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From Public Health to Public Wealth: The Case for Economic Justice

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ARTICLES

FROM PUBLIC HEALTH TO PUBLIC WEALTH: THE CASE FOR ECONOMIC JUSTICE

*Barbara L. Atwell*¹

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*“The discipline of public health is critical . . . because of its values of social justice and fairness for all, and its focus on the collective actions of interdependent and empowered peoples and their communities.”*²

INTRODUCTION

While the United States places great importance on individual freedoms,³ the Preamble to the United States Constitution explicitly recognizes the importance of community. It refers to the “general welfare” of “the people,” suggesting that the Constitution’s ultimate objective is to serve our shared well-being.⁴ Likewise, states’ police power to protect public health, safety, and welfare focuses on the well-being of the whole.⁵ Nonetheless, United States’ law, policy, and culture often emphasize individual rights and freedoms over our mutual good. For example, freedom of speech, freedom of religion, freedom of association, freedom from unreasonable searches and seizures, and the rights to liberty, equal protection and due process are among the rights upon which we place great value.⁶

Public health law stands out in this space of individualism; consistent with the Preamble to the Constitution, it focuses on the collective. The *raison d’être* of public health law is to protect community health.⁷ It recognizes and addresses humanity’s interdependence, both nationally and globally.⁸ Public health experts, for example, understand that failure to contain contagious diseases potentially threatens everyone.⁹ Recent outbreaks of the Ebola and Zika viruses, which impacted several countries on more than one continent, exemplify this reality.¹⁰ No public health threat

² Richard Horton et al., *From Public to Planetary Health: A Manifesto*, 383 LANCET 847, 847 (2014).

³ See, e.g., U.S. CONST. amends. I–X.

⁴ See U.S. CONST. pmbl.; see also *infra* note 18.

⁵ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 39 (2d ed. 2008).

⁶ The Constitution has also been interpreted to encompass a right to privacy and to substantive due process. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152, 164 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The United States Supreme Court has also ruled there is an individual right to bear arms found in the Second Amendment, which was interpreted to include an individual right to bear arms unconnected to state militias. *District of Columbia v. Heller*, 554 U.S. 570, 595–96 (2008). These individual rights are not without controversy, especially the right to bear arms and abortion rights. There are a whole host of opinions, for example, about the scope of the right to bear arms. The right to abortion also remains controversial.

⁷ See GOSTIN, *supra* note 5, at 153.

⁸ See Nicholas Kristof, *How to Defeat Ebola*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/opinion/nicholas-kristof-how-to-defeat-ebola.html> [<https://perma.cc/9PD7-M67Y>] (“[G]lobal health is not just a warm and fussy kind of aid. It’s also self-interest. . . . Our values and interests coincide [].”).

⁹ Required school vaccination rules recognize the need for “herd immunity,” a level of immunization that keeps disease at bay. Pam Belluck & Adeel Hassan, *Measles Outbreak Questions and Answers: Everything You Want to Know*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/measles-outbreak.html> [<https://perma.cc/48J5-U6FV>]. The level of immunization needed for herd immunity varies by disease. *Id.* Measles, for example, typically requires an immunization level of 93–95% for herd immunity. *Id.*

¹⁰ Although our public health laws apply only to the United States, it is clear in this global world that any serious public health threat is a potential threat everywhere. The 2014 Ebola outbreak highlighted the global risk when the disease came to our shores. See Alison Bruzek, *Ebola in the United States: What Happened When*, NAT’L PUBLIC RADIO (Oct. 15, 2014, 12:51 PM), <https://www.npr.org/sections/health-shots/2014/10/15/356098903/ebola-in-the-united-states-what-happened-when> [<https://perma.cc/Y9SA-ER92>]. Organizations like the CDC and the WHO work together across

in modern memory, however, parallels the coronavirus that causes Covid-19. First detected in Wuhan, China in December 2019, within a matter of three months, this novel coronavirus pandemic impacted almost every country in the world.¹¹ By March 2020, the World Health Organization reported 509,164 confirmed cases in nearly 200 countries, with 23,335 deaths.¹² In the United States alone, the Centers for Disease Control & Prevention reported 85,356 cases of Covid-19 and 1,246 deaths.¹³

