



HOW COVID-19 HAS INFECTED THE TOTALITY OF LIFE (INCLUDING LAW)

David M. Frankford*

ABSTRACT

The COVID-19 pandemic, stemming from the SARS-CoV-2 virus, has shown, as if proof were necessary, that a pandemic is an inseparably biological and social phenomenon that combines interacting elements of nature, including evolution, as well as political, social, and economic forces. As such, the COVID-19 pandemic has affected every sphere of human existence.

In this Article, I analyze the more important elements of this seamless web by breaking it down into a number of categories: the virus itself (and some linked phenomena) and the political, economic, and social instability that it has caused everywhere. This instability ranges from effects on forms of primary association like the family to those on forms of secondary association including education, the economy, state legitimacy, social solidarity and law in the United States and, to some extent, in other nations, and health care delivery and public health in the United States.

Pre-pandemic society in the United States was becoming increasingly fractured and polarized. In this ecology, a virus as smart and nimble as SARS-CoV-2 worked its will, seeping into everything because it fed on and exacerbated every crack and crevice; and these impacts are not linear but recursive, feeding into and amplifying one another. Instability in primary association partially feeds off of and into economic instability. Likewise, economic instability is concurrently a consequence and a cause of growing political instability. In turn, both forms partially derive from and cause the growing delegitimization of

* Professor of Law, Rutgers Law School; Core Faculty, Institute for Health, Health Care Policy and Aging Research, Rutgers University; Faculty Director at Camden, Center for State Health Policy, Rutgers University. Thanks to Scott Burris, Joel Cantor, Wendy E. Parmet, Victor Rodwin, and Sara Rosenbaum for their very helpful suggestions. Thanks to John Byrnes, Editor in Chief, Newark, for his patience and support. Thanks to Emily Thampoe for research assistance.

social solidarity and, in particular, the collective enterprise of public health. The latter is one reason that the United States' capacity to respond to this pandemic and any on the horizon has been reduced. The most vulnerable among us have suffered the greatest hardship, but our society as a whole has been diminished.

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INTRODUCTION

COVID-19, the illness caused by the coronavirus SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), is ubiquitous, not just geographically, but also in that it has infected every sphere of human existence, as well as many parts of the animal kingdom. In this Article, I describe this phenomenon. Time and again, it must be repeated that a pandemic is *inseparably* a biological and social phenomenon that combines interacting elements of nature, including evolution, as well as political, social, and economic forces. For analytic purposes, I divide this seamless web into a number of categories: (I.) the virus itself (and some linked phenomena); and (II.) the political, economic, and social instability it has caused everywhere, ranging from its effects on (A.) forms of primary association like the family to forms of secondary association like (B.) education, (C.) the economy, (D.) state legitimacy, social solidarity and law in the United States and, to some extent, in other nations, and (E.) health care delivery and public health in the United States. Among these categories, two points reappear repeatedly, neither of which is surprising: first, with rare exception, the weight of the pandemic has fallen hardest on the most vulnerable among us and around the world, and, second, the pandemic has drawn on and made worse pre-existing problems like those in the United States: the growing gap between the highest and lowest paid that is now wider than that during the Gilded Age; the growing shortage of affordable housing; the constant

underfunding of education and shortage of teachers; the lack of universal child care; the linkage of health insurance to employment; the lack of universal health care insurance and the fragmentation that mars finance and delivery of health care services; the growing nursing shortage; the continuing culture wars that appear more divisive than they were during the tumultuous 1960s; and the growing political polarization, if not a slide toward authoritarianism.

The scope of this Article is quite broad, reflecting the pandemic's effect on all spheres of life, only some of which can be discussed here. The tale is not a happy one because the pandemic has shaken society in the United States from head to toe. The effects are not linear but recursive, feeding into and amplifying one another. Instability in primary association partially feeds off of and feeds into economic instability. Likewise, economic instability is concurrently a consequence and a cause of growing political instability. In turn, both forms partially derive from and cause the growing delegitimization of social solidarity and, in particular, the collective enterprise of public health. The latter is one reason that the United States' capacity to respond to this pandemic and any on the horizon is diminished. Government therefore has become less capable of achieving perhaps its most fundamental purpose, defense of its population—not defense against military threats, but instead defense against a deadly pathogen, and the next one could be worse.¹ In all of this, the pandemic has heightened the pre-existing fragmentation and polarization in our society.

Before proceeding, it is worth placing this Article in context, as a segue between two published works,² and a work in progress that will expand the second piece.³ *Sick at Heart*, written in the late spring and early summer of 2020, describes how health care delivery and finance in the United States and its separation from public health contributed to our lack of preparedness.⁴ *The Coronavirus Feeds on the Pathologies of the American Health Care System*, written in the summer of 2020, flips the perspective of *Sick at Heart* and explicates what the pandemic has

1. Of course, defense against military action and defense against pathogens raise different considerations.

2. David M. Frankford, *Sick at Heart: A Fundamental Reason the United States Was Unprepared for the COVID-19 Emergency*, 72 RUTGERS U.L. REV. 1337, 1337 (2020) [hereinafter "*Sick at Heart*"]; Sara Rosenbaum & David M. Frankford, *The Coronavirus Feeds on the Pathologies of the American Health Care System*, in LAW AND THE AMERICAN HEALTH CARE SYSTEM 3 (2d ed. 2012) [hereinafter "*Coronavirus Feeds on Pathologies*"].

3. David M. Frankford, *The Coronavirus Feeds on the Pathologies of the American Health Care System* (forthcoming 2023) (on file with author).

4. See generally *Sick at Heart*, *supra* note 2.

revealed about health care delivery and finance in the United States.⁵ That picture is very ugly and will be explored more fully in a future article. The project proceeds in parts because COVID-19 has touched every aspect of life.⁶

I. THE VIRUS ITSELF (AND SOME LINKED PHENOMENA)

SARS-CoV-2 has continued to defy prediction. The virus is characterized by a “spike” protein that enables it to penetrate and infect human cells.⁷ Initially, the virus was perceived to cause a unique type of pneumonia, but it soon became apparent that it possesses the capability to invade many kinds of human cells, including those in the nasal passages, trachea, bronchi, lungs, kidneys, gastrointestinal tract, vascular system, heart, and more.⁸

Early predictions and findings held that the virus was more stable than the flu such that a single vaccination would provide lasting immunity.⁹ However, that prediction proved to be wrong, as we have now witnessed multiple mutations of concern, most saliently Alpha, Beta, Delta, and Omicron. The Omicron variant was the most surprising of all, with a whopping 53 mutations overall and an equally astonishing 30 mutations on the spike alone.¹⁰ These characteristics have given Omicron the partial ability to evade human antibodies, whether created by vaccinations or prior infections, thus rendering multiple infections possible, even among persons “fully vaccinated”—then defined as having received two doses, spaced apart—and necessitating the need for a third “booster” and possibly more. While Delta was more virulent than prior

5. Compare *Sick at Heart*, *supra* note 2, at 1337, with *Coronavirus Feeds on Pathologies*, *supra* note 2.

6. Given the Article’s broad scope, to keep it manageable, I do not engage with a broad range of literature to the extent that I would prefer.

7. See Jia Liu et al., *SARS-CoV Cell Tropism and Multiorgan Infection*, 7 CELL DISCOVERY 17, 17 (2021).

8. See, e.g., *id.*

9. See, e.g., Joel Achenbach, *The Coronavirus Isn’t Mutating Quickly, Suggesting a Vaccine Would Offer Lasting Protection*, WASH. POST (Mar. 24, 2020), https://www.washingtonpost.com/health/the-coronavirus-isnt-mutating-quickly-suggesting-a-vaccine-would-offer-lasting-protection/2020/03/24/406522d6-6dfd-11ea-b148-e4ce3fbd85b5_story.html; Derya Ozdemir, *COVID-19 Is Mutating, but Not Fast Enough to Significantly Hinder a Vaccine*, INTERESTING ENG’G (Mar. 26, 2020), <https://interestingengineering.com/covid-19-is-mutating-but-not-fast-enough-to-significantly-hinder-a-vaccine>.

10. See, e.g., Carl Zimmer, *Omicron’s Radical Evolution*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/24/science/omicron-mutations-evolution.html>.

versions of the coronavirus, fortunately Omicron is not.¹¹ However, Omicron's superior ability to infect more people at a much faster rate than earlier variants led to a much larger number of infections and, hence, a large number of hospitalizations and deaths even though it is deemed "milder" than Delta.¹²

As a result, the surge caused by Delta, occurring during the summer of 2021, and that caused by Omicron, occurring largely in January 2022, caught much of the public and many leaders by surprise.¹³ Many leaders' actions and predictions have reflected much wishful thinking, raising expectations that were then dashed by reality. Similar optimism, perhaps shading into denial, was in part responsible for the slow, timid reaction of local leaders in the city of Wuhan and in the Hubei Province at the pandemic's beginning.¹⁴ Similar too was President Biden's declaration on June 2, 2021, that the United States was entering a "summer of freedom,"¹⁵ soon to be belied, first and soon thereafter, by Delta's deadly surge and then, second, by the surge caused by Omicron. This combination of biological fact, predictions that proved wrong, and the social, political, and economic actions and responses—particularly the raised and dashed expectations social scientists often label as the cause of much turmoil throughout history—have contributed to many of the social effects explicated below. Even now as I write in March of 2022, the far majority of people and leaders consider the pandemic to be over despite the numerous warnings by scientists in virology, infectious disease, public health, and elsewhere that we are just mutations away

11. William A. Haseltine, *Omicron: Less Virulent but Still Dangerous*, FORBES (Jan. 11, 2022, 2:13 PM), <https://www.forbes.com/sites/williamhaseltine/2022/01/11/omicron-less-virulent-but-still-dangerous/?sh=3bd97d5e2ea6>.

12. *See id.*

13. Umair Irfan, *What Makes the Omicron Variant So Strange and Surprising*, VOX (Dec. 23, 2021), <https://www.vox.com/22846696/omicron-covid-19-variant-virology-mutation-vaccine>; Joel Achenbach et al., *'Goldilocks Virus': Delta Vanquishes All Variant Rivals as Scientists Race to Understand Its Tricks*, WASH. POST (Aug. 8, 2021, 4:55 PM), https://www.washingtonpost.com/health/delta-variant-most-prevalent/2021/08/08/d1017f0e-f558-11eb-9068-bf463c8c74de_story.html.

14. *See, e.g., Sick at Heart, supra* note 2, at 1344 n.18. As explicated in *Sick at Heart*, motivations were complicated, involving cover-ups at all levels, as well as overly rigid laws and too much top-down leadership, among other factors.

15. Joseph Biden, U.S. President, Remarks on the COVID-19 Response and Vaccination Program (June 2, 2021, 1:41 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program/>. Of course, Trump's denialism was over the top, surpassed perhaps only by Brazil's Jair Bolsonaro's stupidity, cruelty, and arrogance, as discussed in *Sick at Heart*.

from a variant equally or more deadly than Delta *and* equally or more contagious than Omicron.¹⁶

What is happening now has happened numerous times before across history. As one observer quipped, “[u]nlike its beginning, the end of the pandemic will not be televised.”¹⁷ Many pandemics do not end solely because of biological facts, such as the attainment of herd immunity and the end of illness and death. Instead, as written by John M. Barry, probably the most prominent historian of the Spanish Flu,¹⁸ pandemics end when people and public officials grow weary of it and no longer acquiesce in or impose social restrictions.¹⁹ For example, most histories of the 1918 influenza pandemic locate its end in the summer of 1919 after a third wave subsided.²⁰ However, there was a fourth wave in 1920, caused by a new variant, that in many major cities caused more deaths than the second wave that is ordinarily considered the most lethal.²¹ “Newspapers were filled with frightening news about the virus, but no one cared. People at the time ignored this fourth wave; so did historians. Deaths returned to pre-pandemic levels in 1921, and the virus mutated into ordinary seasonal influenza, but the world had moved on well before.”²² The 1957, 1968, and 2009 influenza pandemics followed similar patterns.²³

Stating that “the world” has moved on is—if you will forgive me—a fallaciously global characterization because “the world” is filled with people and nations occupying disparate positions and vulnerabilities. As of March 2022 in the United States, children under the age of five have yet to be vaccinated, and roughly 34 percent of the overall population have yet to be fully vaccinated.²⁴ Additionally, something on the order of

16. See, e.g., Sarah Zhang, *The Coronavirus Will Surprise Us Again: The Variant After Omicron Could Look Very Different from Any Yet*, ATLANTIC (Jan. 29, 2022), <https://www.theatlantic.com/health/archive/2022/01/coronavirus-variant-after-omicron/621404/>.

17. David Robertson & Peter Doshi, *The End of the Pandemic Will Not Be Televised*, BMJ, Dec. 14, 2021, at 3.

18. See generally JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* (2005).

19. John M. Barry, *What We Can Learn from How the 1918 Pandemic Ended*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/opinion/covid-pandemic-end.html>.

20. *Id.*

21. *Id.*

22. *Id.*

23. See *id.*

24. See, e.g., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/interactive/2021/us/covid-cases.html>. Now, “conventional wisdom” states that “Americans are ready to put COVID-19 in the rearview mirror and cast precautions aside.” *As the COVID-19 Pandemic Enters the Third Year Most Adults Say They*

seven million people with suppressed immune systems fail to produce adequate antibodies and therefore not only do not achieve full or even partial immunity against infection or mild illness but also remain at risk for serious illness, hospitalization, and death.²⁵ Long COVID remains a risk for anyone who is infected, even those whose illness creates symptoms like a bad cold or even those whose illness is asymptomatic.²⁶ Millions more have pre-existing illnesses that put them at greater risk than those who do not.²⁷ Last but far from least, only 15.2 percent of the population in low-income countries have received even one vaccination.²⁸ This disparity between wealthy and poor parts of the world is all too typical. Writing of HIV and AIDS, tuberculosis, and malaria, all of which combined still kill millions each year, Peter Sands, executive director of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, glumly put it this way: “By endemic we actually mean a disease the world could get rid of but hasn’t. HIV and AIDS, tuberculosis, and malaria . . . are pandemics that have been beaten in rich countries. Allowing them to persist elsewhere is a policy choice and a budgetary decision.”²⁹

Have Not Fully Returned to Pre-Pandemic ‘Normal,’ KAISER FAMILY FOUND. (April 6, 2022), <https://www.kff.org/other/press-release/as-the-covid-19-pandemic-enters-the-third-year-most-adults-say-they-have-not-fully-returned-to-pre-pandemic-normal/>. Yet, Americans remain almost evenly split on such issues as the extent to which they have returned to “normal” activities, wear masks in public places, and whether masks should be mandatory in areas like transportation. See Grace Sparks et al., *COVID-19 Vaccine Monitor Views on The Pandemic at Two Years*, KAISER FAMILY FOUND. (Apr. 6, 2022), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-pandemic-two-years/> (Accessed April 15, 2022); see also Alec Tyson & Cary Funk, *Increasing Public Criticism, Confusion over COVID-19 Response in U.S.*, PEW RSCH. CTR. (Feb. 9, 2022), https://www.pewresearch.org/science/wp-content/uploads/sites/16/2022/02/PS_2022.02.09_covid-19-response_REPORT.pdf.

25. See, e.g., Ed Yong, *The Millions of People Stuck in Pandemic Limbo*, ATLANTIC (Feb. 16, 2022), <https://www.theatlantic.com/health/archive/2022/02/covid-pandemic-immunocompromised-risk-vaccines/622094/>.

26. See, e.g., Jonathan Wolfe, *Understanding Long Covid*, N.Y. TIMES (Mar. 25, 2022), [nytimes.com/2022/03/25/briefing/understanding-long-covid.html](https://www.nytimes.com/2022/03/25/briefing/understanding-long-covid.html).

27. See Yong, *supra* note 25.

28. See, e.g., *Coronavirus (COVID-19) Vaccinations*, OUR WORLD IN DATA (Apr. 18, 2022), <https://ourworldindata.org/covid-vaccinations#citation>; see also Nadia A. Sam-Aguda et al., *The Pandemic Is Following a Very Predictable and Depressing Pattern*, ATLANTIC (Mar. 4, 2022), https://www.theatlantic.com/health/archive/2022/03/pandemic-global-south-disease-health-crisis/624179/?campaign_id=154&emc=edit_cb_20220304&instance_id=54947&nl=coronavirus-briefing®i_id=111530424&segment_id=84710&te=1&user_id=40ce3fd0abe09cc5dacc1def9a0b0d00.

29. Peter Sands, *Why Aren’t Diseases Like HIV and Malaria, Which Still Kill Millions of People a Year, Called Pandemics?*, STAT FIRST OP. (July 6, 2021), <https://www.statnews.com/2021/07/06/why-arent-diseases-like-hiv-and-malaria-which->

These disparities feed the political, economic, and social instability to which I turn next. To rephrase the title of my work in progress that shines a light on the pathologies of our health care delivery and finance (non)system, these disparities draw on and exacerbate the cleavages, structural disadvantages, and injustices that existed before the COVID-19 pandemic. One fact alone aptly illustrates this continuity and exacerbation; and it shocks the conscience—or mine at least. According to Oxfam International, during the pandemic the top ten billionaires—yes, billionaires—in the world doubled their wealth since the start of the pandemic—yes, doubled.³⁰

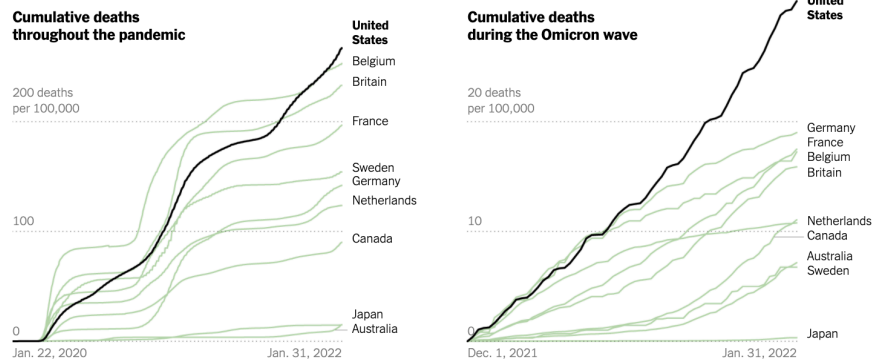
Perhaps nothing has been more important in the United States than the resistance to vaccination. For one thing, it has been estimated that as of December 2021, approximately 163,000 lives would have been saved if the United States had achieved full vaccination, not exactly a drop in the bucket of over 700,000.³¹ Resistance to vaccination, so-called “vaccination hesitancy,” exists in many nations but among wealthy nations it is most acute in the United States and is largely responsible for the fact that the United States has by far the worst rate of death among all wealthy nations.³²

still-kill-millions-of-people-a-year-called-pandemics/. For a wonderful piece discussing all the ambiguities in the value-laden term “endemic,” see generally Jacob Stern & Katherine Wu, *Endemicity Is Meaningless*, ATLANTIC (Feb. 1, 2022), <https://www.theatlantic.com/health/archive/2022/02/endemicity-means-nothing/621423/>. Martha Nussbaum’s great work on societies and norms built on the inclusion, rather than exclusion, of the vulnerable comes to mind immediately.

