/unions/california-passes-radical-ab-257-fast-food-legislation> [<https://perma.cc/KU6P-6FBZ>]; see also Chung, *supra* note 107.

121. Fisk & Reavis, *supra* note 107, at 2–3.

122. Cal. Assemb. B. 257.

123. See ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970s TO 2000s* 3 (Russell Sage Foundation 2011) (previewing the thesis of the study, which is that laws enacted during the 1930s increased the number of workers with “good jobs” but that laws and policies enabled the growth of “bad jobs” and the polarization of the workforce between those with access to good jobs and those without); WEIL, *supra* note 111.

that stifle the hopes of a disproportionate number of Black, Brown, female, and immigrant workers in California and nationwide.

Conclusion

To conclude, because this Essay has been written as the 17th Annual Jack Pemberton Lecture in Workplace Justice, let me explain why I see the legacy of Jack Pemberton in these proposed California laws. He was a civil liberties lawyer who saw the importance of linking civil liberties and civil rights. He believed freedom and equality are in harmony, not in tension. He saw that law could unite people rather than divide them.

So, too, can an inclusive approach to workplace rights and protection serve the interests of everyone. Preventing infections in the workplace protects workers, customers, managers, and everyone else involved. The social safety net, as we all discovered in the pandemic, prevents capitalism from breaking, and it also saves lives. Extending unemployment insurance to everyone who needs it, without regard to immigration status, protects children, families, and communities.

Jack Pemberton's career shows how law can play a role in uniting us rather than dividing us. May his memory be a blessing and an inspiration.