Public health law sets forth government's responsibility to protect community well-being at every level.¹⁴ It includes a number of tools for protecting the health and welfare of the community. For example, mandatory vaccinations for school

national boundaries to facilitate well-being around the world. *What CDC is Doing: CDC Works Worldwide 24/7 to Protect the U.S. from Disease Threats*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/globalhealth/what/default.htm> [<https://perma.cc/M8WT-EJU7>]. During a 1965 commencement address at Oberlin College, Reverend Dr. Martin Luther King, Jr. remarked that “[w]e must all learn to live together as brothers—or we will all perish together as fools. . . . We are tied together.” Martin Luther King, Jr., Commencement Address for Oberlin College: Remaining Awake Through a Great Revolution (June 14, 1965) (transcript available in the Oberlin College Archives), <http://www2.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html> [<https://perma.cc/EA6W-FCV6>]. In this speech, Dr. King focused not just on racial injustice but also on global cooperation and international peace, acknowledging all of humanity's interconnectedness:

[A]ll mankind is tied together; all life is interrelated, and we are all caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. For some strange reason I can never be what I ought to be until you are what you ought to be. And you can never be what you ought to be until I am what I ought to be—this is the interrelated structure of reality.

Id. Public health law reflects this truth. Environmental protections, which also address public health, are further examples of laws that underscore humanity's interconnectedness. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1388 (2018); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018); *see also* Horton et al., *supra* note 2 (“An urgent transformation is required in our values and our practices based on recognition of our interdependence and the interconnectedness of the risks we face. We need a new vision of cooperative and democratic action at all levels of society and a new principle of planetism and wellbeing for every person on this Earth . . .”).

¹¹ *Coronavirus Latest: Pandemic Could Have Killed 40 Million without Any Action*, NATURE (Mar. 27, 2020), <https://www.nature.com/articles/d41586-020-00154-w> [<https://perma.cc/Y96T-F7FA>].

¹² CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT—66, WORLD HEALTH ORGANIZATION [WHO] (Mar. 26, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200326-sitrep-66-covid-19.pdf?sfvrsn=9e5b8b48_2 [<https://perma.cc/88XE-ATCL>].

¹³ *Coronavirus Disease 2019 (COVID-19)*, CTNS. FOR DISEASE CONTROL & PREVENTION (Mar. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/CZ2X-989E>]. These numbers undoubtedly understate the true scope of the outbreak in the United States since inadequate testing was available. Testing was slow to develop and remained difficult to obtain at the end of March 2020. In March 2020, the number of Covid-19 cases was not expected to peak for several weeks, James Glanz et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html> [<https://perma.cc/G3UB-NESA>], yet the total number of confirmed cases surpassed that of China, despite the fact that the United States' population is a fraction of China's. Lazaro Gamio et al., *Where the U.S. Stands Now on Coronavirus Testing*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/interactive/2020/03/26/us/coronavirus-testing-states.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/JS9K-JYB7>].

¹⁴ For a broad discussion of the role of public health law in society, see *infra* Part I.

attendance,¹⁵ rules for disease surveillance,¹⁶ and the keeping of vital records¹⁷ are just a few examples of governmental efforts to promote public health. Public health law's focus on the health and well-being of the community, indeed of humanity itself, also protects the individuals who comprise the community. Public health law's goals thus reflect the constitutional values of promoting the "general welfare" for "the people,"¹⁸ even when it falls short of meeting those goals.¹⁹

Its recognition of our shared well-being makes public health law a model for other legal arenas. It is an inclusive approach to the law that seeks solutions for our mutual benefit. This article therefore argues that public health law can be used as a prism through which to view the law more generally. Specifically, it compares public health law to laws that address financial well-being. When it comes to financial well-being, the law generally focuses on the individual. It often fails to address the general welfare. Instead, it tends to include policies that explicitly pick winners and losers.²⁰ Corporate law, for example, generally does not reflect our financial

¹⁵ See cases cited *infra* note 64.

¹⁶ *Public Health Surveillance*, WORLD HEALTH ORG., https://www.who.int/topics/public_health_surveillance/en/ [<https://perma.cc/W9KW-B72S>].

¹⁷ Disease surveillance and the keeping of vital records supply us with critical data with which to make public health decisions. MICHAEL J. SIRI & DANIEL L. CORK, NAT'L RESEARCH COUNCIL, VITAL STATISTICS: SUMMARY OF A WORKSHOP 80–81 (2009).