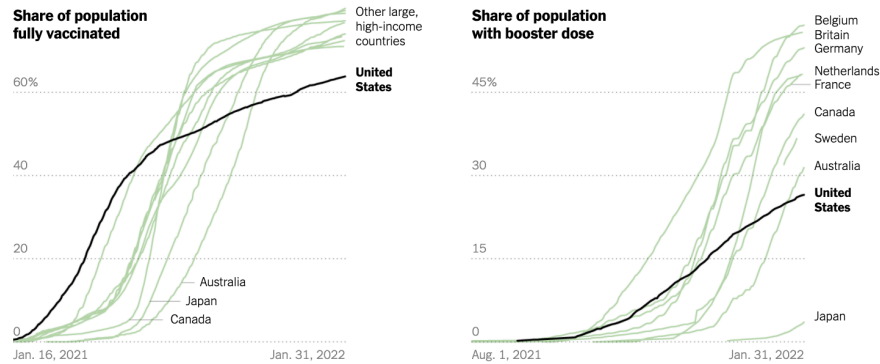
30. *Ten Richest Men Double Their Fortunes in Pandemic While Incomes of 99 Percent of Humanity Fall*, OXFAM INT’L (Jan. 17, 2022), <https://www.oxfam.org/en/press-releases/ten-richest-men-double-their-fortunes-pandemic-while-incomes-99-percent-humanity>. The methodology used in Oxfam’s reports has been criticized but its point still holds. See, e.g., Vauhini Vara, *Critics of Oxfam’s Poverty Statistics Are Missing the Point*, NEW YORKER (Jan. 28, 2015), <https://www.newyorker.com/business/currency/critics-oxfams-poverty-statistics-missing-point#:~:text=Oxfam%20worked%20down%20from%20the,all%20take%20debt%20into%20account>.

31. Jared Ortaliza et al., *COVID-19 Preventable Mortality*, PETERSON-KFF HEALTH SYS. TRACKER (Dec. 10, 2021), <https://www.healthsystemtracker.org/brief/covid19-and-other-leading-causes-of-death-in-the-us/>.

32. Both figures are taken from Benjamin Mueller & Eleanor Lutz, *U.S. Has Far Higher Covid Death Rate than Other Wealthy Countries*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/interactive/2022/02/01/science/covid-deaths-united-states.html>.



Sources: New York Times database of reports from state and local health agencies (U.S. deaths); The Center for Systems Science and Engineering at Johns Hopkins University (world deaths); World Bank (world populations); United States Census Bureau (U.S. population) • Note: Countries shown are those with the highest gross national income per capita among countries with a population of more than 10 million people.



Sources: Our World in Data (world vaccinations); Centers for Disease Control and Prevention (U.S. vaccinations) • Note: Vaccination and booster data in some countries are available infrequently. Sweden data for booster doses is available only from Jan. 20, 2022.

There are multiple reasons for vaccine hesitancy and resistance, which do not need to be distinguished here. Some do not get vaccinated because they must take off work to do so and do not get paid leave. Others face problems such as lack of transportation. Some do not have adequate access to providers. These are pre-existing structural deficits. Others distrust the health care system because of a history of racial and ethnic discrimination.³³ Many people are concerned that the vaccines were

33. One of the most fascinating aspects of the mobilization to encourage vaccination was the manner in which Black communities collectively rallied to overcome, to a great extent, the history of abuse and discrimination. See, e.g., Tasleem J. Padamsee et al., *Changes in COVID-19 Vaccine Hesitancy Among Black and White Individuals in the US*, JAMA NETWORK OPEN (Jan. 21, 2021), <https://jamanetwork.com/journals/>

developed too rapidly, ignorant of the fact that the basic science had been developing for decades. Many have been confused about or fear side effects.³⁴ In general, there has been a precipitous decline in social solidarity while “personal responsibility” and “freedom” have taken over,³⁵ both discussed much more fully below.³⁶ However, the most important factor in the United States is that the issue of vaccination, as well as mitigation measures such as lockdowns, social distancing, the wearing of masks and the like, have become partisan ones, drawing on the increasingly poisonous nature of our politics and the massive proliferation of what is charitably called “misinformation,” but in reality, is simply the creation and dissemination of falsehoods, whether the falsity is intentional or not. This poisonous atmosphere did not originate with the Trump administration but goes back at least to the scorched-earth political warfare that both carried Newt Gingrich to power as the Speaker of the House and that he fomented.³⁷ Since then, the vitriol has only grown, with the Trump administration and the aftermath of the January 6th insurrection, all driven in part by such factors as the dominance of social media, the demise of professional journalistic

jamanetworkopen/article-abstract/2788286. However, Black children ages 5-11 remain disproportionately unvaccinated with higher rates of hospitalization. See Dallas S. Shi et al., *Hospitalizations of Children Aged 5-11 Years with Laboratory-Confirmed COVID-19, 14 States, March 2020-February 2022, Morbidity & Mortality Weekly Report*, CDC (April 19, 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7116e1.htm?s_cid=mm7116e1_w. For a fascinating description of some of these community-based efforts, see Andrew Jacobs, “All Hands on Deck”: When Vaccinating Black People Is a Communal Effort, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/03/28/health/covid-19-vaccine-african-americans.html>. Unfortunately, largely due to problems of access, Black people in the United States have fallen behind white people in obtaining boosters. See, e.g., Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KAISER FAMILY FOUND. (April 7, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/>; Julie Wenau & Renée Onque, *Health Workers Plan for Years of Covid-19 Vaccine Outreach to Black People*, WALL ST. J. (Mar. 10, 2022, 8:00 AM), <https://www.wsj.com/articles/health-workers-plan-for-years-of-covid-19-vaccine-outreach-to-black-people-11646917200>; Ashley Wong, *Booster Shot Data from New York City Shows Major Disparities by Race and Neighborhood*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/11/nyregion/nyc-covid-booster-shot.html>.

34. See, e.g., Zeynep Tufekci, *The Unvaccinated May Not Be Who You Think*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/opinion/covid-vaccines-unvaccinated.html?action=click&module=RelatedLinks&pgtype=Article>.

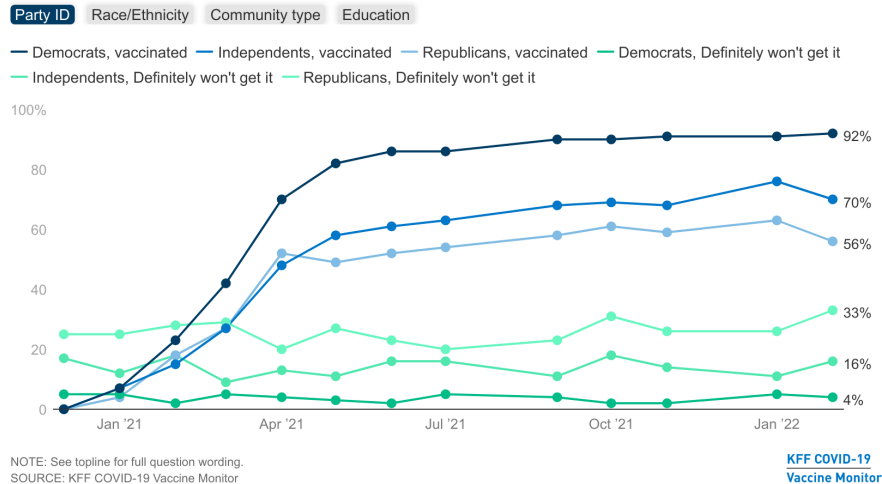
35. See, e.g., Anita Sreedhar & Anand Gopal, *Behind Low Vaccination Rates Lurks a More Profound Social Weakness*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/opinion/vaccine-hesitancy-covid.html>.

36. See *infra* Section II.D.

37. It should be clear that my understanding of history is that Great Men do not drive it, nor are they simply carried along by a wave. Structure and agency both matter.

standards and the proliferation of “alternative facts.”³⁸ The stark fact is that Republicans are far less likely than Democrats to be vaccinated and to be willing to be vaccinated, trends that have held through both the Delta and Omicron surges.³⁹

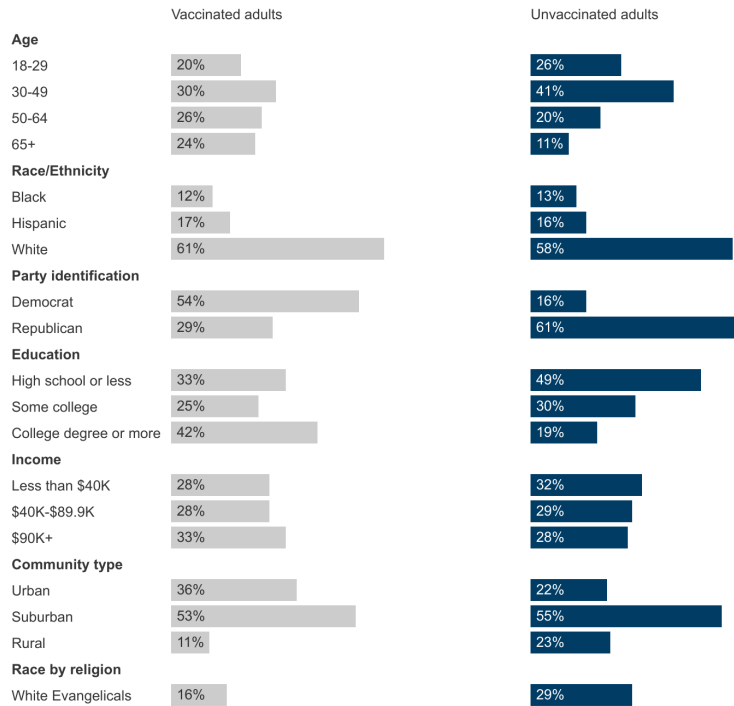
Percent in each group who say they are **already vaccinated** or **definitely will not get vaccinated** against COVID-19 in each given month:



38. Defending White House Press Secretary Sean Spicer’s statement that the inauguration of President Trump drew the largest audience in history, something easily proved false by photographs, Kellyanne Conway, senior counsel to the President, stated that Spicer “gave alternative facts to that.” See, e.g., Aaron Blake, *Kellyanne Conway Says Donald Trump’s Team Has “Alternative Facts.” Which Pretty Much Says It All*, WASH. POST (Jan. 22, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/kellyanne-conway-says-donald-trumps-team-has-alternate-facts-which-pretty-much-says-it-all/>.

39. See *KFF COVID-19 Vaccine Monitor*, KFF, <https://www.kff.org/coronavirus-covid-19/dashboard/kff-covid-19-vaccine-monitor-dashboard/#uptake> (last visited May 14, 2022) (providing a variety of charts and statistics pertaining to the Covid-19 vaccine). The KFF Tracker sites are invaluable. The following two figures were taken from the KFF Covid-19 Vaccine Monitor. *Id.*

Demographic profile of adults who are vaccinated for COVID-19 and those who are not vaccinated for COVID-19:



NOTE: Party identification includes independents who lean towards either party. See topline for full question wording.
 SOURCE: KFF COVID-19 Vaccine Monitor (February 9-21, 2022)

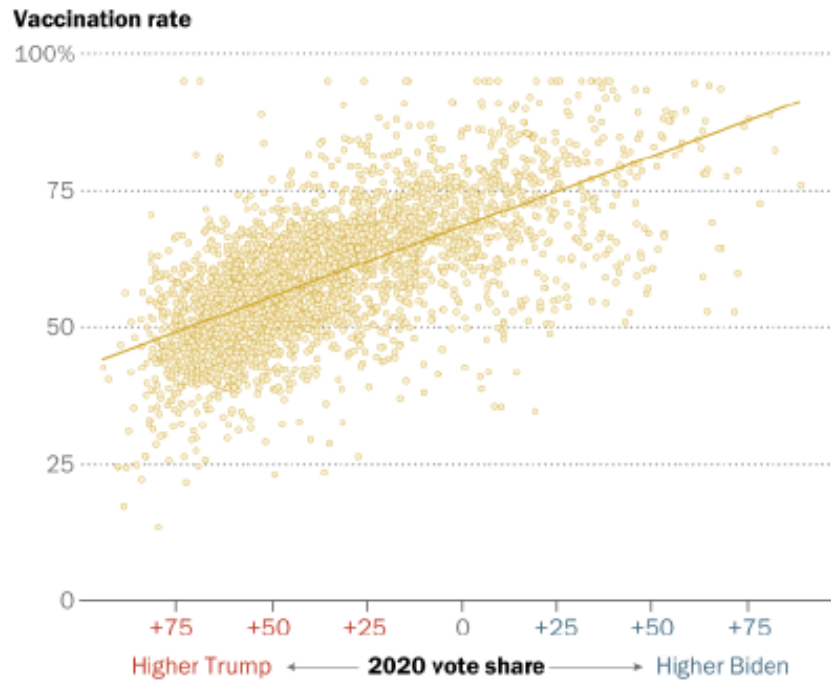
[KFF COVID-19 Vaccine Monitor](#)

This difference particularly trends by counties, where there is, one might say, both herd mentality and higher infection rates differentiated by the type of herd, relatively protected by vaccines and not.⁴⁰

40. See *id.*

Counties that Biden won in 2020 have higher vaccination rates than counties Trump won

Share of adults who are fully vaccinated in each county in the U.S.



Notes: 165 counties (about 4% of the U.S. population) are excluded because they have reported fewer than 80% of the vaccinations within their jurisdiction to the CDC. Excludes Alaska, where election results are not reported at the county level. The fitted line shows the relationship between the vaccination rate in each county and the shares of the two-party vote that went to Trump vs. Biden in that county.

Source: Pew Research Center analysis of Centers for Disease Control and Prevention vaccination data as of Feb. 28, 2022. See methodology for details.

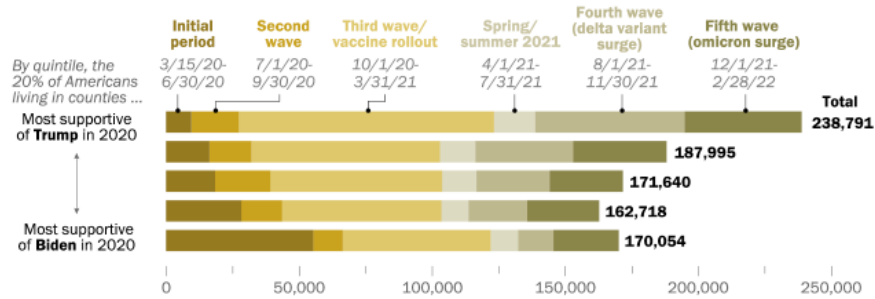
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Since unvaccinated persons in the United States stand a ten times greater risk of dying than fully vaccinated ones (as of the beginning of

January 2020),⁴¹ the greater death rates of Republicans, shown by area, is simply stunning.⁴²

Initially, deaths from COVID-19 were concentrated in Democratic-leaning areas; the highest overall death toll is now in the 20% of the country that is most GOP-leaning

Total number of reported coronavirus deaths in groups of counties representing 20% segments of the U.S. population, by support for Trump or Biden



Notes: Counties are grouped into quintiles by the share of the two-party general election vote won by Trump and by Biden. Each quintile represents 20% of the total U.S. population. Excludes Alaska (1,127 deaths), where election results are not reported at the county level. Source: Pew Research Center analysis of COVID-19 data collected by The New York Times as of Feb. 28, 2022. See methodology for details.

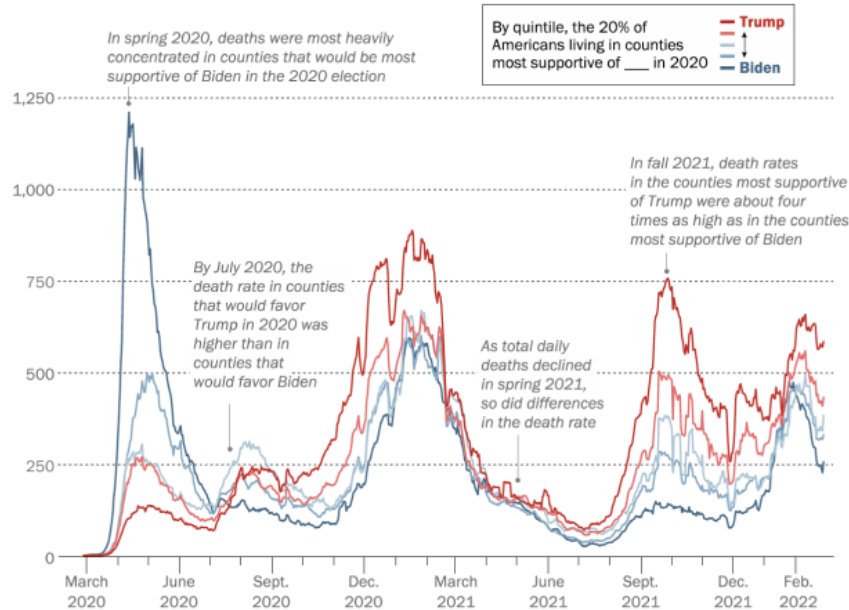
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41. See *Coronavirus in the U.S.: Latest Map and Case Count. Rates for Vaccinated and Unvaccinated*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/interactive/2021/us/covid-cases.html>.

42. The following three figures are taken from Bradley Jones, *The Changing Political Geography of COVID-19 over the Last Two Years*, PEW RSCH. CTR. (Mar. 3, 2022), <https://www.pewresearch.org/politics/2022/03/03/the-changing-political-geography-of-covid-19-over-the-last-two-years/>.

In early phase of pandemic, far more COVID-19 deaths in counties that Biden would go on to win; since then, there have been many more deaths in pro-Trump counties

Number of daily reported coronavirus deaths in groups of counties representing 20% segments of the U.S. population, by support for Trump or Biden



Notes: Counties are grouped into quintiles by the share of the two-party general election vote won by Trump and by Biden. Each quintile represents 20% of the total U.S. population, excluding Alaska, where election results are not reported at the county level. Source: Pew Research Center analysis of COVID-19 data collected by The New York Times as of Feb. 28, 2022. See methodology for details.

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This situation is simply a witches' brew. In a sense, the SARS-CoV-2 virus is just an ingredient in the roiling pot, which rotates on its own but is also stirred by leaders, social movements, and all the factors that go into what we call, as a shorthand, political, economic, and social forces.