¹⁸ The language of the Preamble is replete with references to the general populace:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. CONST. pmb. For example, "*We the people*," "*a more perfect Union*," and "*promote the general welfare*" are all references to the population at large. President Lincoln's famous Gettysburg Address likewise recognized the collective: "[G]overnment of the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (emphasis added). For a more recent example of general welfare-oriented policies, see Thomas L. Friedman, *Where American Politics Can Still Work: From the Bottom Up*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/opinion/community-revitalization-lancaster.html> [<https://perma.cc/G3LQ-9G6F>] (discussing communities that check their personal political views at the door and work together for the common good). Friedman quotes Randy Patterson, Lancaster Director of Economic Development and Neighborhood Revitalization:

"There were no community-oriented goals, . . . [s]o the board moved to a collective-impact model—four bold goals over 10 years—aimed at reducing poverty by 50 percent; making sure that every child is kindergarten-ready in terms of basic learning skills; ensuring that every adult has access to postsecondary education and credentials; and ensuring that every citizen has access to some kind of health care."

Id.

¹⁹ See *infra* text accompanying notes 79–113.

²⁰ The recent tax reform, for example, will reportedly benefit the top one percent of the economic ladder far more than those who most need it. Dylan Matthews, *The Republican Tax Bill Got Worse: Now the Top 1% Gets 83% of the Gains*, VOX (Dec. 18, 2017, 4:01 PM), <https://www.vox.com/policy-and-politics/2017/12/18/16791174/republican-tax-bill-congress-conference-tax-policy-center> [<https://perma.cc/GV86-H45F>]. Criminalizing and incarcerating non-violent, low-level drug offenders is another example of these types of policies. See Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment* 3 (Global Comm. on Drug Policies, Working Paper, Jan. 24–25, 2011). Some states and countries, however, have finally begun to view drug use and addiction as a public health problem rather than a criminal problem. See, e.g., Naina Bajekal, *Want to Win*

interdependence, but instead reflects free market theories and profit maximization regardless of the harm they may impose on substantial segments of society. The government is reluctant to interfere with private commercial agreements even if those agreements harm others.²¹ While we pride ourselves on our individualism and individual rights, extreme individualism without regard for the greater community can be devastating if it prevents a collective response to a collective problem such as a contagious disease or a diseased economy. Just as we are interdependent in matters of public health, we are interdependent financially. Yet the law often fails to reflect this. In order to improve, a new paradigm—a “progressive capitalism” that includes the general welfare in the financial context—must be implemented.²²

While the one percent thrives under the status quo, they often seem unconcerned with those left behind. Arguably this is because the privileged few fail to recognize a common cause with the struggling masses, and they further fail to see their well-being as interdependent with the well-being of the 99 percent. For example, corporate law and policy focus on maximizing profitability and shareholder value. While this is important, it arguably minimizes the importance of other members of the corporate community such as workers and customers. Yet all constituencies of the corporate community are interdependent. History has shown that as a society and as an economy, we do best when our laws and policies work toward everyone’s benefit.²³ An inclusive focus on the entire “beloved community”²⁴ protects it at both the macro and micro levels.

the War on Drugs? Portugal Might Have the Answer, TIME (Aug. 1, 2018), <https://time.com/longform/portugal-drug-use-decriminalization/> [https://perma.cc/78GE-V9G4] (discussing the positive effects of Portugal’s decriminalization of drugs); *States Rethinking Drug Policy*, EQUAL JUST. INITIATIVE (Sept. 24, 2012), <https://eji.org/news/states-rethinking-drug-policy/> [https://perma.cc/T7L5-UMNM].

²¹ See Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR (Mar. 31, 2011), <https://www.vanityfair.com/news/2011/05/top-one-percent-201105> [https://perma.cc/59B9-8SJ6]. Reluctance to interfere with the freedom to contract unless, for example, it is unconscionable, entered into under duress, or other extreme circumstances is an example of this. Simple unfairness is not enough. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (noting that the presence of unconscionability at time of the creation of a contract rendered the contract unenforceable); U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2002); see also *infra* text accompanying note 116. In another example of favoring money over health, the United States tried to obstruct an effort to encourage breast feeding in order to aid companies that make competing products. Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html> [https://perma.cc/F683-TRNP].

²² See Joseph E. Stiglitz, *Progressive Capitalism is Not an Oxymoron*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/opinion/sunday/progressive-capitalism.html?smid=nytcore-ios-share> [https://perma.cc/H4V3-GWJR].

²³ See *infra* notes 146 and accompanying text.

²⁴ The term “beloved community” was first coined by Josiah Royce, founder of the Fellowship of Reconciliation, and Reverend Dr. Martin Luther King, Jr. subsequently embraced the term. *The King Philosophy*, KING CTR., <http://www.thekingcenter.org/king-philosophy> [https://perma.cc/XVB9-7KZE]. The King Center explains:

Dr. King’s Beloved Community is a global vision, in which all people can share in the wealth of the earth. In the Beloved Community, poverty, hunger and homelessness will not be tolerated because international standards of human decency will not allow it. Racism and all forms of discrimination, bigotry and prejudice will be replaced by an all-inclusive spirit of sisterhood and brotherhood. In the Beloved Community, international disputes will be resolved by peaceful conflict-resolution and reconciliation of adversaries, instead of military power. Love

This Article examines how we can overlay the principle of serving the common good, which undergirds public health law, onto financial well-being. It suggests that we apply public health law principles to corporate law and culture. In matters of public health, we view quite broadly states' police power to protect the public good. Government is also empowered to protect the general welfare in matters of financial well-being. Using the "general welfare" as a guidepost, this Article challenges the conventional wisdom that corporations exist solely to maximize profit and shareholder value to the exclusion of virtually everything else.²⁵ It proposes two areas of change for improving our collective financial well-being. First, it suggests new rules for corporate board composition and accountability, specifically, proposing the elimination of the business judgment rule for executive compensation decisions. Second, it proposes that employees of large corporations elect 40% of the board members. Finally, this Article also highlights the link between financial well-being and democracy and urges that voting rights and campaign finance laws be strengthened. Part I of this Article explores the community-focused mission of public health law. Part II examines the more individualistic nature of corporate law and culture. Part III suggests policy changes that would apply community-focused public health law concepts to the economy, making for a more equitable society.

I. PUBLIC HEALTH LAW: "WE'RE IN THE SAME BOAT NOW"²⁶

Public health law can be a model for evaluating other areas of the law. Public health law, like public health professionals,²⁷ has as its fundamental purpose the protection of population health.²⁸ In contrast to individual health care practitioners who work one-on-one with each patient, public health experts are focused on the

and trust will triumph over fear and hatred. Peace with justice will prevail over war and military conflict.

Dr. King's Beloved Community was not devoid of interpersonal, group or international conflict. Instead he recognized that conflict was an inevitable part of human experience. But he believed that conflicts could be resolved peacefully and adversaries could be reconciled through a mutual, determined commitment to nonviolence. No conflict, he believed, need erupt in violence. And all conflicts in The Beloved Community should end with reconciliation of adversaries cooperating together in a spirit of friendship and goodwill.

Id. Consider also the Biblical commandment to "Love thy neighbor as thyself" and the story of the Good Samaritan, which encourage each individual to treat others with compassion. See Norman H. Young, *The Commandment to Love Your Neighbor as Yourself and the Parable of the Good Samaritan (Luke 10:25–37)*, 21 ANDREWS U. SEMINARY STUD. 265, 267–68 (1983).

²⁵ See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 16–23 (2012).

²⁶ Although its precise origins are unknown, this quote is attributed to Dr. Martin Luther King, Jr. Maya Oppenheim, *Martin Luther King Day 2018: Nine Quotes from the Civil Rights Leader That Still Resonate Today*, INDEPENDENT (Jan. 15, 2018), <https://www.independent.co.uk/news/world/americas/martin-luther-king-day-2018-civil-rights-quotes-race-relations-equality-birmingham-selma-birthday-a8159771.html> [https://perma.cc/ET4B-LEHT].

²⁷ Public health professionals include epidemiologists, statisticians, and others. *A Guide to Public Health Careers: Industries and Sectors that Attract Public Health Professionals*, PUB. HEALTH ONLINE, <https://www.publichealthonline.org/careers/> [https://perma.cc/W945-ULNE].