II. POLITICAL, ECONOMIC AND SOCIAL INSTABILITY

Pandemics in human history have disrupted and partially or fully destroyed pre-existing social orders. Perhaps the most extreme example of this effect was the Black Death, also known as "the Plague," that swept across Europe and Asia in the mid-fourteenth century (followed by numerous surges thereafter).⁴³ Killing somewhere between a third and

43. See, e.g., Daniel W. Gingerich & Jan P. Vogler, *What the 14th Century Plague Tells Us About How Covid Will Change Politics*, POLITICO (Nov. 7, 2021, 7:00 AM),

half of Europe's population, the Plague led to a severe labor shortage.⁴⁴ The increased economic power of serfs led many of them to abandon their fields, seeking and demanding better living and working conditions elsewhere.⁴⁵ Of course, this newly found power led to a counterreaction by monarchies and lords as they tried to reestablish the old order.⁴⁶ Repressive laws and taxation followed, as well as the burning of villages, which in turn led to the torching of manors and the like.⁴⁷ Rampant inflation also ensued.⁴⁸ This tumult contributed to the rise of the Renaissance in Italy and ultimately the demise of the feudal order.⁴⁹ The COVID-19 pandemic so far has caused nothing close to the disaster wrought by the Black Death, but particularly because it has occurred in an interconnected world and has, as quipped before, been televised, and also because the social mobilization to mitigate its effect has been much greater than anything occurring in the past, it has indeed shocked virtually all of life.

A. *Primary Association*

These shocks have occurred, first, in the forms of primary association, such as families and friendships. For millions, the rhythms of ordinary life were displaced as many people no longer went to work, children no longer went to school, and activities outside the home ceased or became

<https://www.politico.com/news/magazine/2021/11/07/black-death-labor-politics-covid-history-519717>.

44. *See id.* (“[O]ne factor of economic production, labor, suddenly became scarce and expensive, while the other, land, became abundant and cheap. The result was a massive increase in peasants’ bargaining power. Thus, workers were able to demand better working conditions, improve their access to land and, given the challenges elites faced in policing their movement, migrate to the cities.”); *see also* Emma Ockerman, *What the Black Death’s Labor Shortage Can Tell Us About Our Own*, VICE NEWS (Jan. 21, 2022, 9:48 AM), <https://www.vice.com/en/article/93bqz/the-black-death-and-labor-shortage>.

45. *See* Joshua J. Mark, *Effects of the Black Death on Europe*, WORLD HIST. ENCYC. (Apr. 16, 2020), <https://www.worldhistory.org/article/1543/effects-of-the-black-death-on-europe/>.

46. *See* M.T. Anderson, *In Medieval Europe, a Pandemic Changed Work Forever. Can It Happen Again?*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/opinion/sunday/covid-plague-work-labor.html> (“Laborers complained they couldn’t afford the bare necessities — and if they weren’t paid what they demanded, they walked away from the plow, fled their landlords’ villages, and went off in search of a better deal.”).

47. *See id.*

48. *See id.*

49. *See* *How Did the Bubonic Plague Make the Italian Renaissance Possible*, DAILYHISTORY (Jan. 12, 2019), https://dailyhistory.org/How_did_the_Bubonic_Plague_make_the_Italian_Renaissance_possible. For a crisp and incisive comparison of our current circumstances and the turmoil caused by the Black Death, *see* Anderson, *supra* note 46.

less frequent. Those stuck inside were simply on top of one another and everyone was under stress, with varying degrees of isolation. Shockingly higher rates of behavioral health and substance abuse issues have been reported,⁵⁰ along with increased levels of child, domestic, and elder abuse—coupled with lower visibility due to the closure of schools and diminished access to the police, social welfare agencies, and the health care system.⁵¹ While researchers continue to debate the existence and magnitude of these effects,⁵² it is certainly clear that for many people, family dynamics have been greatly affected.

Likewise, the web of interpersonal relationships beyond the nuclear family have been altered. Some of the impacts were again due to isolation to combat contagion as families simply were separated to avoid contact. However, equally significant were differences of opinion regarding levels of risk, risk tolerance, mitigation measures and, perhaps most saliently, vaccinations.⁵³ The media have been filled with reports of families and friendships torn asunder because of seemingly *existential* differences over such matters.⁵⁴ Even conceptions of social space have reportedly been altered as people approach each other warily as potential sources of infection,⁵⁵ leading even to the development of new rules of courtship.⁵⁶

More troubling than the increased wariness of the other is the enhanced level of diffuse anger, which gets directed at others in increased levels of anger, even violence. One finds this in so many places and in so

50. See, e.g., Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>. Alcohol-related deaths increased by twenty-five percent in one year, from 2019 to 2020. Roni Caryn Rabin, *Alcohol-Related Deaths Spiked During the Pandemic, A Study Shows*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/health/alcohol-deaths-covid.html?campaign_id=9&emc=edit_nn_20220322&instance_id=56368&nl=the-morning®i_id=46942463&segment_id=86179&te=1&user_id=0cc6db07c6705a59d49fe14856c91700. During this time period, drug overdoses increased 28.5 percent. Laura Santhanam, *U.S. Surpassed 100,000 Overdose Deaths in First Year of COVID-19*, PBS NEWS HOUR (Nov. 17, 2021, 11:48 AM), <https://www.pbs.org/newshour/health/u-s-surpassed-100000-overdose-deaths-in-first-year-of-covid-19>.

51. See, e.g., Ashley Rapp et al., *Child Maltreatment During the COVID-19 Pandemic: A Systematic Rapid Review*, 68(5) PEDIATRIC CLINICS N. AM. 991, 992 (2021).

52. See *id.* (finding great divergence among study findings).

53. Jonathan Wolfe, *Coronavirus Briefing: Covid Family Feuds*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/28/briefing/covid-briefing.html>.

54. See, e.g., *id.*

55. See Robin Welsch et al., *Physical Distancing and the Perception of Interpersonal Distance in the COVID-19 Crisis*, SCI. REPS., June 1, 2021, at 1.

56. See, e.g., Valeriya Safranova, *True Stories of Hooking Up During Covid-19*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/01/10/style/coronavirus-sex-hookups-dating.html>.

many ways. During the pandemic there have reportedly been more instances of speeding and reckless driving and a greater number of pedestrian fatalities.⁵⁷ During the 2020 spring and summer holidays of Memorial Day and the Fourth of July, people were setting off fireworks at all hours of the night, keeping people awake in multiple cities,⁵⁸ and even at least one reported instance of setting a homeless person on fire.⁵⁹ As the pandemic has worn on and anger over social restrictions like wearing masks has increased, persons seeking to enforce restrictions in restaurants, shops and in the air have been attacked.⁶⁰ A 20-year-old student working at a gas station in Germany was shot and killed after he had asked someone to wear a mask.⁶¹ The pandemic has also brought a substantial spike in gun violence and the ownership of firearms.⁶² The social fabric has become frayed and, to some extent, lawlessness and violence normalized.

This anger has been particularly targeted at public health officials and political leaders imposing mitigation measures. Anthony Fauci's becoming demonized is but one of many, many examples.⁶³ The plot to kidnap and kill Gretchen Whitmer, the Governor of Michigan, was

57. Simon Romero, *Pedestrian Deaths Spike in U.S. as Reckless Driving Surges*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/us/pedestrian-deaths-pandemic.html>.

58. See, e.g., Corey Kilgannon & Juliana Kim, *New Woe for a Jittery N.Y.C.: Illegal Fireworks Going off All Night*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2020/06/19/nyregion/fireworks-every-night-nyc.html>.

59. *\$2,500 Reward Offered After Shocking Video Shows Sleeping Homeless Man Attacked with Fireworks*, CBS N.Y. (June 23, 2020, 8:40 PM), <https://www.cbsnews.com/newyork/news/homeless-man-attacked-with-fireworks/>.

60. Sarah Lyall, *A Nation on Hold Wants to Speak with a Manager*, N.Y. TIMES (Jan. 1, 2022), <https://www.nytimes.com/2022/01/01/business/customer-service-pandemic-rage.html?action=click&module=RelatedLinks&pgtype=Article>; Amanda Mull, *American Shoppers Are a Nightmare*, ATLANTIC (Aug. 3, 2021), <https://www.theatlantic.com/health/archive/2021/08/pandemic-american-shoppers-nightmare/619650/>.

61. Christopher F. Schuetze, *A Gas Station Attendant Is Killed in Germany After Telling a Customer to Mask Up*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/world/germany-coronavirus-shooting-covid.html>.

62. See, e.g., Tim Arango & Troy Closson, *"We Can't Endure This": Surge in U.S. Shootings Shows No Sign of Easing*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/shooting-gun-violence.html>.

63. See, e.g., Stephanie Armour & Andrew Restuccia, *Tensions Rise Between Fauci, GOP over Covid-19 Pandemic Response*, WALL ST. J. (Jan. 12, 2022, 4:59 PM), <https://www.wsj.com/articles/tensions-rise-between-fauci-gop-over-covid-19-pandemic-response-11642024794>; Andrés R. Martínez, *Fauci Accuses Senator Paul of Fueling Threats Against Him in the Latest Exchange*, N.Y. TIMES (Jan. 11, 2022), https://www.nytimes.com/live/2022/01/11/world/omicron-covid-testing-vaccines?name=styl-n-coronavirus®ion=TOP_BANNER&block=storyline_menu_recirc&%E2%80%A6#rand-paul-fauci-covid.

particularly notorious,⁶⁴ but a vast array of federal, state, and local officials have likewise been ridiculed, threatened, hounded out of office or worse.⁶⁵

B. Education

The schools have proved to be a particular flashpoint. A number of other countries closed bars, restaurants, gyms, concert venues and the like to reduce the overall level of infection in order to be able to keep schools open—in other words, keeping schools open was the highest priority even if doing so increased overall risk that was then mitigated by closing some businesses. By contrast, in the United States, some governments did the opposite, closing schools while maintaining economic activity, placing a higher value on economic imperatives than education.⁶⁶ Pitched battles in the new culture wars occurred as everyone debated whether children were a danger to each other, were a danger to adults, or whether adults were a danger to children.⁶⁷ Contentious also were the issues of whether masks were effective, necessary or useless in preventing spread among children or from children to teachers and staff,⁶⁸ and, on the other side, (1) whether masks inhibited the teaching

64. Nicholas Bogel-Burroughs et al., *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

65. See, e.g., Amanda Holpuch, *Boise's Mayor, Who Championed Covid Restrictions, Says She Faces Violent Threats and Harassment*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/06/us/boise-mayor-covid.html>; Emily Anthes, *"They See Us as the Enemy": School Nurses Battle Covid-19, and Angry Parents*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/health/coronavirus-school-nurses.html>; *Health Officials Are Quitting or Getting Fired Amid Outbreak*, MOD. HEALTHCARE (Aug. 10, 2020, 3:36 PM), https://www.modernhealthcare.com/policy/health-officials-are-quitting-or-getting-fired-amid-outbreak?utm_source=modern-healthcare-daily-dose&utm_medium=em%E2%80%A6.

66. New York City was a notable example of these priorities. See, e.g., Sharon Otterman & Eliza Shapiro, *Europe Keeps Schools Open, Not Restaurants. The U.S. Has Other Ideas.*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2020/11/13/nyregion/covid-indoor-dining-school-closings.html>. Also, the perceived risks of community spread from having schools open changed over time.

67. See Richard Horton, *Offline: COVID-19 as Culture War*, 399 LANCET 346, 346 (2022) ("As the pandemic enters its third year, the difficult truth is that the political debate about COVID-19 has evolved into a bitter culture war, where arguments have become struggles between different social groups holding different beliefs about how society should be constructed and governed.")

68. In a number of studies, the CDC has found that masks in schools prevent spread, see, e.g., Press Release, Ctrs. for Disease Control & Prevention, *Studies Show More COVID-19 Cases in Areas Without School Masking Policies* (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>, but the methodology used has been subject to scathing criticism. See, e.g., David Zweig, *The CDC's Flawed Case*

of language skills, particularly for students living in homes where English is not the primary language or for children with challenges like cognitive delays or speech or hearing issues; (2) whether masks delayed or prevented the development of social skills; or (3) whether masks inflicted emotional harm.⁶⁹ Options tried included remote learning, hybrid learning or in-person classes. Isolation of children clearly took a terrible toll, particularly for those already vulnerable such as children with learning issues.⁷⁰

Likewise, parents were sandwiched between working and simultaneously monitoring children's remote learning at home or caring for children still too young for school or pre-school. Particularly frustrating was the on-and-off-again in-person teaching, a problem that increased during the Omicron surge as schools became shorthanded of teachers, bus drivers, and other staff due to the absences from the increased rates of infection.⁷¹ Overnight, members of some states' National Guard units became teachers, custodians, bus drivers—as well as nurses and aides in health care facilities—because long-standing shortages became unmanageable with all the persons sick and quarantined or isolated at home.⁷²

All of this chaos hampered economic recovery as many workers, particularly women, were unable to return to their jobs, either by

for *Wearing Masks in School*, ATLANTIC (Dec. 16, 2021), <https://www.theatlantic.com/science/archive/2021/12/mask-guidelines-cdc-walensky/621035/>. A recent study, Catherine V. Donovan et al., *SARS-CoV-2 Incidence in K-12 School Districts with Mask-Required Versus Mask-Optional Policies—Arkansas, August–October 2021*, 71 MORBIDITY & MORTALITY WKLY. REP. 384, 386–87 (2022), has been more warmly received, see, e.g., Benjamin Mueller, *Masking Helped Protect Children from the Virus Last Fall, a C.D.C. Study Suggests*, N.Y. TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/health/covid-masks-kids-study-cdc.html>, but the data predate Omicron.

69. See, e.g., Margery Smelkinson et al., *The Case Against Masks at School*, ATLANTIC (Jan. 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/kids-masks-schools-weak-science/621133/>.

70. See, e.g., Christine Vestal, *COVID Harmed Kids' Mental Health—and Schools Are Feeling It*, PEW CHARITABLE TRS. (Nov. 9, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/08/covid-harmed-kids-mental-health-and-schools-are-feeling-it>; Lauren Morando-Rhim & Sumeyra Ekin, *How Has the Pandemic Affected Students with Disabilities? A Review of the Evidence to Date*, CTR. FOR LEARNER EQUITY (Aug. 2021), <https://www.centerforlearnerequity.org/wp-content/uploads/How-Has-the-Pandemic-Affected-Students-with-Disabilities.pdf>.

71. See, e.g., J. David Goodman & Giulia Heyward, *No Shots, No Day Care: Parents of Kids Under 5 Stuck in Grueling Limbo*, N.Y. TIMES (Jan. 14, 2022), <https://www.nytimes.com/2022/01/14/us/covid-vaccines-children.html>.

72. Erica L. Green, *New Twist in Pandemic's Impact on Schools: Substitutes in Camouflage*, N.Y. TIMES (Feb. 20, 2022), <https://www.nytimes.com/2022/02/20/us/politics/substitute-teachers-national-guard-new-mexico.html>.

working remotely or at an office.⁷³ For those with very young children, this nation's failure to have universal child care became an even greater problem than it has usually been because child care too became an on-and-off-again proposition, with many child-care centers closed because of high rates of infection in the community or because staff members were infected.⁷⁴ In the midst of this completely chaotic situation, the United States fell one vote shy—that of Senator Joe Manchin of West Virginia⁷⁵—of finally passing legislation that would have created funding for multiple programs that would have brought the United States as close as possible to a universal entitlement to child care—not truly universal, but the sort of patchwork mess that is all the United States is capable of achieving.⁷⁶

Two things have become absolutely clear about this crisis in education. First, children, particularly younger ones, have fallen behind, in some cases to historically low levels.⁷⁷ A number of different studies have found that students were well below benchmarks for grade-appropriate K-2 reading levels.⁷⁸ Many first and second graders, out of the classroom because of the pandemic, had to return to parts of the kindergarten curriculum.⁷⁹ A study conducted in Virginia shows a remarkable increase in the number of students who read below grade level since the start of the pandemic.⁸⁰

73. See, e.g., Amanda Taub, *Pandemic Will “Take Our Women 10 Years Back” in the Workplace*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html>; Claire Cain Miller, *The Pandemic Created a Child-Care Crisis. Mothers Bore the Burden.*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/interactive/2021/05/17/upshot/women-workforce-employment-covid.html>.

74. See, e.g., Goodman & Heyward, *supra* note 71.

75. See, e.g., Emily Cochrane & Catie Edmondson, *Manchin Pulls Support from Biden’s Social Policy Bill, Imperiling Its Passage*, N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2021/12/19/us/politics/manchin-build-back-better.html>.

76. See, e.g., Ashley Hackett, *What Democrats Mean by ‘Universal Child Care’ in the Build Back Better Act*, MINN. POST (Sept. 22, 2021), <https://www.minnpost.com/national/2021/09/what-democrats-mean-by-universal-child-care-in-the-build-back-better-act/>; N.Y. Times & Erica L. Green, *New Support for Children and Families, in What’s in the \$2.2 Trillion Social Policy and Climate Bill: New Support for Children and Families*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/article/build-back-better-explained.html>.

77. See, e.g., Dana Goldstein, *It’s ‘Alarming’: Children Are Severely Behind in Reading*, N.Y. TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/us/pandemic-schools-reading-crisis.html>.

78. *Id.*

79. *Id.*

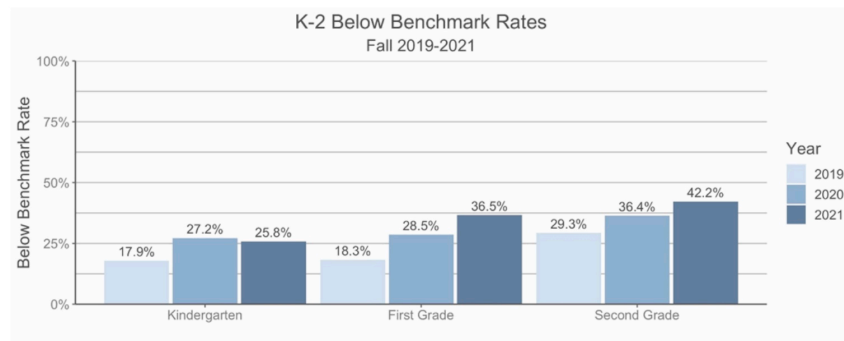
80. SCH. OF EDUC. & HUM. DEV., UNIV. OF VA., EXAMINING THE IMPACT OF COVID-19 ON THE IDENTIFICATION OF AT-RISK STUDENTS: FALL 2021 LITERACY SCREENING FINDINGS 3 (2021).