²⁸ See Lawrence O. Gostin, *Public Health Law in a New Century*, 283 J. AM. MED. ASS'N 2837, 2837–39 (2000).

collective rather than the individual.²⁹ Supporting that focus, public health *law* emphasizes the health of the community. It explores the responsibilities of, as well as the limitations on, governmental power to protect the public's health³⁰ and provides the foundation for a public health infrastructure to protect community health.³¹ A functional public health infrastructure requires a wide breadth of dedicated governmental agencies, from the Centers for Disease Control (CDC) to the National Institutes of Health (NIH), to the World Health Organization (WHO), to state and local departments of health, among others.³² In essence, public health infrastructure is the result of laws and advocacy that recognize the need to protect the common good.

Matters of health generally come within the purview of state police power. In the seminal public health law case, *Jacobson v. Massachusetts*, the United States Supreme Court upheld a Cambridge, Massachusetts ordinance, promulgated under authority of state law, that imposed a mandatory smallpox vaccination on its inhabitants.³³ Noting that the City of Cambridge had found that smallpox posed a significant threat to the community, the Court upheld the ordinance.³⁴ It understood that there are times when individual rights must give way to the greater good, and it explicitly recognized the breadth of the state's police power to protect public health, safety, and welfare:

Although this court has refrained from any attempt to define the limits of [state police] power, yet it has distinctly recognized the authority of a State to enact . . . “health laws of every description[.]” According to settled principles the police power of a State must be held to embrace, at least,

²⁹ While there is no bright line between public health law and other health laws like the Affordable Care Act, public health initiatives have been credited with the bulk of the increase in life expectancy during the 20th century. *Ten Great Public Health Achievements—United States, 1900–1999*, 48 CDC MORBIDITY & MORTALITY WKLY. REP. 241, 241 (1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm> [<https://perma.cc/C52G-E3ET>] (noting that 25 of the more than 30-year increase in life expectancy were due to public health advances).

³⁰ GOSTIN, *supra* note 5, at 33; cf. Micah L. Berman, *Defining the Field of Public Health Law*, 15 DEPAUL J. HEALTH CARE L. 45, 47 (2013) (“[P]ublic health concerns are often absent from legal debates, and even when they are raised, they are often discarded as improper ‘policy’ (as opposed to legal) considerations.”).

³¹ Although they are not truly separate, individualized medicine generally refers to individual diagnoses and recommended treatments between individual patients and their physicians. See Onyebuchi A. Arah, *On the Relationship Between Individual and Population Health*, 12 MED. HEALTH CARE & PHIL. 235, 235–36 (2009). Arah notes:

The relationship between individual and population health is partially built on the broad dichotomization of medicine into clinical medicine and public health. Potential drawbacks of current views include seeing both individual and population health as absolute and independent concepts. . . . [T]he relationship between individual and population health[, however,] is largely relative and dynamic.

Id. at 235.

³² *Global Health—Our Partnerships*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/globalhealth/partnerships.htm> [<https://perma.cc/HH37-WHCE>]. For examples of failures in the public health infrastructure, see *infra* notes 79–113 and accompanying text.

³³ *Jacobson v. Massachusetts*, 197 U.S. 11, 26–28, 38–39 (1905) (upholding a law stating that refusal to comply with vaccination requirement would result in a five-dollar fine).

³⁴ See *id.* at 27–28.

such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the State may invest local bodies . . . with authority . . . to safeguard the public health and . . . safety.³⁵

The Court concluded that the mandated vaccination fell under the state's police power umbrella and was thus an appropriate governmental mandate.³⁶ Individual liberty under the Fourteenth Amendment was subordinate to the common good.³⁷

States and municipalities retain extensive police power to protect the public health, safety, and welfare. Every state and many municipalities have Departments of Health and/or Departments of Public Health.³⁸ They determine, for example, legal smoking and drinking ages, although the federal government also weighs in by withholding funding if states reduce the legal age below federally recommended guidelines.³⁹ Various levels of government impose taxes on products, like cigarettes, that they deem unhealthy, in an effort to deter their use.⁴⁰

Like the Cambridge ordinance in *Jacobson*, states often delegate some police powers to municipalities. This is due, in part, to the fact that municipal officials are closer to their communities and are better positioned to recognize public health

³⁵ *Id.* at 25 (citations omitted).

³⁶ *Id.* at 24–25.