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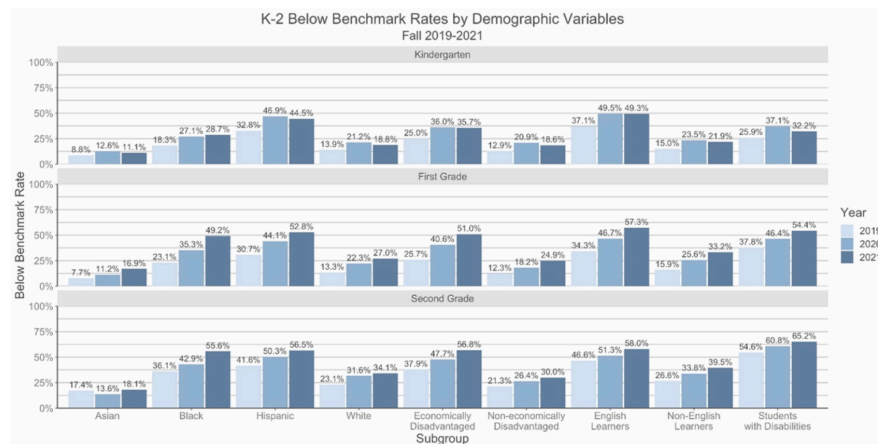
PALS REPORT

FIGURE 2



Second, the greatest damage has been done to students of color, those with disabilities, non-English learners, and the economically disadvantaged.⁸¹

FIGURE 4



81. *Id.* at 5.

Before the pandemic public education was chronically underfunded and teachers had nothing close to the respect they deserve. As described above, many think the pandemic is over, but for school children and teachers it is not, as many teachers, already suffering from exhaustion and burnout, are left to deal with traumatized students suffering emotionally, as manifested by panic attacks, self-harm, suicidal ideation and the like, and generally just acting out.⁸² Many state and local education systems have been in turmoil with the culture wars over what can be taught in schools. To this mix, the pandemic added emotionally-laden debates over whether teaching should be remote, in person, or hybrid, as well as whether masks should be required. As a result, a bad situation worsened. Writing in the *Atlantic*, one incisive observer of education, George Packer, characterized the crisis as follows:

It isn't clear how the American public-school system will survive the COVID years. Teachers, whose relative pay and status have been in decline for decades, are fleeing the field. In 2021, buckling under the stresses of the pandemic, nearly 1 million people quit jobs in public education, a 40 percent increase over the previous year. . . .

Students are leaving as well. Since 2020, nearly 1.5 million children have been removed from public schools to attend private or charter schools or be homeschooled. Families are deserting the public system out of frustration with unending closures and quarantines, stubborn teachers' unions, inadequate resources, and the low standards exposed by remote learning. It's not just rich families, either, David Steiner, the executive director of the Johns Hopkins Institute for Education Policy, told me. "COVID has encouraged poor parents to question the quality of public education. We are seeing diminished numbers of children in our public schools, particularly our urban public schools." In New York, more than 80,000 children have disappeared from city schools; in Los

82. See, e.g., Kalyn Belsha et al., *I Still Just Worry: 3 Teachers on Covid's Long Shadow over American Schools*, N.Y. TIMES (Mar. 19, 2022), <https://www.nytimes.com/2022/03/19/sunday-review/pandemic-school-education.html>.

Angeles, more than 26,000; in Chicago, more than 24,000.⁸³

As Packer goes on to describe, what is at stake is not simply reading, writing, and arithmetic but the foundations of our democracy, which depends on an educated citizenry schooled in civics—although today one might say practiced in civility, with the double entendre of celebrating and enacting pluralism as the way of living in the polis.⁸⁴ The pandemic certainly did not start the culture wars in education, “with their atmosphere of resentment, fear, and petty faultfinding,”⁸⁵ but it certainly aided and abetted them. In many fora, such as local school board meetings, what our young saw practiced time and time again was not exposure to and tolerance of differences of opinion in the processes of mutual governance, but instead the shutting up of diversity of opinion and debate, downright intolerance, incivility, and, at the worst, the substitution of threats, bullying, and even violence towards others with whom disagreements exist and a retreat into the echo chambers within which many people dwell.⁸⁶ The lesson, then, was not one in civics, but the very destruction of it and the continuing erosion of what binds us together as a collective. We return to this point below in our discussion of state legitimacy, social solidarity, and law.

C. *The Economy*

The economy has been scrambled by the pandemic. The initial shock, of course, stemmed from the need to separate people from one another. Much work, as we know it, consists of bringing people together in shared space along with certain materials, means of production if you will.⁸⁷ This mode of organization includes manufacturing, of course, but also education, food processing, transportation, retail, the performing arts, the fine arts, and much more, as well as many types of services such as dining, entertainment, health care delivery, and leisure and

83. George Packer, *The Grown-Ups Are Losing It: We've Turned Schools into Battlefields, and Our Kids Are the Casualties*, ATLANTIC (Mar. 10, 2022), https://www.theatlantic.com/magazine/archive/2022/04/pandemic-politics-public-schools/622824/?utm_source=newsletter&utm_medium=email&utm_campaign=atlantic-weekly-newsletter&utm_content=20220313&silverid=%25%25RECIPIENT_ID%25%25&utm_term=This%20Week%20on%20TheAtlanticcom

84. To me, John Dewey's writings on civic education come to mind immediately.

85. See Packer, *supra* note 83.

86. See *id.*

87. See Sydney Ember, *They Could Never Work from Home. These Are Their Stories*, N.Y. TIMES (Oct. 3, 2021), <https://www.nytimes.com/2021/09/22/business/never-remote-workers-covid.html>.

hospitality.⁸⁸ With the initial partial lockdown, much of this pre-pandemic mode of organizing work came to a screeching halt.

From that point forward, there has been a meandering process of seeking alternatives, stopping and starting, constant experimentation, and building the plane while flying it. Some workers were deemed “essential,” perhaps a signifier that what they did was so important that life could not go on without it, perhaps a statement that their work could only occur in the pre-pandemic mode of organization, perhaps a euphemism that their lives were expendable, or perhaps some combination thereof.⁸⁹ Food processing provides perhaps one of the more awful examples because workers—in largely poor, rural areas and disproportionately Black and Latino immigrants—on the processing line stand shoulder to shoulder in foul conditions, coughing and breathing on one another.⁹⁰ It took much illness and death, and political pressure, to force the food manufacturers to make working conditions safer⁹¹—and then at least one of them, Tyson, had the gall to tout proudly what great citizens and human beings they are by being among the leaders in mandating vaccinations and achieving a workforce that is relatively fully vaccinated.⁹² For these essential workers, there has been a continuous process of push and pull to change the manner of work so that workers and, when relevant, patrons they serve are less at risk of infection.⁹³ In all of this, as one might suspect, the greater burden fell on the most vulnerable, particularly young workers of color.⁹⁴

In an advanced service economy, like that of the United States, however, much work could still go on, but at home remotely. The reign of the Great and Terrible Zoom began. Here too there has been substantial

88. *Id.*

89. *Id.*

90. See, e.g., Adeel Hassan, *Coronavirus Cases and Deaths Were Vastly Underestimated in U.S. Meatpacking Plants, a House Report Says*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/world/meatpacking-workers-covid-cases-deaths.html>.

91. See *id.*

92. See Lauren Hirsch, *Days Away from Its Deadline, Tyson Foods Reaches a 96 Percent Vaccination Rate*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/10/26/business/tyson-vaccine-mandate.html>. For a description of Tyson’s appalling safety record, see Karen Perry Stillerman, *Tyson Foods Is a Monster in Disguise*, UNION OF CONCERNED SCIENTISTS (Oct. 29, 2021, 10:18 AM), <https://blog.ucsusa.org/karen-perry-stillerman/tyson-foods-is-a-monster-in-disguise/>.

93. See, e.g., FROST & SULLIVAN, AS THE WORKPLACE CHANGES, DON’T LEAVE FRONTLINE WORKERS BEHIND (on file with author; last visited Apr. 27, 2022).

94. See Alice Chen, *Communities of Color Can’t Be Asked to Continue Shouldering the Burden of the COVID-19 Pandemic*, FORBES (Jan. 31, 2022, 4:57 PM), <https://www.forbes.com/sites/civication/2022/01/31/communities-of-color-cant-be-asked-to-continue-shouldering-the-burden-of-the-covid-19-pandemic/?sh=3b31cbbe7afc>.

experimentation, with many starts and stops—actually, perhaps not many actual starts, but “Return to Work Days” that were projected in the expectation that the pandemic was all over or at least the worst was behind us, only then to be postponed by the latest surge.⁹⁵ After so many dashed expectations, the common advice for the C-Suite and HR community is no longer to set and broadcast a date for the Great Return but to plan only for the short-term—perhaps not quite “go with the flow,” but something in that direction.⁹⁶

In the broader economy, the law of unexpected consequences took over (although a cynic might suggest that there was no change in that). Idled at home, many Americans were still flush with cash as their paychecks continued to flow or as government relief kicked in. Some people also had way too much time on their hands and nothing to do with it, since the daily great escape from the all-encompassing sameness of life consisted in walking the dog or dogs—which I do not minimize because dog walking saved my sanity—and buying goods, goods, and more goods. This occurred in a number of wealthy economies but perhaps more so in the United States merely because of the size and pre-existing health of its economy and, moreover, the size of the subsidies coming from the federal government.⁹⁷ In health care policy, we talk about the “demand-inducing” power of health care providers, particularly physicians. Well, in current circumstances and wholly ironically, we can perhaps now talk about the “demand-inducing power of pandemics.”

However, we have yet to reach “equilibrium”—which is perhaps more in the eye of the beholder than the state of the economy, or nature, or anything else for that matter—because we can equally talk about the “supply-constricting power of pandemics.” Although the decline in the number of workers was nothing on the scale of the Black Death, there was a constriction in the supply of labor, with a declining number of the working age participating in the economy, although a substantial

95. See, e.g., *Omicron Suddenly Upends the World's Return to the Office*, BLOOMBERG (Dec. 19, 2021), <https://www.bloomberg.com/graphics/2021-return-to-office/>.

96. See Emma Goldberg, *The End of a Return-to-Office Date*, N.Y. TIMES (Dec. 11, 2021), <https://www.nytimes.com/2021/12/11/business/return-to-office-2022.html>. Average office occupancy in ten major cities was stuck in the low thirty percent, rose to around forty percent after Delta's surge, and as of mid-March 2022 is around thirty-eight percent. See Emma Goldberg, *A Two-Year, 50-Million-Person Experiment in Changing How We Work*, N.Y. TIMES (Apr. 13, 2022), <https://www.nytimes.com/2022/03/10/business/remote-work-office-life.html> [hereinafter *A Two-Year, 50-Million-Person Experiment in Changing How We Work*].

97. See, e.g., Neil Irwin, *America Is Driving the Global Economy. When Does That Become a Problem?* N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/06/08/upshot/pandemic-economy-trade.html>.

number of workers have returned to the workplace over the past few months, many perhaps because inflation has risen to historic levels.⁹⁸

A number of factors have been at work here. As discussed above in a number of places, many people remain in limbo because they or a family member are still at risk of serious illness or death despite the prowess of our vaccines.⁹⁹ Therefore they cannot return fully or partially to work.¹⁰⁰ Further, something like three million relatively senior workers took retirement early because they have not been able to find work they consider to be safe,¹⁰¹ because, at the higher income levels, they decided it was time to live life differently,¹⁰² or because, at the lower income levels, they were laid off and could not regain employment.¹⁰³ Finally, in what may be part of the realignment of work discussed more fully below, there has been what has been dubbed, “the Great Resignation,” as some number of millions of workers have seized upon the pandemic to quit and find better opportunities, particularly among low-wage workers, or, at

98. See, e.g., Josh Mitchell, *Strong Hiring, Low Unemployment Point to Economy Making Post-Pandemic Pivot*, WALL ST. J. (Mar. 4, 2022, 6:45 PM), <https://www.wsj.com/articles/february-jobs-report-unemployment-rate-2022-11646343310>; Jeanna Smialek, *Labor Force Participation Is Static, a Conundrum for the Fed.*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/business/economy/job-market-participation-federal-reserve.html>.

99. See *supra* Sections I, II.A, II.B; Harriet Torry, *Everything Costs More, and That's Disrupting Retirement for Many*, WALL ST. J. (Apr. 11, 2022), <https://www.wsj.com/articles/everything-costs-more-and-thats-disrupting-retirement-for-many-11649669401>.

100. See *supra* Section II.B. One team of researchers has used the term “long social distancing” to describe a group of about 3 million workers who will not return to the workforce or ordinary activities because of concerns over getting infected. JOSE MARIA BARRERO, NICHOLAS BLOOM & STEVEN J. DAVID, WFH RSCH., LONG SOCIAL DISTANCING (Apr. 15, 2022), https://wfhresearch.com/wp-content/uploads/2022/04/LongSocialDistance_v11_forwebsite.pdf.

101. See, e.g., Michael Sainato, *Too Young to Retire but at Risk for Covid, Older Americans Struggle to Find Work*, GUARDIAN (Jan. 25, 2022, 5:00 AM), <https://www.theguardian.com/society/2022/jan/25/older-americans-struggle-find-work-covid-retirement>.

102. See, e.g., Paul Sullivan, *For Some People, Working from Home Sped Up Their Decision to Retire*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/07/09/your-money/pandemic-working-from-home-retire.html>.

103. See, e.g., Nelson D. Schwartz & Coral Murphy Marcos, *They Didn't Expect to Retire Early. The Pandemic Changed Their Plans*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/business/economy/retire-early-pandemic-social-security.html>. Most of the early “retirements” were involuntary and among lower-income workers whose retirement funds are put at greatest risk by inflation, to be discussed below. *Id.* On early “retirement” generally, see Owen Davis, *Employment and Retirement Among Older Workers During the Covid-19 Pandemic* 1–56 (Schwartz Ctr. for Econ. Pol’y Analysis, Working Paper No. 6, 2021); Richard Fry, *Amid the Pandemic, a Rising Share of Older U.S. Adults Are Now Retired*, PEW RSCH. CTR. (Nov. 4, 2021), <https://www.pewresearch.org/fact-tank/2021/11/04/amid-the-pandemic-a-rising-share-of-older-u-s-adults-are-now-retired/>.

higher wage levels, to reevaluate their life goals and bail out of the rat race.¹⁰⁴ This phenomenon may be somewhat separate from or linked to what could be called the “Great Alienation,” a sense among millions that something is wrong in our highly stratified, competitive, achievement-oriented existence in which the deck is hugely stacked against too many people, that many lives are expendable and cheap, and that politics sucks and is useless.¹⁰⁵ Liberalism, as the land of perpetual growth and

104. See, e.g., David Gelles, *Executives Are Quitting to Spend Time with Family . . . Really*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/2022/02/16/business/executives-quitting.html>; Emma Goldberg, *You Quit. I Quit. We All Quit. And It's Not a Coincidence: Why the Decision to Leave a Job Can Become Contagious*, N.Y. TIMES (Jan. 23, 2022), <https://www.nytimes.com/2022/01/21/business/quitting-contagious.html>; Kathryn Dill, *America's Workers Are Leaving Jobs in Record Numbers*, WALL ST. J (Oct. 15, 2021, 12:48 PM), https://www.wsj.com/articles/whats-driving-americas-workers-to-leave-jobs-in-record-numbers-11634312414?mod=Searchresults_pos8&page=1. However, the “quit rate” of low-wage workers has started to diminish, apparently because their leverage is likewise starting to decrease. To rehire workers in the sectors hardest hit by the pandemic, restaurant, retail, and leisure, firms offered wage increases throughout 2021 and early 2022. However, those increases seem to have been one-time things and so low-wage workers may have fewer better opportunities worth quitting to obtain. See, e.g., Gabriel T. Rubin, *When Quitting Normalizes, Benefit to Low-Wage Workers May Subside*, WALL ST. J. (Apr. 17, 2022), <https://www.wsj.com/articles/when-quitting-normalizes-benefit-to-low-wage-workers-may-subside-11650196802>.

Additionally, some have questioned whether the Great Resignation occurred at all. For example, initially assenting to the view that the Great Resignation existed, Paul Krugman recently changed his mind, arguing that if one takes into account self-employment and the much lower levels of immigration, stemming from the Trump administration’s policies, then it is not the case that Americans are no longer willing to work. See Paul Krugman, *What Ever Happened to the Great Resignation*, N.Y. TIMES (Apr. 5, 2022), <https://www.nytimes.com/2022/04/05/opinion/great-resignation-employment.html>. For another dissenting view, see Peter Coy, *Is the Great Resignation Overblown?*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/opinion/jobs-great-resignation.html>.

105. David Leonhardt of the *New York Times* has called this phenomenon “Covid Malaise” and attributes a sense of disaffection with the economy to general unhappiness with the economic and social costs of the pandemic and mitigation measures. See David Leonhardt, *Covid Malaise*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/briefing/us-economy-covid-malaise.html>. Noreen Malone recently wrote about this sense of malaise as a cultural alienation from work. See Noreen Malone, *The Age of Anti-Ambition: When 25 Million People Leave Their Jobs, It's More than Just Burnout*, N.Y. TIMES MAG. (Feb. 20, 2022), <https://www.nytimes.com/2022/02/15/magazine/anti-ambition-age.html>. I have something broader in mind than either, more along the lines of what Ed Yong has written about America’s normalization of a million COVID-19 deaths, see Ed Yong, *How Did This Many Deaths Become Normal?*, ATLANTIC (Mar. 8, 2022), https://www.theatlantic.com/health/archive/2022/03/covid-us-death-rate/626972/?utm_source=newsletter&utm_medium=email&utm_campaign=atlantic-daily-news%E2%80%A6, and what Anita Sreedhar and Anand Gopal have written about as the reasons that vaccine hesitancy is highly correlated with education and socio-economic status: the privatization of health care, the reduction of health to personal “choice” and “responsibility” rather than collective well-being. See Anita Sreedhar & Anand Gopal,

opportunity, may have run its course. Because the legitimacy of social stratification in part depends upon the promise of an ever-growing pie, which may no longer be perceived as possible, and because the pandemic has enhanced the already growing perception that opportunity is a lie or is limited, then the pandemic has made worse the growing fracturing over disparity in wealth.

Yet, beyond all this perhaps psycho-politico-babble, the pandemic, as indicated above, rages on for most of the world and still directly causes labor shortages. In most of the world, millions of people are still getting infected, even dying, and therefore simply cannot work.¹⁰⁶ In the poorer portions of the world, that means fewer raw resources and manufactured goods being produced to satisfy the enhanced demand for resources and goods flowing to the wealthier portions of the world like the United States¹⁰⁷—I have yet to mention the economic problems worsened by the war in Europe and will not dwell on that here. Factories everywhere get shuttered in places like Southeast Asia, which means that there are too few goods like Nikes to be shipped.¹⁰⁸ Given global supply lines and just-in-time inventories, there are ubiquitous production shortages, and the situation could become much worse because China, the second largest economy in the world,¹⁰⁹ is a ticking timebomb.

China has continued to pursue its zero-COVID policy, which has been given up everywhere else even where it had succeeded, e.g., New Zealand, because it is unlikely to stop Omicron.¹¹⁰ There had been some recent indications that China was finally recognizing that it, too, will have “to live with” COVID, and was reportedly developing something like a two-

Behind Low Vaccination Rates Lurks a More Profound Social Weakness, N.Y. TIMES (Dec. 3, 2022), <https://www.nytimes.com/2021/12/03/opinion/vaccine-hesitancy-covid.html>.

106. Yong, *supra* note 25.

107. See Lazaro Gamio & Peter S. Goodman, *How the Supply Chain Crisis Unfolded*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/interactive/2021/12/05/business/economy/supply-chain.html>, for a wonderful description of how the dominoes have fallen.

108. See, e.g., Jacob Gallagher, *Nike's Supply-Chain Snags Bring Pain to Sneakerhead Shops*, WALL ST. J. (Feb. 13, 2022, 9:00 AM), <https://www.wsj.com/articles/nikes-supply-chain-snags-bring-pain-to-sneakerhead-shops-11644760802>.

109. *Projected GDP Ranking*, STAT. TIMES (Oct. 26, 2021), <https://statisticstimes.com/economy/projected-world-gdp-ranking.php>.

110. Lianchao Han & Bradley A. Thayer, *The Brutality and Absurdity of China's Zero-COVID Policy*, HILL (Apr. 4, 2022, 12:00 PM) <https://thehill.com/opinion/international/3256866-the-brutality-and-absurdity-of-chinas-zero-covid-policy/>; Ruri Syailendrawati et al., *What Happens When Zero-COVID Countries Lift Restrictions*, THINK GLOB. HEALTH (Feb. 23, 2022), <https://www.thinkglobalhealth.org/article/what-happens-when-zero-covid-countries-lift-restrictions>.

year plan to ease into that life.¹¹¹ However, occurring at the time of writing in mid-April 2022 are the worst, most widespread outbreaks—multi-provincial—than at any time since the initial one in Wuhan and Hubei Province in late 2019 and early 2020. In the face of Omicron, China, the site of between a quarter and a third of the world’s manufacturing, is a tinderbox. Most of its population has little or no natural immunity because after the initial outbreak, at least until Omicron, its zero-COVID policy had been largely successful.¹¹² Additionally, much of its vaccinated population received Sinovac, its domestically developed and produced vaccine that is less effective than the mRNA vaccines produced in the West but spurned by China. Although Sinovac had been fairly effective against previous variants, the Sinovac vaccine alone with two doses produces no neutralizing antibodies against Omicron.¹¹³ Finally, only about half of China’s population over eighty is fully vaccinated.¹¹⁴ In these respects, China’s circumstances are similar to the current situation in Hong Kong that at one point moved to the highest per capita death rate in the world after it, like China, had suffered very few deaths at all before the recent Omicron surge.¹¹⁵

At this moment, it seems that China’s leadership believes that all China can do is more of the same, as it has shut down more than seventy

111. See, e.g., Sha Hua & Keith Zhai, *How Will China Relax Its Zero-Covid Grip? With Bubbles, Drugs and New Messaging*, WALL ST. J. (Mar. 2, 2022, 11:45 PM), <https://www.wsj.com/articles/china-weighs-methods-for-relaxing-zero-covid-19-grip-bubbles-drugs-and-new-messaging-11646230580>; *China’s Scientists Are Looking for a Way Out of the Zero-Covid Policy*, ECONOMIST (Mar. 12, 2022), <https://www.economist.com/china/2022/03/10/chinas-scientists-are-looking-for-a-way-out-of-the-zero-covid-policy>.

112. Greg Ip, *China’s “Zero-COVID” Policy Holds Lessons for Other Nations*, WALL ST. J. (Feb. 16, 2022, 2:45 PM), <https://www.wsj.com/articles/chinas-zero-covid-policy-holds-lessons-for-other-nations-11645033130>.

113. See Eddy Pérez-Then et al., *Neutralizing Antibodies Against the SARS-CoV-2 Delta and Omicron Variants Following Heterologous CoronaVac Plus BNT162b2 Booster Vaccination*, 28 NATURE MED. 481 (2022); *China’s Sinovac COVID-19 Booster Weaker Against Omicron—Hong Kong Study*, REUTERS (Dec. 23, 2021, 5:43 AM), <https://www.reuters.com/world/china/chinas-sinovac-covid-19-booster-weaker-against-omicron-hong-kong-study-2021-12-23/>; see also Jonathan Corum & Carl Zimmer, *How the Sinovac Vaccine Works*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/interactive/2020/health/sinovac-covid-19-vaccine.html> (“The private Chinese company Sinovac developed a coronavirus vaccine called CoronaVac.”).

114. See Hua & Zhai, *supra* note 111.

115. See, e.g., Benjamin Mueller, *High Death Rate in Hong Kong Shows Importance of Vaccinating the Elderly*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/21/health/covid-hong-kong-deaths.html>; Luke Taylor, *Covid-19: Hong Kong Reports World’s Highest Death Rate as Zero Covid Strategy Fails*, BMJ, March 17, 2022; Natasha Khan, *Hong Kong’s Covid-19 Death Rate Is the World’s Highest Because of Unvaccinated Elderly*, WALL ST. J. (Mar. 8, 2022, 11:52 PM), https://www.wsj.com/articles/unvaccinated-elderly-send-hong-kongs-covid-19-death-rate-to-worlds-highest-11646748091?mod=article_inline.

cities, accounting for approximately 40 percent of its economic output, since mid-March.¹¹⁶ China's leadership had signaled that they would experiment with "softer" lockdown policies, but April 2022 lockdowns include all of Shanghai, China's financial center with a population of 25 million, after phased versions failed; as a result, worldwide production shortages and disruption of supply lines are likely to worsen.¹¹⁷

Additionally, the entire shipping system is bottled up, as there have been far too few ships to move across the Pacific, too few containers to carry all the goods across the ocean, too few berths at ports to handle all the ships and containers, too few truckers to carry the containers away, too few goods going back east to make it worthwhile to haul the containers back across the Pacific, and so on.¹¹⁸ As I wrote at the outset

116. See, e.g., Keith Bradsher, *China's Covid Lockdown Set to Further Disrupt Global Supply Chains*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/business/covid-china-economy.html>; Chris Buckley, *China's Covid Shutdowns Go Far Beyond Shanghai*, N.Y. TIMES (Apr. 19, 2022), <https://www.nytimes.com/2022/04/19/world/china-lockdowns.html>; Lingling Wei, Stella Yifun Xie & Natasha Khan, *Shanghai's Outbreak Corners Chinese Leader*, WALL ST. J. (Apr. 8, 2022), <https://www.wsj.com/articles/shanghais-omicron-outbreak-corners-chinese-leader-11649423941>.

117. See, e.g., Liyan Qi & Natasha Khan, *China Grapples with How to Handle All the Mild Covid Cases*, WALL ST. J. (Mar. 23, 2022, 8:38 AM), <https://www.wsj.com/articles/china-grapples-with-how-to-handle-all-the-mild-covid-cases-11648039088>; Wenxin Fan, *Foxconn Running at Full Capacity After Covid-19 Restrictions Lifted*, WALL ST. J. (Mar. 21, 2022, 5:33 PM), <https://www.wsj.com/articles/foxconn-running-at-full-capacity-in-shenzhen-after-covid-19-restrictions-lifted-11647856698>; Amy Qin & Amy Chang Chien, *As Omicron Surges and Economy Suffers, China Tweaks "Zero COVID"*, N.Y. TIMES (Mar. 20, 2022), <https://www.nytimes.com/2022/03/20/world/asia/china-zero-covid.html>; Sha Hua, *China Tests More-Targeted Covid-19 Strategy Amid Record Omicron Surge*, WALL ST. J. (Mar. 18, 2022), <https://www.wsj.com/articles/china-tests-more-targeted-covid-19-strategy-amid-record-omicron-surge-11647610409>; Wei, Xie & Khan, *supra* note 116; Bradsher, *supra* note 116. See also Rachel Liang, Rebecca Feng & Liyan Qi, *Covid Cases in China Hit Record, as Shanghai Extends Lockdown*, WALL ST. J. (Apr. 5, 2022), <https://www.wsj.com/articles/covid-cases-in-china-hit-record-as-shanghai-extends-lockdown-11649154418>; Wenxin Fan, *Shanghai Extends Lockdown as City Tests Its 25 Million Residents for Covid*, WALL ST. J. (Apr. 4, 2020), <https://www.wsj.com/articles/shanghai-orders-snap-covid-tests-for-25-million-locked-down-residents-11649053546>; Yang Jie, Liza Lan & James T. Areddy, *Shanghai to Lock Down 25 Million People, Half of the City at a Time*, WALL ST. J. (Mar. 28, 2022), <https://www.wsj.com/articles/shanghai-imposes-staggered-lockdowns-to-keep-coronavirus-at-bay-11648399828>; Yang Jie, *China's Covid Lockdowns Hit Supplies to Companies Like Apple and Tesla*, WALL ST. J. (Apr. 8, 2022), <https://www.wsj.com/articles/manufacturers-grind-to-a-halt-in-china-as-lockdowns-expand-11649343420>. In mid-April, an estimated 400 million people in China were locked down, causing substantial economic dislocations. See Alexandra Stevenson, *China's Economy Pays a Price as Lockdowns Restrict Nearly a Third of Its Population*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/china-lockdowns-economy.html> (Accessed April 15, 2022).

118. See Gamio & Goodman, *supra* note 107.

of this Article, none of these “dislocations” is entirely new because the lack of capacity in so many sectors has been building for years, driving trucks long distances has long been a terrible job with more drivers leaving than entering.¹¹⁹ Globalization and just-in-time inventory clearly set the stage for massive dislocations from any shock, and the pandemic has provided a big one. The world economy is a bloody mess.

Unexpected consequences beget more unexpected consequences. When I wrote *Sick at Heart* in the relatively early months of the pandemic, workers were being laid off or fired right and left, with the burden falling much more heavily, by far, on those at the lower ends of the socio-economic ladder.¹²⁰ At that point, if someone had told me that this would all lead to an enhancement of low-wage workers’ bargaining power, I would have thought that to be nuts but that is what has happened, at least in the short run. The American Rescue Plan, enacted in the early days of the Biden administration, was remarkably successful in at least one regard in that it reduced the number of persons in poverty to historic lows.¹²¹ Then, as the recovery proceeded and millions of new jobs were created, albeit in fits and starts, low-wage workers, in particular but not solely in recovering sectors like retail, leisure and hospitality, and dining, found themselves in great demand.¹²² A number of successful high-profile strikes occurred,¹²³ for example, and wages have risen at a rate not seen in two decades.¹²⁴

Nonetheless, another unintended consequence is eating away at, if not eliminating, these gains—inflation. Some price increases were

119. See, e.g., Peter S. Goodman, *The Real Reason America Doesn’t Have Enough Truck Drivers*, N.Y. TIMES (Feb. 9, 2022), <https://www.nytimes.com/2022/02/09/business/truck-driver-shortage.html>.

120. See generally *Sick at Heart*, *supra* note 2.

121. See, e.g., Jason DeParle, *Pandemic Aid Programs Spur a Record Drop in Poverty*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2021/07/28/us/politics/covid-poverty-aid-programs.html>; see generally Laura Wheaton, Linda Giannarelli & Ilham Dehry, *2021 Poverty Projections: Assessing the Impact of Benefits and Stimulus Measures*, URB. INST. (July 28, 2021), <https://www.urban.org/research/publication/2021-poverty-projections-assessing-impact-benefits-and-stimulus-measures>.

122. See, e.g., Gabriel T. Rubin, *Young Workers Rake in Biggest Wage Gains in Tight Labor Market*, WALL ST. J. (Feb. 28, 2022, 5:30 AM), <https://www.wsj.com/articles/young-workers-rake-in-biggest-wage-gains-in-tight-labor-market-11646044201>.

123. See, e.g., Michael Sainato, *“They Are Fed Up”: US Labor on the March in 2021 After Years of Decline*, GUARDIAN (Dec. 21, 2021, 2:00 PM), <https://www.theguardian.com/us-news/2021/dec/21/labor-organizing-pandemic-decline>.

124. See, e.g., Gabriel T. Rubin, *U.S. Wages, Benefits Rose at Two-Decade High as Inflation Picked Up*, WALL ST. J. (Jan. 28, 2022, 3:07 PM), <https://www.wsj.com/articles/us-employers-labor-costs-inflation-11643331612>; Ben Casselman, *Strong Job Growth Continues as Latest Covid Wave Eases*, N.Y. TIMES (Mar. 4, 2022), <https://www.nytimes.com/2022/03/04/business/economy/jobs-report-february.html>.

expected by many policy makers because of the historic fiscal stimulus enacted in the American Rescue Plan to aid those hurt by the pandemic and to stoke the economy more generally.¹²⁵ It was also thought that the supply bottlenecks would ease over the course of 2022.¹²⁶ However, the current inflation persists and is worse than expected as the annual inflation rate is almost at 8 percent,¹²⁷ roughly four times the Federal Reserve's target of 2 percent—the highest level experienced since the 1970s, but nothing approaching those days of double digit inflation.¹²⁸ While the future is very uncertain—what else is new?—it is clear that, despite the recent wage gains by low-income persons and families, the current inflation is hitting them hard.¹²⁹

Still, the labor shortage encompasses not just low-wage jobs but also those higher up the wage scale, particularly for persons working in tech, who now find themselves with great bargaining power.¹³⁰ Clearly, segments of work continue to be reconfigured as workers—and employers too—have learned that work need not be conducted in offices. Many workers and bosses have found that it is preferable to avoid the hassle and expense of long commutes and to relocate to avoid high housing prices, to spend more quality time with families, and “to be let alone” as the classic characterization of freedom has it.¹³¹ Many workers also find

125. Jeanna Smialek, *A Regional Fed Analysis Suggests Biden's Stimulus Is Temporarily Stoking Inflation*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/business/economy/fed-inflation-stimulus-biden.html>.

126. Stella Yifan Xie, *Supply-Chain Problems Show Signs of Easing*, WALL ST. J. (Nov. 21, 2021, 7:00 AM), <https://www.wsj.com/articles/supply-chain-problems-show-signs-of-easing-11637496002> (“Shipping and retail executives say they expect the U.S. port backlogs to clear in early 2022.”).

127. Gabriel T. Rubin, *Inflation Reached 7.9% in February; Consumer Prices Are the Highest in 40 Years*, WALL ST. J. (Mar. 10, 2022, 12:22 PM), <https://www.wsj.com/articles/us-inflation-consumer-price-index-february-2022-11646857681>.

128. See, e.g., Ana Swanson & Jeanna Smialek, *Global Economy Sinks Deeper into Turmoil as Fed Prepares to Raise Rates*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/business/economy/inflation-rates-global-economy.html>; Christopher J. Neely, *Overshooting the Inflation Target*, 24 ECON. SYNOPSIS (Oct. 7, 2021), <https://research.stlouisfed.org/publications/economic-synopses/2021/10/07/overshooting-the-inflation-target#:~:text=In%20January%202012%2C%20the%20Fed,target%2C%20usually%20about%20%20percent>.

129. See, e.g., Jeanna Smialek, *Surging U.S. Inflation Raises Stakes as War Pushes Up Prices*, N.Y. TIMES (Mar. 10, 2022), <https://www.nytimes.com/2022/03/10/business/economy/cpi-inflation-february-2022.html>. If the Federal Reserve hits the brakes on the economy hard enough such that it sparks a recession, the position of lower-wage workers could significantly erode.

130. See Christopher Mims, *How the Pandemic Broke Silicon Valley's Stranglehold on Tech Jobs*, WALL ST. J. (Mar. 12, 2022, 12:00 AM), <https://www.wsj.com/articles/how-the-pandemic-broke-silicon-valleys-stranglehold-on-tech-jobs-11647061211>.

131. See, e.g., Peter Grant, *People Are Going Out Again, but Not to the Office*, WALL ST. J. (Feb. 14, 2022, 4:09 PM), <https://www.wsj.com/articles/people-are-going-out-again-but->

it refreshing that they no longer have to conform to workplace cultures that simply do not suit them and may in fact be discriminatory, particularly against women and persons of color.¹³² Connecting with work associates by Zoom avoids the need to play the chummy-up games that characterize many workplaces. The office is supposed to be a one-size-fits-all organization of work, and in the human resources community, there is a new recognition that the standard size may not in fact fit all.¹³³ On the other hand, there is significant concern that when work is hybrid, those who are not in the office are out of sight and out of mind, particularly in light of the history of discrimination against women, mothers, or those hoping to have children who are perceived as not sufficiently dedicated to their jobs and as outside of the “good-ole-boy” network.¹³⁴ Right now, because workers possess unusual bargaining power, because many are simply demanding that they work remotely, and because the pandemic’s future remains uncertain, many employers are accepting, although perhaps not embracing, a process of the “de-office-ication” of work.¹³⁵

It might be the case, then, that the economic effects brought on by the pandemic are just more of the same in that relatively high-income workers will get perks like working remotely while work for the less fortunate will remain relatively Taylorized, often unsafe, alienating and

not-to-the-office-11644843600; Mims, *supra* note 130; Callum Borchers, *Sorry, Bosses: Workers Are Just Not That into You*, WALL ST. J. (Feb. 24, 2022), <https://www.wsj.com/articles/why-workers-not-back-to-office-bosses-11645640418>; see generally Kim Parker et al., *COVID-19 Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/>.

132. For a remarkable description of how remote work allows pregnant women to avoid microaggressions that office work would otherwise subject them to, see Sarah Kessler, *How Moms to Be Get to Act More Like Dads: The Liberation of Being Pregnant on Zoom and Not in the Office*, N.Y. TIMES (Mar. 5, 2022), <https://www.nytimes.com/2022/03/05/business/pregnancy-remote-work.html>.

133. See, e.g., *A Two-Year, 50-Million-Person Experiment in Changing How We Work*, *supra* note 96.

134. See, e.g., Harriet Torry, *Women Embrace Flexible Working, but Economists Say It Could Hinder Their Careers*, WALL ST. J. (Mar. 13, 2022, 10:00 AM), <https://www.wsj.com/articles/women-embrace-flexible-working-but-economists-say-it-could-hinder-their-careers-11647180001>.

135. Already, high office vacancy rates are expected to climb as leases come up for renewal. Some analysts expect a 15 percent drop in demand due to this reconfiguration of the workplace. See, e.g., Konrad Putzier & Peter Grant, *Record High Office Lease Expirations Pose New Threat to Landlords and Banks*, WALL ST. J. (Apr. 12, 2022), <https://www.wsj.com/articles/record-high-office-lease-expirations-pose-new-threat-to-landlords-and-banks-11649764801>. For an interesting tale of the travails of a recruiter, see Susan Dominus, *Tech Companies Face a Fresh Crisis: Hiring*, N.Y. TIMES MAG. (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/magazine/tech-company-recruiters.html>.

degrading. However, there might be something more afoot as indicated above in that the pandemic has brought some sort of reckoning in that many are no longer willing to accept the status quo—more exactly, the status quo that they perceive as “fact” in their particular echo chambers.¹³⁶ We saw above in the discussion of education that the pandemic has worsened the tendency to retreat into separate spheres that often come into conflict.¹³⁷ The economic fallout from the pandemic seems to have exacerbated the division between the haves and the have-nots.¹³⁸ I return to this issue after reviewing how the pandemic has affected the legitimacy of the state, social solidarity, and law.