³⁷ *Id.* at 29–30. Public health laws generally impose some limitation on individual freedom. *Id.* at 29. Required school vaccination programs, for example, limit a child's freedom to attend school without the required vaccine. *Required Vaccines for Child Care and School*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/parents/records/schools.html> [https://perma.cc/HWK8-JAXE]. State laws may provide for religious and/or personal exemptions from vaccination requirements. *State Law & Vaccine Requirements*, NAT'L VACCINE INFO. CTR., <https://www.nvic.org/vaccine-laws/state-vaccine-requirements.aspx> [https://perma.cc/4WGT-DRB8]. Food safety regulations, like those that limit access to raw dairy products, limit food choices. *Compare* N.Y. COMP. CODES R. & REGS. tit. 1, § 2.3 (2019) (restricting the sale of raw milk unless seller has obtained a permit), *with* ARIZ. REV. STAT. ANN. § 3-606 (2019) (permitting the sale of raw milk in retail stores). Other public health tools, like quarantine, while rarely used, restrict freedom much more severely. *See Victory: Detained Nurse's Ebola Suit Secures Due Process*, ACLU N.J. (July 27, 2017), <https://www.aclu-nj.org/news/2017/07/27/victory-detained-nurses-ebola-suit-secures-due-process> [https://perma.cc/5JUV-AAW2]. For example, in 2014, former New Jersey Governor Chris Christie quarantined Kaci Hickox upon her return to the United States after working in Ebola-plagued communities abroad. *Id.* She was confined for three days and prevented from travelling to her home in Maine. *Id.* Because public health law often encompasses some level of restriction, the initiatives may be challenged, as in Hickox's case. *See id.*; *see also Jacobson*, 197 U.S. at 25–26 (noting that Jacobson challenged the smallpox vaccination mandate). Many parents also resisted giving their children the HPV vaccine, which can reportedly prevent cervical cancer. Mark Donald White, *Pros, Cons, and Ethics of HPV Vaccine in Teens—Why Such Controversy?*, 3 TRANSLATIONAL ANDROLOGY & UROLOGY 429, 432 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4708146/> [https://perma.cc/MW6F-6WVU].

³⁸ *State Departments of Public Health*, U.S. DEP'T AGRIC. FOOD SAFETY & INSPECTION SERV., https://www.fsis.usda.gov/wps/wcm/connect/fsis-content/internet/main/topics/recalls-and-public-health-alerts/additional-recall-links/state-departments-of-public-health/ct_index [https://perma.cc/Q59F-GUFD] (containing a USDA list of state departments of public health for use in case of a recall or other public health alert).

³⁹ The federal government, through its spending and taxing power, persuades states to adopt certain public health measures. *See South Dakota v. Dole*, 483 U.S. 203, 205–06 (1987), for an example of how a state forfeits a portion of federal highway funds if it reduces its drinking age below twenty-one.

⁴⁰ *See, e.g.*, N.J. STAT. ANN. § 54:40A-8 (West 2009); 41 C.F.R. § 102-74.315 (2008); N.Y. COMP. CODES R. & REGS. tit. 9 § 386.1 (2018).

emergencies at the outset.⁴¹ In addition to addressing outbreaks of contagious diseases, localities engage in a wide range of initiatives designed to improve public health. For example, they keep vital statistics, something that may seem mundane; but, by keeping track of births and deaths, municipalities also track causes of death and other information that can be key to protecting the community.⁴² Localities may also do things like increase the number of sidewalks and use zoning laws to facilitate exercise and recreation.⁴³ Former New York City Mayor Michael Bloomberg undertook a number of public health initiatives, including the failed effort to limit the size of some sugary beverages.⁴⁴

With globalization and world travel, the federal government and global organizations have also taken leading roles to protect public health.⁴⁵ Because diseases are oblivious to local, national, and international borders, they can and do travel with people crossing those borders. At no time has this been more readily apparent than with Covid-19.⁴⁶ At the federal level, the Department of Health and Human Services generally, and the Centers for Disease Control and Prevention (CDC) more specifically, play an active role in protecting the public health.⁴⁷ In addition, global organizations, both private and public play a pivotal public health role. The World Health Organization, Doctors Without Borders, Partners in Health, and others dedicate themselves to serving public health.⁴⁸

⁴¹ See *Jacobson*, 197 U.S. at 27 (noting that it was City of Cambridge officials who required the vaccinations). Having local governments make certain public health decisions also may take political pressure off elected state officials.

⁴² See MODEL STATE VITAL STATISTICS ACT §§ 5, 7, 13 (U.S. DEP'T OF HEALTH & HUMAN SERVS. 1992), <https://www.cdc.gov/nchs/data/misc/mvsact92b.pdf> [<https://perma.cc/SETX-M3YT>].