D. State Legitimacy, Social Solidarity, and Law

To varying degrees, mitigation measures like masks and social distancing have caused consternation throughout the world, particularly as the pandemic has dragged on and people have become tired of it.¹³⁹ There has also been vehement opposition to vaccination, particularly to mandates even though they have been proven to be safe and effective, albeit with certain limitations like the need for boosters.

In many countries in which there has been significant opposition one cannot even speak of movements in opposition, because dissent in most countries has been largely concentrated among fringe groups and is still fairly diffuse and relatively unorganized, and lacks support in political institutions. Germany provides an example of this phenomenon. Marches and demonstrations have drawn thousands of people but the opposition, in the words of one journalist, “has forged an alliance of strange bedfellows that stretches across the political spectrum,”¹⁴⁰ with Neo-Nazis, general hooligans, naturalists and homeopaths, Greens, and others marching together on the same streets, and not shooting at each other, but also not gaining the support of anything close to mainstream parties.¹⁴¹ The lunatic fringe has used vaccines as an excuse to engage in violence, admittedly a worrisome trend, particularly given German

136. See sources cited *supra* note 131.

137. See discussion *supra* Section II.B.

138. See Smialek, *supra* note 129.

139. See Parker et al., *supra* note 131.

140. Katrin Bennhold, *Eco-Leftist and the Far Right: Vaccine Mandate Forges Unlikely Coalition of Protestors in Germany*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/01/24/world/europe/germany-vaccine-mandate-antivax-movement.html>.

141. See, e.g., *id.*

history,¹⁴² yet if anything such acts deprive the far right of any chance of widespread support.

This instability has occurred in rather unexpected places, of which Ottawa, in particular, and Canada, more generally, are prime examples. The so-called “trucker’s convoy”—so-called because the major Canadian truckers associations opposed the convoy and about 90 percent of truckers are vaccinated¹⁴³—made news around the world.¹⁴⁴ Why did this protest garner such attention? It was because it was so un-Ottawan and so “non-Canajun.” Ottawa is often seen in Canada as about as sleepy a place as it can get,¹⁴⁵ and politics in Canada is so mild as to be thought of as boring by many.¹⁴⁶ The protests, therefore, were quite a thing in that they were almost exotic, at least until the police were forced to use stronger and stronger tactics to clear them out—likewise was the perception of the copycat effort in New Zealand, which at first was a big party but then turned violent as the police and affected citizens had had enough.¹⁴⁷ In both countries these events gained financial support from right-wing groups in the United States, a grim new export.

142. See, e.g., Katrin Bennhold, *Threats Emerge in Germany as Far Right and Pandemic Protestors Merge*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/world/europe/germany-covid-far-right-protests.html>.

143. See, e.g., Claire Parker, *Canadian Truckers Distance Themselves from “Freedom Convoy” Protests*, WASH. POST (Feb. 18, 2022, 2:55 PM), <https://www.washingtonpost.com/world/2022/02/16/canada-trucker-distancing-protests/>; Ian Austen & Vjosa Isai, *Canadian Trucker Convoy Descends on Ottawa to Protest Vaccine Mandates*, N.Y. TIMES (Feb. 10, 2022), <https://www.nytimes.com/2022/01/29/world/americas/canada-trucker-protest.html>.

144. See, e.g., *Covid-19 Protests Grow in New Zealand as Truck Blockade Continues in Canada*, IRISH TIMES (Feb. 11, 2022, 7:18 AM), <https://www.irishtimes.com/news/world/covid-19-protests-grow-in-new-zealand-as-truck-blockade-continues-in-canada-1.4799538> (Irish media coverage of the Canadian trucker convoy); *Trudeau Slams Truckers’ Protest, Warns Blockade Threatens Canada’s Economic Recovery*, STRAITS TIMES (Feb. 11, 2022, 6:40 AM), <https://www.straitstimes.com/world/trudeau-slams-canada-trucker-protests-warns-that-blockade-threatens-countrys-economic-recovery> (Singaporean media coverage of the Canadian trucker convoy).

145. See, e.g., *Most Boring City in Canada Award Goes to Ottawa*, HUFFINGTON POST CAN. (May 24, 2013, 2:50 AM), https://www.huffpost.com/archive/ca/entry/most-boring-city-canada-ottawa_n_3333161. Actually, I find Ottawa to be lovely, although it certainly lacks the energy and nightlife in, say, Toronto and Montreal.

146. This topic is even the subject of a podcast series. See CANADIAN POLITICS IS BORING, <https://www.canadianpoliticsisboring.com/> (last visited Mar. 19, 2022). Having lived in Canada and the United States, I must admit that I am more than ready for boring, a label here meant to be a compliment. At about 83% full vaccination Canada ranks near the top of wealthy nations and in the world, for that matter. See, e.g., JOHNS HOPKINS UNIV. MED. CORONAVIRUS RES. CTR, *Percentage of Populations Full Vaccinated*, <https://coronavirus.jhu.edu/vaccines/international> (last visited May 14, 2022). In my lights, their society is way ahead of that in the United States.

147. See, e.g., Stephen Wright, *New Zealand Targets Protestors Camped Outside Parliament with Lawn Sprinklers, Blaring Barry Manilow*, WALL ST. J. (Feb. 22, 2022, 4:40

In this light, the opposition to vaccines and particularly mandates in the United States is uniquely mainstream. The point is not simply that the Republican party has wrapped itself in this flag—again, something unique in the world even though many countries such as Germany, like the United States, had pre-pandemic anti-vaccination movements¹⁴⁸—but also the point that among a substantial segment of the population, the concept that public health is a collective endeavor lacks almost any legitimacy and itself is mainstream in the United States. Perhaps the best example of this fact is that the Biden administration has turned to the trope of personal responsibility and choice as justification for its declaration that mitigation measures are no longer supported by “the science” as necessary. As Katherine Wu observed regarding the recent elimination of mandatory mitigation efforts:

In the new playbook, recommendations for individual people, not communities, sit front and center. . . . Throughout the pandemic, American leaders have given individuals more responsibility for keeping themselves safe than might be ideal; these revised guidelines codify that approach more openly than ever before. Each of us has yet again been tasked with controlling our own version of the pandemic, on our own terms.¹⁴⁹

In its new guidance, the CDC repeatedly urged people at risk to “talk to [their] healthcare provider[s],”¹⁵⁰ which is not an example of public health, but instead of personal responsibility and choice.¹⁵¹

PM), <https://www.wsj.com/articles/new-zealand-targets-protesters-camped-outside-parliament-with-lawn-sprinklers-blaring-barry-manilow-11645533062>.

148. Lucian Staiano-Daniels, *The Far-Right Has Turned East Germans Against Vaccines*, FOREIGN POLY (Feb. 12, 2022, 7:00 AM), <https://foreignpolicy.com/2022/02/12/germany-vaccines-soviets-afd/>.

149. Katherine J. Wu, *The Biden Administration Killed America’s Collective Pandemic Approach*, ATLANTIC (Mar. 2, 2022), <https://www.theatlantic.com/health/archive/2022/03/covid-cdc-guidelines-masks/623337/>.

150. See *COVID-19 Community Levels: A Measure of the Impact of COVID-19 Illness on Health and Healthcare Systems*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

151. Even under the context of public health, the new guidance has deservedly been criticized because by the time we notice that there is trouble, the barn will be on fire with the horses trapped inside. See, e.g., Katherine J. Wu, *America Is About to Test How Long ‘Normal’ Can Hold*, ATLANTIC (Mar. 23, 2022), https://www.theatlantic.com/health/archive/2022/03/next-covid-variant-surge-strategy/627597/?utm_source=newsletter&utm_medium=email&utm_campaign=atlantic-daily-newsletter&utm_content=20220323&utm_term=The%20Atlantic%20Daily.

For better or for worse—in my opinion, much for the worse—the Supreme Court has been at the vanguard of this process of delegitimizing the authority of public health in favor of personal autonomy—even when that puts others at serious risk of illness and death. We can start with *National Federation of Independent Businesses (“NFIB”) v. Sebelius*,¹⁵² commonly taken as upholding the constitutionality of the Affordable Care Act (“ACA”) and the “individual mandate”—the ACA’s requirement that individuals have some form of health insurance. While those were the results, the reasoning of the majority, in fact, greatly diminished the power of the federal government to address the problems of underinsurance and uninsurance in the country.¹⁵³ How’s that? For four reasons. First, a majority of the Court held that Congress has no power under the Commerce Clause to force individuals to obtain health insurance.¹⁵⁴ Second, the basis of this holding is individual freedom, that individuals cannot be forced to participate in commerce if they choose not to do so, regardless of the fact that the collective impact of such decisions can cause *the death spiral* of insurance—the demise of private health insurance.¹⁵⁵ The individual’s effect on the collective, therefore, is simply not relevant because individual freedom—*freedom, not responsibility for others*—is all that matters. (Sound familiar? An individual’s choice not to get vaccinated is an exercise of freedom regardless of its impact on the collective, the spreading of an infectious disease). Third, while Congress possesses authority under the Constitution to impose an exaction—a *tax*—for an individual’s failure to obtain health insurance, the ACA’s individual mandate could be characterized as a tax only because it was so *de minimis* as to lack any coercive impact at all.¹⁵⁶ Put conversely, under the Taxation Clause Congress has no power to impose a *penalty*, a monetary exaction that is *not* a tax in that it actually has some bite and thereby actually mandates, not as a formal matter but in actual effect, that individuals obtain health insurance.¹⁵⁷ If the monetary heft of the individual mandate had been more forceful, then the Court would not have categorized the exaction as a tax but instead as a penalty outside Congress’ taxing power. Fourth, the mandate that states adopt the ACA’s Medicaid expansion was held to be unconstitutionally coercive, the first such holding *ever* that the federal government’s exercise of its spending

152. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

153. See *id.* at 519–24 (summarizing the Court’s reasoning).

154. *Id.* at 552–58.

155. *Id.*

156. *Id.* at 574.

157. *Id.* (“Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.”).

power could be unconstitutionally coercive upon the states.¹⁵⁸ Congress has no authority to order the states to protect health insurance.¹⁵⁹

Numerous studies have linked health insurance to health status—otherwise, why all the bother?¹⁶⁰ As a result, effectively precluding the federal government’s ability to create universal health insurance, something found in *every* other wealthy nation, amounts to depriving the federal government of one of the most important tools in ensuring the health of the population—access to the healthcare system; and only the federal government is up to the task because only the federal government has the sufficient fiscal power to create a viable risk pool encompassing the entire nation.¹⁶¹ The only state—the *only* state—to obtain anything close to universal health insurance has been Massachusetts, and that state is fairly unique in that it had relatively few uninsured to begin with and high per-capita income, along with a wealth of expertise and a history of innovation in which stakeholders had learned to work together.¹⁶² *All other states* that have attempted to achieve near universal insurance, the latest of which has been Vermont’s effort to create a publicly financed single-payer universal system, have failed because they simply do not have the fiscal wherewithal to do so.¹⁶³

In light of the Supreme Court’s reasoning in *NFIB*,¹⁶⁴ the recent holdings depriving state public health officials and particular federal executive agencies of the power to protect the collective against individuals’ spread of COVID-19, through either mandatory mitigation measures or mandated vaccinations, is hardly surprising at all—a *fortiorari* by a Supreme Court that has a much more conservative

158. *Id.* at 587–88 (“As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions.”).

159. *Id.*

160. See, e.g., COMM. ON THE CONSEQUENCES OF UNINSURANCE, INST. OF MED., CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE (2002).

161. See Jenna Flannigan, *Why Doesn't the United States Have Universal Healthcare?*, HEALTHLINE (Apr. 18, 2017), <https://www.healthline.com/health-news/why-doesnt-the-us-have-universal-healthcare#Why-U.S.-healthcare-stands-out>.

162. See, e.g., Michael T. Doonan & Katharine R. Tull, *Health Care Reform in Massachusetts: Implementation of Coverage Expansions and a Health Insurance Mandate*, 88(1) MILBANK Q. 54, 55 (2010).

163. Vermont’s “Green Mountain Health Care” had even been legislatively authorized before Governor Peter Shumlin’s stunning announcement that he would not submit the final financial plan to the legislature because it would have required a payroll tax of 11.5 percent and a sliding-scale income tax with a maximum rate of 9.5 percent, both very heavy lifts for a relatively poor state. See Peter Hirschfeld, *Shumlin: It's 'Not the Right Time' for Single Payer*, VT. PUB. RADIO (Dec. 17, 2014, 2:53 PM), <https://www.vpr.org/vpr-news/2014-12-17/shumlin-its-not-the-right-time-for-single-payer>.

164. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

majority than it did when *NFIB* was decided.¹⁶⁵ Let us start with the challenge to state authorities' imposition of social distancing requirements on religious houses of worship and then turn to the federal cases concerning the authority of federal agencies. These cases all were decided in the Supreme Court's shadow docket, something that in itself is troubling but beyond the scope of this Article.¹⁶⁶ In presenting these cases I make no attempt to analyze the numerous other cases decided or kicking around in lower courts, which would require a separate lengthy writing. Instead, I only continue the point I started with the Supreme Court's decision in *NFIB*, to wit, that the Supreme Court has been part of the process of delegitimizing the assertion that public health, a collective enterprise, cannot override individual "freedom," as well as to explicate that since *NFIB*, the conservative Court has moved further in this direction.

The first two cases, *South Bay United Pentecostal Church v. Newsom*¹⁶⁷ and *Calvary Chapel Dayton Valley v. Sisolak*,¹⁶⁸ were similar and were both decided by a 5-4 majority. I discuss *South Bay* more because in that case there were opinions from each side, whereas in *Calvary Chapel* the only opinions issued were from dissenters. In *South Bay*, the Court was asked to issue a preliminary injunction to enjoin California Governor Gavin Newsom's executive order limiting "attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."¹⁶⁹ The only opinion written by any member of the majority was a concurring opinion by Chief Justice Roberts, who wrote that there had been an insufficient showing of discrimination at odds with the Free Exercise Clause because

[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in

165. See, e.g., Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN POL. (Sept. 26, 2020, 6:33 PM), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html>.

166. See, e.g., Louis Jacobson, *The Supreme Court's 'Shadow Docket': What You Need to Know*, POLITIFACT (Oct. 18, 2021), <https://www.politifact.com/article/2021/oct/18/supreme-courts-shadow-docket-what-you-need-know/>.

167. 140 S. Ct. 1613 (2020).

168. 140 S. Ct. 2603 (2020).

169. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

which people neither congregate in large groups nor remain in close proximity for extended periods.¹⁷⁰

The Chief Justice found that “[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.”¹⁷¹ He continued:

Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people.¹⁷²

Writing in dissent for himself and Justices Thomas and Gorsuch—but not for Justice Alito, the fourth dissenter—Justice Kavanaugh saw things in a directly opposite manner.¹⁷³ First, he found that there was discrimination against the free exercise of religion because “comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.”¹⁷⁴ In finding these places to be comparable, Justice Kavanaugh completely ignored, much less failed to engage with, the very facts relied on by public health authorities in drawing the distinctions at issue, namely the fact that in places of worship, in contrast to the settings treated more leniently, those gathered are in close proximity indoors for hours while singing and chanting, and thereby, if infected, expelling a significant aerosolized amount of virus for others to breathe. In identical fashion—completely ignoring the public health rationales for the distinctions drawn—Justice Kavanaugh found that the state had failed to show that the distinctions it drew were narrowly tailored to achieve a compelling state interest:

170. *Id.*

171. *Id.*

172. *Id.* at 1613–14 (citations omitted).

173. *Id.* at 1614 (Kavanaugh, J., dissenting).

174. *Id.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could “insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities.” Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.¹⁷⁵

Likewise, Justice Kavanaugh in *Calvary Dayton* was quite happy to assume that there was no factual basis for the distinctions drawn between places of worship and secular organizations; i.e., from a public health perspective they are all the same:

Nevada undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms. Calvary Chapel is happy to abide by the same 50% occupancy cap or some stricter across-the-board standard, as the State sees fit, so long as the same standard applies to those secular businesses. And the Church has committed to social distancing, mask requirements, and certain voluntary safety measures.¹⁷⁶

In the Court’s next Term, in *Roman Catholic Diocese of Brooklyn v. Cuomo*¹⁷⁷ and *Tandon v. Newsom*,¹⁷⁸ the Court reached the exact opposite conclusion than the results obtained in *South Bay* and *Calvary Dayton* on the same issues. What had changed? Justice Ginsburg had died and been replaced by Justice Barrett.¹⁷⁹

175. *Id.* (citation omitted).

176. 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting).

177. 141 S. Ct. 63 (2020) (per curiam).

178. 141 S. Ct. 1294 (2021) (per curiam).

179. I will admit that I write this portion of the Article with significant disrespect. Why? Because the sudden shifts wrought by this Court, only some of which are described here, occurred *only* because the composition of the Court changed so drastically when Justice

I focus primarily on *Roman Catholic Diocese* because its opinions are more extensive. At issue, once again, were social distancing requirements that plaintiffs alleged, and a majority of the Court agreed, applied more rigorous, and hence discriminatory, standards to houses of worship than to identical—and there’s the posited conclusion—secular places.¹⁸⁰ Governor Andrew Cuomo’s order had divided geographical areas into “red” and “orange” zones, with more stringent requirements applicable in the red zones due to higher levels of infection and other markers of danger.¹⁸¹ According to the majority, writing in a per curiam opinion, these distinctions constituted discrimination against the exercise of religion:

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could “literally have hundreds of people shopping there on any given day.” Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that

Ginsburg died and was replaced by Justice Barrett. In my view, the five Justices who authored the decisions I discuss here have no understanding of what the rule of law entails and how important the rule of law is for law to be legitimate. In this regard, I view what has happened here to be of a piece with a prime subject of this Article, the fracturing of this country that the pandemic has worsened and the erosion of democratic norms. Furthermore, it is for that reason that I have come to admire Chief Justice Roberts all the more because he gets it and refuses to go along with law that has done an abrupt about-face only because the composition of the Court has changed. However, at this point, his vote is no longer needed as the fifth vote, so he is no longer able to protect the Supreme Court as an institution.

180. *Roman Catholic Diocese*, 141 S. Ct. at 65–66.

181. *Id.*

factories and schools have contributed to the spread of COVID–19, but they are treated less harshly than the Diocese’s churches and Agudath Israel’s synagogues, which have admirable safety records.¹⁸²

Perhaps even more troubling, the Court’s majority of five showed themselves quite willing to make up their own public health facts and distinctions:

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows.¹⁸³

In a dissent, Justice Sotomayor, joined by Justice Kagan, wrote about the majority’s failure to engage with the actual facts while making up their own (in a much less blunt way than I):

The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York’s conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. But the District Court rejected that argument as unsupported by the factual record. Undeterred, Justice Gorsuch offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York’s rules (*e.g.*, going to the liquor store or getting a bike repaired). But Justice Gorsuch does not even try to square his examples with

182. *Id.* at 66 (citations omitted).

183. *Id.* at 67.

the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. Unlike religious services, which “have every one of th[ose] risk factors,” bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.¹⁸⁴

The point was made even more forcefully by Justice Kagan, in an opinion joined by Justice Sotomayor, in *Tandon v. Newsom*, which concerned a challenge to across-the-board limitations on gatherings in private homes:

[T]he *per curiam*’s analysis of this case defies the factual record. According to the *per curiam*, “the Ninth Circuit did not conclude that” activities like frequenting stores or salons “pose a lesser risk of transmission” than applicants’ at-home religious activities. But Judges Milan Smith and Bade explained for the court that those activities do pose lesser risks for at least three reasons. First, “when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting,” with participants “more likely to be involved in prolonged conversations.” Second, “private houses are typically smaller and less ventilated than commercial establishments.” And third, “social distancing and mask-wearing are less likely in private settings and enforcement is more difficult.” These are not the mere musings of two appellate judges: The district court found each of these facts based on the uncontested testimony of California’s public-health experts. No doubt this evidence is inconvenient for the *per curiam*’s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments.¹⁸⁵

184. *Id.* at 79 (Sotomayor, J., dissenting) (citations omitted).

185. *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting) (citations omitted).

Based on these decisions, why do I write that the Supreme Court has now become involved in a process of delegitimizing public health?¹⁸⁶ Such would be the case even if the Court had merely refused to acknowledge that public health authorities deserve deference because of their expertise. However, these cases go beyond even this reasoning because they ignore the very facts upon which expertise operates, as well as the findings of lower courts, and they even make up their own facts, making the expertise itself *vanish*. When facts do not matter, there is no expertise to be exercised at all. The Supreme Court has thus joined the world of alternative facts as discussed above, all in the context of disregarding the “public” in “public health.” The potential threat to public health is startling indeed:

Any law can burden *someone’s* religious practice; and all laws have exemptions. Yet, freed from deference, and unconcerned with empirical facts, the Court is left with little but its own intuition to determine which secular activities pose health risks that are comparable to the regulated activities that the plaintiff sincerely views as religious. The result may be a Free Exercise jurisprudence that dramatically limits the states’ ability to protect public health, except when the Justices’ intuition tells them that the religious activity at issue is not comparable to the exempt secular activities. Judicial intuition, however, seems a thin reed upon which to rest the public’s health.¹⁸⁷

This process of depriving the government of the means to protect public health continued in two cases involving the authority of federal agencies, again decided in the shadow docket. In *Alabama Association of*

186. As I indicated above, I write about these cases only for limited purposes and much more could be written about them. For example, why is it that an across-the-board restriction is discriminatory, a conclusion questioning decades-old precedent? One could state that the majority in these cases has extended a process of protecting religious interests against public health measures that began with Justice Alito’s opinion in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 689–91 (2014), in which the Court, for the first time, extended the protections of the Religious Freedom Rights Act (“RFRA”) to for-profit, closely held religious corporations and held that RFRA was violated by the Affordable Care Act’s (“ACA”) mandate that employers offer contraceptive services in their health plans. However, those discussions, as well as others, would take this Article far afield.

187. Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court’s COVID-Free Exercise Cases*, 49 J. LAW, MED. & ETHICS 564, 575 (2021). Professor Parmet’s analysis of these cases is far more extensive than mine.

Realtors v. Department of Health and Human Services, the Court ruled that a district court improperly stayed its judgment that the CDC had no authority to impose a moratorium on evictions.¹⁸⁸ In a per curiam opinion, the Court stated that “[i]t strains credulity to believe that [the CDC’s authorizing statute] grants the CDC the sweeping authority that it asserts.”¹⁸⁹ Similarly, in *National Federation of Independent Business v. Department of Labor*,¹⁹⁰ the Court held that the authority of the Occupational Safety and Health Administration (“OSHA”) to protect workplace safety did not include the authority to mandate vaccination of employees in workplaces with at least 100 employees.¹⁹¹ In both cases, the issue was joined largely over statutory interpretation but the name of the game was the same as in the religious cases just discussed: in engaging in statutory interpretation the Court ignored the facts and inferences that fall within the expertise of public health authorities.¹⁹² In one case, *Biden v. Missouri*,¹⁹³ the Court did find that the Department of Health and Human Services, in administering Medicare and Medicaid, does possess the authority to require health care workers in participating facilities be vaccinated.¹⁹⁴ However, that decision was compelled because it is *impossible* to deny a factual connection between the provision of what we call *health care* and ensuring that *health care workers* are not infected with COVID-19. Nonetheless, that did not prevent four Justices—Justices Thomas, Alito, Gorsuch, and Barrett—from ignoring that *tautologous* connection in their dissent.¹⁹⁵

Let us begin with the CDC’s emergency moratorium on the eviction of any financially needy tenant in a county that is experiencing substantial or high levels of COVID-19 transmission in the midst of the extremely deadly Delta surge in the summer and fall of 2021. In public health, the connection between increased risk of infection during such a surge and the eviction of poor people is self-evident. A poor person, or more likely a poor nuclear or extended family, is evicted. Where do they go? One possibility is that they move in with family or friends. More than likely, “dense” housing stock becomes even more dense, one reason among others that poor persons suffered much higher rates of spread

188. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021).

189. *Id.* at 2486.

190. 142 S. Ct. 661 (2022).

191. *Id.* at 666.

192. *See generally id.*; *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490.

193. 142 S. Ct. 647 (2022).

194. *Id.* at 653.

195. *See id.* at 659–60.

than, say, persons living in single-family dwellings in the suburbs.¹⁹⁶ Another possibility is that they go to a shelter or live on the streets or in the subway or the like, where rates of spread are much higher than if they were able to continue living in the dwellings from which they were evicted.

The dissenters in *Alabama Association of Realtors* readily embraced these connections, well documented in the emergency order:

Look back at the order's criteria for temporary eviction relief. The CDC targets only those people who have nowhere else to live, in areas with dangerous levels of community transmission. These people may end up with relatives, in shelters, or seeking beds in other congregant facilities where the doubly contagious Delta variant threatens to spread quickly. Absent the current stay, the CDC projects a strong "likelihood of mass evictions nationwide" with public-health consequences that would be "difficult to reverse."

. . . The CDC has determined that "[a] surge in evictions could lead to the immediate and significant movement of large numbers of persons from lower density to higher density housing. . . when the highly transmissible Delta variant is driving COVID-19 cases at an unprecedented rate." The CDC cites models showing up to a 30% increased risk of contracting COVID-19 for some evicted people and those who share housing with them after displacement. The CDC invokes studies finding nationally over 433,000 cases and over 10,000 deaths may be traced to the lifting of state eviction moratoria.¹⁹⁷

By contrast, the majority in *Alabama Association of Realtors* (as in the religious cases) would have nothing to do with the facts of life—or at least *the facts of life of the poor*, which appear completely foreign to and completely ignored by the majority, just as they ignored the facts in the religion cases. Instead, they nitpicked the statute authorizing the CDC, construing separately each statutorily enumerated power, none of which explicitly contains the word "eviction."¹⁹⁸ Therefore, by completely

196. Sara Rosenbaum and I covered much of this terrain already in previous work. See *Coronavirus Feeds on Pathologies*, *supra* note 2, at 37–39.

197. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2493 (Breyer, J., dissenting) (citations omitted).

198. See *id.* at 2488–89.

missing the forest for the trees—a standard canon of statutory construction that construes a statute as a whole—and in fact often completely ignoring plain meaning, the Court found that the CDC’s order was *ultra vires*—or perhaps that should be “*ultra virus*.”¹⁹⁹

The process of reasoning regarding OSHA’s emergency order in *National Federation of Independent Business v. Occupational Safety and Health Administration* was similar. There, the majority noted the uncontroversial proposition that OSHA is given the power to set workplace safety standards but not to regulate public health more generally. Because the risk of getting infected with the SARS-Cov-2 virus exists outside the workplace, when OSHA regulates the risk of infection in the workplace, it is *not* regulating the risk of infection in the workplace.²⁰⁰

The reasoning was truly that facile. Suppose that OSHA regulates the spraying of toxins against bugs in the workplace but not in homes. Why draw this distinction? Because, based on *National Federation of Independent Business*, OSHA is given no authority to regulate outside the workplace.²⁰¹ Does the fact that the toxins pose dangers outside of the workplace somehow deprive OSHA of the authority to regulate them in the workplace? Suppose that OSHA mandates and regulates the removal of lead paint in the workplace. Way too many homes still contain lead paint, which is dangerous to all occupants, particularly children, and the hazard increases if removal is improper, spewing lead-containing dust everywhere. Does the existence of this danger outside the workplace somehow deprive OSHA of the authority to regulate it in the workplace? The list could go on and on. The reasoning is simply absurd.

The *National Federation of Independent Business* majority then concluded with an ode to democracy, or at least one in which the resolution of difficult issues mixing expertise and trade-offs in a complex society are not committed to agency discretion:

In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million

199. *Id.* at 2489.

200. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022).

201. *See id.* at 666 (noting the “crucial distinction” between “occupational risk” and “risk more generally”).

Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.²⁰²

However, the question is “who is legislating” in reaching this result? Nothing in the statute—not even a hint—indicates that Congress deprived OSHA of authority to regulate safety in the workplace because the same danger exists outside the workplace.²⁰³ The proposition is absurd, and the dissenters skewer the majority on this point:

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. . . .

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we “lack[] the background, competence, and expertise to assess” workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When

202. *See id.*

203. *See* 29 U.S.C. § 654(a)(1) (requiring employers to provide their employees with “a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [the] employees”).

we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.²⁰⁴

In all these cases the majority of the Supreme Court phrases the issue in the abstract: whether Congress has granted an agency the authority to act in a certain way. It then moves on to characterize the case as rule by legislatures or rule by bureaucrats. However, that is simply a smokescreen and one that is extremely disingenuous. The plaintiffs in these cases are not protectors of democracy but instead are protecting their own private interests, i.e., claimed individual freedoms. In *NFIB*, that was freedom not to obtain health insurance. In the vaccine mandate cases, that was individuals' freedom not to be coerced into getting vaccinated. In the cases involving maximum gatherings, that is the freedom to gather despite creating greater risk of spread. Broadly, this is the right to be free from actions taken to protect public health—which necessarily is a collective good—because in the state of nature the individual is granted such natural rights upon which the administrative state has no authority to intrude.

The Court's answer to this is that only the legislature can impose such collective burdens. However, in the modern world that proposition is nothing short of absurd, particularly when the threat is something as lightning fast and mercurial as the SARS-Cov-2 virus. Writing before the Supreme Court's decisions, Professor Wendy E. Parmet stated that a ruling against OSHA could be disastrous:

History has repeatedly shown that many of the country's most pressing health problems, from pollution to pandemics, cross state lines and cannot be addressed by

204. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 676–77 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (citation omitted).

states alone. States also lack the resources to respond adequately to natural disasters or finance the rapid development and distribution of new vaccines. Indeed, when crises hit, the public, even in Republican-led states, usually looks to Washington. Sometimes that requires congressional action. But it is unrealistic to expect Congress, even when it functions well, to pass legislation in response to every new health issue or to foresee every regulation that might be required. Administrative agencies, like the C.M.S. and the Food and Drug Administration, have developed for a reason. Without them the government cannot deliver the services and protection that Americans rely upon.²⁰⁵

The result, then, of the Court's decisions is effectively to leave the responsibility to ensure the public's health in the hands of individual choice, the very fragmentation and delegitimization of public health that is one point of this Article. The decision leaves the nation fully or partially unprotected because its government is unable or less able to address the most fundamental reason the modern nation-state exists, to defend its populace. That is the final portion of this Article to which we now turn.

E. Health Care Delivery and Public Health in the United States

Before the COVID-19 pandemic, lack of public health capacity in the United States was one of the more significant factors contributing to the nation's lack of preparedness for such a crisis.²⁰⁶ Since then public health capacity has diminished in four respects.²⁰⁷ I make four points here.

First, while the Biden administration and Congress have poured billions of dollars into creating supply lines and means of distribution for COVID testing, treatments, and vaccinations, this funding provides

205. Wendy Parmet, *The Government's Ability to Control the Pandemic Is at Stake*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/opinion/supreme-court-vaccine-mandates.html>.

206. Much of this ground is covered in *Sick at Heart*, *supra* note 2, at 1353–61.

207. While the coronavirus has killed one million in the United States in just over two years, a more invisible casualty has been the nation's public health system. Already underfunded and neglected even before the pandemic, public health has been further undermined in ways that could resound for decades to come. A *New York Times* review of hundreds of health departments in all 50 states indicates that local public health across the country is less equipped to confront a pandemic now than it was at the beginning of 2020. Mike Baker & Danielle Ivory, *Why Public Health Faces a Crisis Across the U.S.*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/us/coronavirus-public-health.html>.

means to meet the current challenges, not future ones.²⁰⁸ Even the appetite for additional funding for this pandemic seems to have greatly diminished as, in mid-March 2022, Congress has balked at providing further resources.²⁰⁹ The Biden administration has announced that it no longer has money for testing, treatment, or the foreseen fourth booster shots except for persons over the age of 65.²¹⁰ As discussed previously, many now consider the pandemic to have ended.²¹¹ While memories regarding pandemics have historically been short—needs during the crisis are forgotten and not funded to meet future crises—the shortness of memory now occurring probably sets a record in that we have entered the “neglect cycle” while we are still in the middle of a pandemic.²¹² A number of fine plans have already been formulated to end this pandemic and to strengthen preparedness for future ones.²¹³ However, like their

208. *See id.*

209. *See, e.g.*, Sheryl Gay Stolberg & Madeleine Ngo, *Uncertainty for Biden’s Covid Plan After Aid Is Dropped from Spending Bill*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/us/politics/biden-pandemic-response-funding.html>.

210. Press Release, The White House, FACT SHEET: Consequences of Lack of Funding for Efforts to Combat COVID-19 if Congress Does Not Act (Mar. 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/15/fact-sheet-consequences-of-lack-of-funding-for-efforts-to-combat-covid-19-if-congress-does-not-act/>; *Provider Relief Fund*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/provider-relief> (last visited May 14, 2022) (announcing that due to insufficient funds the COVID-19 Uninsured Program and the COVID-19 Coverage Assistance Fund will stop accepting claims for testing, treatment, and vaccinations). *See, e.g.*, Stephanie Armour & Sabrina Siddiqui, *Biden Administration to Stop Reimbursing Hospitals for Covid-19 Care for Uninsured*, WALL ST. J. (Mar. 22, 2022), <https://www.wsj.com/articles/biden-administration-to-stop-reimbursing-hospitals-for-covid-19-care-for-uninsured-11647955166>; Stephanie Armour, *Biden’s Plans for Second COVID-19 Boosters Threatened by Funding Impasse*, WALL ST. J. (Mar. 18, 2022), <https://www.wsj.com/articles/bidens-plans-for-second-covid-19-boosters-threatened-by-funding-impasse-11647608400>; Sheryl Gay Stolberg, *In Impasse over New Covid Relief Aid, Neither Side Is Willing to Bend*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/us/politics/biden-congress-covid-relief-aid.html>; Stephanie Armour, Natalie Andrews & Sabrina Siddiqui, *White House Warns of Blow to Covid-19 Fight as Funding Stalls*, WALL ST. J. (Mar. 12, 2022), <https://www.wsj.com/articles/white-house-warns-of-blow-to-covid-19-fight-as-funding-stalls-11647097200>.

211. *See supra* Section I.

212. *See, e.g.*, Ed Yong, *America is Zooming Through the Pandemic Panic-Neglect Cycle*, ATLANTIC (Mar. 17, 2022), <https://www.theatlantic.com/health/archive/2022/03/congress-covid-spending-bill/627090/>; Benjamin Mueller, *Another Covid Surge May Be Coming. Are We Ready for It?*, N.Y. TIMES (Mar. 19, 2022), <https://www.nytimes.com/2022/03/19/health/covid-ba2-surge-variant.html>.

213. *See, e.g.*, Delores Albarracín et al., *Getting to and Sustaining the Next Normal: A Roadmap for Living with COVID*, <https://www.covidroadmap.org/> (last visited May 14, 2022); THE WHITE HOUSE, NATIONAL COVID-19 PREPAREDNESS PLAN (2022); THE WHITE HOUSE, AMERICAN PANDEMIC PREPAREDNESS: TRANSFORMING OUR CAPABILITIES (2021); *Improving Pandemic Preparedness: Lessons from COVID-19*, COUNCIL ON FOREIGN

predecessors,²¹⁴ they will just gather dust without the commitment of resources.

Second, as indicated above, public health officials have been on the frontlines in the backlash against mitigation measures.²¹⁵ Public health officials have been “villainized” and made personally identifiable by their presence on social and other media, which they need to use as a means of dissemination of public health information.²¹⁶ They therefore effectively wear bullseyes as both state and local officials have been subjected to numerous incidents of abuse, harassment, and threats of violence. This treatment has taken a clear toll: hundreds of public health officials have left their jobs because of these attacks.²¹⁷ Even without taking into

RELATIONS (Oct. 2021), <https://www.cfr.org/report/pandemic-preparedness-lessons-covid-19>. Indeed, even now, our level of preparedness is going backwards. For example, the domestic firms created during the pandemic to resolve the issue of damaged or severed supply lines for personal protective equipment are now going out of business because hospitals are again purchasing from China. *See, e.g.*, Joe Nocera, *Why American Mask Makers Are Going Out of Business*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/05/business/dealbook/american-mask-makers.html>. One might be somewhat skeptical of predictions, *see, e.g.*, Jeanna Smialek, *Is America's Economy Entering a New Normal?*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/business/economy/america-russia-pandemic-inflation.html>, that the pandemic will cause “de-globalization.” Instead, overseas supply lines might become more diversified. *See, e.g.*, Ben Casselman & Ana Swanson, *Supply Chain Hurdles Will Outlast Pandemic, White House Says*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/biden-supply-chain.html>; Josh Zumbrun, *Supply-Chain Woes Won't Be Solved by "Reshoring," Report Says*, WALL ST. J. (Apr. 12, 2022), <https://www.wsj.com/articles/supply-chain-woes-wont-be-solved-by-reshoring-report-says-11649772000>.

214. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., PANDEMIC INFLUENZA PLAN 2017 UPDATE (2017).

215. *See supra* Section II.A.

216. *See, e.g.*, Julie A. Ward et al., *Pandemic-Related Workplace Violence and Its Impact on Public Health Officials, March 2020–January 2021*, 112 AM. J. PUB. HEALTH 736, 736 (2022).

217. Different sources used in this paragraph have different numbers regarding the points made in this paragraph, probably because they cover different time periods, use different methods, or both. *See, e.g.*, Baker & Ivory, *supra* note 207; Ward et al., *supra* note 216; *Public Health Official Departures*, ASSOCIATED PRESS (Sept. 20, 2021), <https://data.world/associatedpress/public-health-official-departures>; Kathleen Moran-McCabe, Adrienne Ghorashi & Elizabeth Platt, *Sentinel Surveillance of Emerging Laws Limiting Public Health Emergency Orders*, TEMP. UNIV. BEASLEY SCH. OF L. CTR. FOR PUB. HEALTH L. RSCH. (Dec. 2, 2021), <https://phlr.org/product/sentinel-surveillance-emerging-laws-limiting-public-health-emergency-orders>; NAT'L ASSOC. OF CNTY. & CITY HEALTH OFFS., PROPOSED LIMITS ON PUBLIC HEALTH AUTHORITY: DANGEROUS FOR PUBLIC HEALTH (2021); Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KAISER HEALTH NEWS (Sept. 15, 2021), <https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/>. I make no attempt to resolve the differences because all sources support the points I make.

account this recent bleeding, the Beaumont Foundation estimates that we need an eighty percent increase in the workforce of public health departments.²¹⁸ For public health officials still standing, not only is there burnout and demoralization, there is a reportedly high rate (somewhere north of fifty percent) of behavioral health issues, including depression, post-traumatic stress disorder, and suicidal ideation.²¹⁹ Perhaps most important for this Article is the fact that “[a]mong public health officials who resigned during the pandemic, many indicated that their expertise had been marginalized and disregarded.”²²⁰

Third, the disregard for public health expertise has become embodied in law—and not just in the Supreme Court’s rulings discussed above. Somewhere between 19 and 32 states have newly passed laws that restrict or eliminate the authority of public health officials—sometimes governors too—to make decisions regarding vaccines, masks, contact tracing, social distancing, or quarantine, and it seems that many more are coming.²²¹ Like the Supreme Court decisions these enactments delegitimize public health and are written into law.

Fourth, perhaps even more so than what I wrote about in *Sick at Heart*,²²² the health care finance and delivery system continues to contribute to our lack of preparedness. For one thing, the pre-existing shortage of nurses, as well as other health care workers, is far worse than what existed prior to the pandemic. It has been reported that nearly one in five healthcare workers have left the profession due to the pandemic.²²³ As of the end of March 2022, 28 percent of nursing facilities reported at

218. See, e.g., DE BEAUMONT FOUND., STAFFING UP: WORKFORCE LEVELS NEEDED TO PROVIDE BASIC PUBLIC HEALTH SERVICES FOR ALL AMERICANS 1 (2021).

219. See, e.g., Jonathan Bryant-Genevier et al., *Symptoms of Depression, Anxiety, Post-Traumatic Stress Disorder, and Suicidal Ideation Among State, Tribal, Local, and Territorial Public Health Workers During the COVID-19 Pandemic—United States, March–April 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 1680, 1680 (2021).

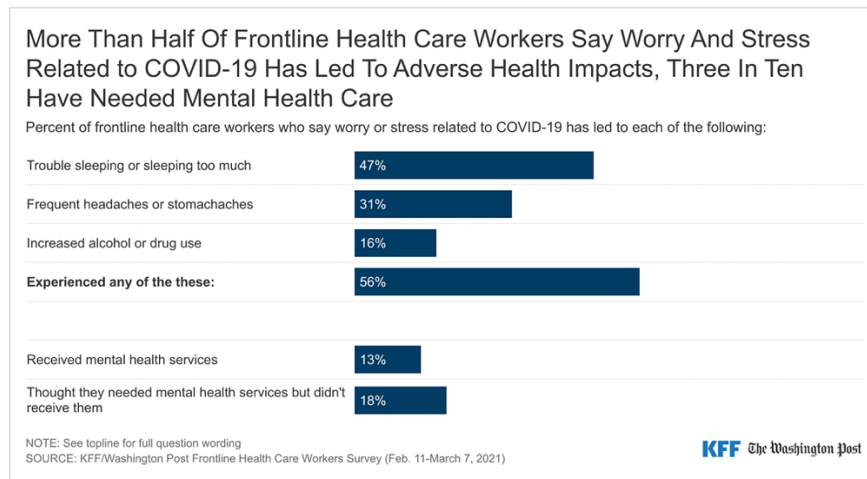
220. Ward et al., *supra* note 216, at 740, 742.

221. See, e.g., *Summary of Pending Bills Limiting Public Health Authority: The Second Wave*, NETWORK FOR PUB. HEALTH LAW (Apr. 6, 2022), <https://www.networkforphl.org/wp-content/uploads/2022/04/50-State-Survey-Summary-of-Pending-Bills-Limiting-Public-Health-Authority-The-Second-Wave-2.pdf>. The low number comes from KATIE MORAN-MCCABE, SENTINEL SURVEILLANCE OF EMERGING LAWS LIMITING PUBLIC HEALTH EMERGENCY ORDERS 1 (Ctr. Pub. Health L. Rsch. ed., 2021). The high number stems from Baker & Ivory, *supra* note 207.

222. See *Sick at Heart*, *supra* note 2, at 1371–84.

223. See, e.g., Gaby Galvin, *Nearly 1 in 5 Health Care Workers Have Quit Their Jobs During the Pandemic*, MORNING CONSULT (Oct. 4, 2021, 12:01 AM), <https://morningconsult.com/2021/10/04/health-care-workers-series-part-2-workforce/>.

least one staffing shortage.²²⁴ This shortage hits hardest on small and rural hospitals, rural hospitals of any size, and hospitals of any size or location serving vulnerable populations.²²⁵ Because these facilities include some of the hardest hit hospitals, the fact that these institutions are suffering the greatest shortages will lead to even worse impacts on the persons they serve. The future may lead to even greater shortages.²²⁶ Even about a year ago, the mental toll on health care workers was already huge.²²⁷



224. Nancy Ochieng et al., *Nursing Facility Staffing Shortages During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Apr. 4, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/nursing-facility-staffing-shortages-during-the-covid-19-pandemic/>.

225. See, e.g., The Daily, 'Somebody's Got to Save Us While We're Saving Everybody Else', N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/podcasts/the-daily/covid-nursing-shortages.html?>; Lauren Hilgers, 'Nurses Have Finally Learned What They're Worth', N.Y. TIMES MAG. (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/magazine/traveling-nurses.html>; Andrew Jacobs, *A Shrinking Band of Southern Nurses, Neck-Deep in Another Covid Wave*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/23/health/covid-mississippi-nurses.html>; Joseph Goldstein, *What the Omicron Wave Looks Like at One Brooklyn E.R.*, N.Y. TIMES (Jan. 15, 2022), <https://www.nytimes.com/2022/01/15/nyregion/brooklyn-omicron-cases.html>.

226. See, e.g., Christine A. Sinsky et al., *COVID-Related Stress and Work Intentions in a Sample of US Health Care Workers*, 5 MAYO CLINIC PROC.: INNOVATIONS, QUALITY & OUTCOMES 1165, 1172 (2021).

227. *KFF/Post Survey Reveals the Serious Mental Health Challenges Facing Frontline Health Care Workers a Year into the COVID-19 Pandemic*, KAISER FAM. FOUND. (Apr. 6, 2021), <https://www.kff.org/coronavirus-covid-19/press-release/kff-post-survey-reveals-the-serious-mental-health-challenges-facing-frontline-health-care-workers-a-year-into-the-covid-19-pandemic/#:~:text=More%20than%20a%20year%20into,The%20Washington%20Post%20national%20survey.>

For another thing, the distribution of relief funds for hospitals largely made the rich richer, the poor poorer, helped hospitals or systems with market power more than those without market power and may have aided those with market power to acquire even more.²²⁸ Although the targeting of the relief funds to hospitals in need, not to the wealthy ones, improved marginally over time, the initial formula used by the Trump administration, based on a hospital's proportion of fee-for-service Medicare payments in 2019 and the provider's recent gross receipts, was a disaster.²²⁹

[It] resulted in an inequitable distribution of funds to hospitals, with disproportionately less going to rural hospitals, critical access hospitals, and those serving poor communities. Many of these hospitals also faced disproportionately higher rates of COVID-19-related hospital admissions due to the poverty and vulnerability of the populations in their catchment areas. Most of these types of hospitals were also financially fragile prior to the coronavirus pandemic and had fewer resources than other hospitals to respond to the onslaught of COVID-19 hospitalizations.²³⁰

The results of this distribution were predictable because it favored hospitals with more private insurance, larger margins, and lower levels of uncompensated care.²³¹ Hospitals "in the top decile of private insurance revenue received \$44,321 in federal relief funds per hospital bed compared to only \$20,710 per bed for hospitals in the lowest decile of private insurance revenue."²³² Large systems were particularly favored, even "20 large hospital chains that had well over \$100 billion in cash on hand, much of it the result of investments in financial assets."²³³ Likewise, academic medical centers benefited because they often hold for-profit subsidiaries that generate revenues apart from providing health care, e.g., from patents based on research, and therefore were sitting on

228. See generally EILEEN APPELBAUM & ROSEMARY BATT, CTR. FOR ECON. & POL'Y RSCH., CURBING INEQUITIES IN THE DISTRIBUTION OF EMERGENCY RELIEF: LESSONS FROM THE CARES ACT IN HEALTH CARE (2022).

229. *Id.* at 4–5.

230. *Id.* at 4. This paper consists of an excellent survey and synthesis of the literature. I rely on it primarily because it accords with my reading of the underlying literature.

231. *Id.* at 6.

232. *Id.*

233. *Id.*

large piles of cash.²³⁴ Smaller hospitals lack the wherewithal to do that.²³⁵ As a result, these wealthy nonprofit hospitals received large relief funds although they were not in need of relief.²³⁶

For example, the Catholic health system Ascension (the second largest nonprofit hospital system by revenue), received \$496.8 million in grants even though it had 231 days of cash on hand. Cleveland Clinic, with 337 days of cash on hand, received \$161.1 million in grants. Another of the largest Catholic health systems, CommonSpirit, had 142 days of cash on hand and received \$427.8 million in grants. Other wealthy hospitals with 200 or more days of cash on hand—Advent Health, Mayo Clinic, Banner Health, and others—accepted hundreds of thousands of dollars in grants.²³⁷

The effect on large for-profit health systems was similar. For example, the largest for-profit system, Healthcare Corporation (“HCA”),

had total net income of \$3.5 billion in 2019 and \$732 million in cash or cash equivalents on hand as of March 31, 2020. It received very large grants from CARES Act funds by the end of May. Federal officials later found accountability errors in virtually every HCA grant or award, primarily related to employment, contracting, and consumer protection, but also tax and CEO pay issues. HCA later returned most if not all of the funding. Most other hospital systems, however, did not. Tenet, with \$613 million in cash and cash equivalents on hand as of March 31, 2020, received \$517 million in grants. Community Health Systems (CHS) received a CARES grant of \$420 million, which was more than the health system earned in 2019 when it registered a net loss of \$675 million. Universal Health Services (UHS), with \$55 million in cash on hand on March 31, received a grant of \$239 million.²³⁸

234. *Id.* at 7.

235. *Id.*

236. *Id.*

237. *Id.* at 7–8.

238. *Id.* at 8–9 (citations and footnotes omitted).

Although later distributions were somewhat better targeted, the later rules of distribution *still* failed to account for a hospital's assets and endowment and *still* failed to account for a hospital's census by use of, for example, the impoverished nature of the patient population it serves.²³⁹ Hence, even the more targeted, later rounds of funds *still* favored wealthier hospitals.²⁴⁰

Another long-lasting effect of the relief fund's distribution is that it helped many of the wealthy recipients to leverage mergers and acquisitions.²⁴¹ Perhaps most egregious was the behavior of hospital-owning private equity firms, whose game is usually something like saddling the acquired facility or facilities with the debt incurred by the acquisition, selling off the acquired facility's assets, and then funneling the returns from those sales to the private equity owners. There are numerous examples of this activity.²⁴²

Alone, the distribution favored hospitals with high market power because those with market power command higher prices, i.e., higher receipts, which, as we discussed above, leads to higher levels of "relief."²⁴³ Moreover, the relief funds increased the levels of reserves and the funds held by private equity, thereby abetting even great levels of acquisitions and mergers.²⁴⁴

Even were we unconcerned about the greater health care expenditures caused by this flawed system, we should nonetheless care about the manner in which greater consolidation affects preparedness. As I discussed in *Sick at Heart*, the greater the degree of consolidation, the less that we can expect the cooperation among providers that is needed in a crisis.²⁴⁵ The very point of horizontal and vertical consolidation is to lock patients and the goods and services provided to them as much as possible into the consolidated network, while the point of coordination among providers, necessary in a pandemic, is to rationalize activities among different hospitals without regard to the

239. *Id.* at 10–15.

240. *See id.*

241. *See id.* at 17–19; *see also* Reed Abelson, *Buoyed by Federal Covid Aid, Big Hospital Chains Buy Up Competitors*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/05/21/health/covid-bailout-hospital-merger.html>.

242. *See* APPELBAUM & BATT, *supra* note 228, at 19–21.

243. *See* RICHARD M. SCHEFFLER ET AL., SCH. OF PUB. HEALTH, UNIV. CAL. BERKELEY, *THE DISTRIBUTION OF PROVIDER RELIEF PAYMENTS AMONG CALIFORNIA HEALTH SYSTEMS* 1, 13 (2020).

244. *See* Richard Scheffler & Laura Alexander, *Consolidation of Hospitals During the COVID-19 Pandemic: Government Bailouts and Private Equity*, MILBANK Q., July 20, 2021.

245. *See Sick at Heart*, *supra* note 2, at 1367.

networks or chains they are in.²⁴⁶ The two objectives are at odds, with consequences like the ones I described earlier in *Sick at Heart*.²⁴⁷

CONCLUSION

As I wrote at the outset, the conclusions in this Article are morbid. Before the pandemic, the United States was already riven by a multitude of divisions.²⁴⁸ Of course, there was the usual economic stratification but so many cleavages are cumulative, combining divisions of wealth and income with those of race, ethnicity, education, occupation, geographic location, rural-urban, political party affiliation, Trumpism, definitions of leisure, literacy, even diet.²⁴⁹ More and more, we no longer even share common facts, much less shared beliefs and values.

Common purposes, formed and expressed through political, economic, and social institutions that are deemed to be legitimate, can bridge these divides, but more and more Americans are devolving into separate spheres in which compromise is an evil to be avoided at almost all costs. In this ecology, a virus as smart and nimble as SARS-CoV-2 can work its will, seeping into everything because it feeds on and exacerbates every crack and crevice.

Preventing or mitigating a pandemic requires the creation and exercise of collective imagination across all spheres of life. One would hope that we would be able to reach sensible and collective solutions across this broad expanse but the data I draw on here and in *Sick at Heart* show that uniquely among wealthy nations we are failing in a number of ways. There is just so much alienation—we might say anomie—all around, in primary association, in the schools, in the highly stratified economy, and in the view of politics, the view of all kinds of authority, and the view of science and public health. To so many, dropping out or not engaging in anything like a swath of society broader than one's "tribe"—and definitely not sacrificing for the collective because there simply is none—are the only ways to tolerate life in society, given the stratification in wealth and income, the limited opportunities for meaningful upward social mobility, and the seemingly unlimited opportunities for downward mobility—falling out of the middle class is a common phrase. The growing view is that participation in politics is not worth anything because, like the economic battlefield, the decks are stacked. Our schools no longer seem to meld us together but instead fulfill

246. *Id.* at 1373–74.

247. *Id.* at 1371–84.

248. *See supra* Section II.A–E.

249. *See id.*

the adage that warfare is the continuation of politics rather than the waging of peace. The situation of privatized and industrialized health care makes plain that the rich get taken care of while the poor do not, teaching us that our lives are simply commodities for which there is no collective responsibility and no social solidarity, that it is each person for him or herself against everyone else, and that health really is a luxury only for the well-off.²⁵⁰

Perhaps we will luck out with this pandemic in that the gods of mutation will be in our favor, that Omicron will be the last significant variant, and that eventually there will be enough immunity all around so that we will reach that end state of “endemicity,” a thoroughly normative term implying that it is permissible to ignore the thousands, tens of thousands, hundreds of thousands or even millions who will not fare so well “living with COVID.”²⁵¹ However, we might not even be so “lucky” this time or next.

To support efforts at mitigation, it has commonly been said and written that we “must follow the science.”²⁵² Coming out of the Trump administration, this slogan made a point that was needed but is still quite limited. We commonly say that “hard cases make bad law.” Well, we might say that the rebound from “terrible leadership makes bad leadership.” As this Article demonstrates, the notion that all divisions can be overcome by “following the science” is absurd because the decisions during the pandemic cross every boundary, and they do so because that is exactly what a pandemic *is*. On the other hand, ignoring “the science” is equally perilous because we can learn much from science and use it as a collective tool to get a handle on things or at least to prevent even greater harm.

Still, the problem goes far deeper and seems intractable because in our fragmented state there are just too many unscientific flags that can fly under the banner of science while many have lost faith in or, more strongly, view with hostility the institutions that have enabled the sorting out of what science consists in and what fails to meet those norms. Not that these institutions have worked perfectly because nothing in human life is up to that standard, but riven as we are by so much fracturing, those institutions, along with many other sources of expertise, have now lost much legitimacy. It should come as no surprise that warring camps should be at war also over what scientific facts are and what science consists of.

250. See generally Sreedhar & Gopal, *supra* note 35.

251. See generally Stern & Wu, *supra* note 29.

252. See, e.g., David Leonhardt, *Follow the Science?*, N.Y. TIMES (Feb. 11, 2022), <https://www.nytimes.com/2022/02/11/briefing/covid-cdc-follow-the-science.html>.

More generally, the task ahead has been stated quite incisively by Charles M. Blow, a *New York Times* columnist, in the following terms:

Covid has made us reconsider everything, the meaning of home and work, the value of public space, the magnitude and immediacy of death, what it truly means to be a member of a society.

We are still finding the answers to those questions, but the America we knew ended in 2019. This is a new one, scarred, struggling to its feet, dogged by moral and philosophical questions that on one hand have revealed its cruelty and on the other have forced it into metamorphosis.²⁵³

Perhaps for unpredictable reasons, we will all end up singing and dancing together on our way along the Yellow Brick Road.²⁵⁴ I hope that everything in this Article is all wrong. However, what I have discussed seems to indicate a different path ahead. The ship was already listing when COVID-19 struck it like a torpedo. Let us hope that it somehow gets righted again.

253. Charles M. Blow, *There Will Be No Post-Covid*, N.Y. TIMES (Feb. 13, 2022) <https://www.nytimes.com/2022/02/13/opinion/no-post-covid.html>.

254. In using this metaphor, I hope that I offend no one because I invoke no symbolism other than a path that leads to happiness, long and meaningful life, and the like.