⁴³ *Land Use/Zoning*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/healthy-eating/land-usezoning> [<https://perma.cc/73ZR-4QNJ>].

⁴⁴ *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 541 (N.Y. 2014) (noting that the mayor's office lacked authority to impose the size restriction and that it was a decision that should have been made by the New York City Council); *id.* at 550 (Read, J., dissenting).

⁴⁵ The Obama Administration, for example, established the White House National Security Council Directorate for Global Health and Security and Bio-defense, in an effort to prepare for future pandemics. See Deb Riechmann, *Trump Disbanded NSC Pandemic Unit that Experts had Praised*, AP NEWS (Mar. 14, 2020), <https://apnews.com/ce014d94b64e98b7203b873e56f80e9a> [<https://perma.cc/7E5U-C77J>]. The office was disbanded under the Trump administration. *Id.* But see Glenn Kessler & Meg Kelly, *Was the White House Office for Global Pandemics Eliminated?*, WASH. POST (Mar. 20, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/03/20/was-white-house-office-global-pandemics-eliminated/> [<https://perma.cc/76TK-BY7T>] (discussing whether the office was eliminated or absorbed into other offices as part of a reorganization).

⁴⁶ See *supra* notes 12–13 and accompanying text.

⁴⁷ *About CDC 24-7: Mission, Role and Pledge*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/organization/mission.htm> [<https://perma.cc/XG5K-2SRN>] (“CDC works 24/7 to protect America from health, safety and security threats, both foreign and in the U.S.”).

⁴⁸ *Our Values*, WORLD HEALTH ORG., <https://www.who.int/about/who-we-are/our-values> [<https://perma.cc/RYP8-NXCY>]; *Independent, Impartial, Neutral*, DOCTORS WITHOUT BORDERS, <https://www.doctorswithoutborders.org/who-we-are/principles/independence> [<https://perma.cc/MLK8-FPZ7>]; *Our Mission at PIH*, PARTNERS IN HEALTH, <https://www.pih.org/pages/our-mission> [<https://perma.cc/SK9G-B5V5>].

There is a plethora of examples of public health infrastructure at work. That infrastructure includes sanitation,⁴⁹ plumbing,⁵⁰ clean water,⁵¹ safe housing requirements,⁵² food safety,⁵³ the keeping of vital statistics,⁵⁴ environmental protections,⁵⁵ disease reporting,⁵⁶ and contact tracing.⁵⁷ It also includes age restrictions on smoking and drinking, as well as taxing and spending rules that incentivize healthy behaviors while discouraging unhealthy ones.⁵⁸ Public health laws also govern controversial measures like isolation and quarantine.⁵⁹

Jacobson demonstrates why this is the case. The Court in *Jacobson* noted the importance of protecting the community from a smallpox outbreak, the breadth of the state police power to accomplish that goal, and the necessity of subordinating individual liberty to the public good.⁶⁰ The Court refused to permit one person's objection to a vaccine to endanger the larger community.⁶¹ *Jacobson* does not stand alone. In *Prince v. Massachusetts*, for example, the Supreme Court reaffirmed the importance of protecting the community.⁶² The risk of exposing the community to health hazards functions as a major counterweight to the liberty interests of an individual who does not want to abide by a vaccination requirement.⁶³ Although *Prince* involved a violation of child labor laws, the Court held that a mother could be prosecuted for violating those laws, notwithstanding her religious freedom claim.⁶⁴ Again, protecting children outweighed the mother's individual claim of

⁴⁹ INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 22 (2003); Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 273 (2005).

⁵⁰ Mariner, *supra* note 49, at 258.

⁵¹ INST. OF MED., *supra* note 49, at 22; Mariner, *supra* note 49, at 273.

⁵² Mariner, *supra* note 49, at 273.

⁵³ See generally Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, 331–350/1 (2018) (identifying the purpose of the entire act as protecting the safety of food for public use).

⁵⁴ MODEL STATE VITAL STATISTICS ACT § 5 (U.S. DEP'T OF HEALTH & HUMAN SERVS. 1992), <https://www.cdc.gov/nchs/data/misc/mvsact92b.pdf> [<https://perma.cc/3BY8-JVT4>].

⁵⁵ See generally Clean Water Act, 33 U.S.C. § 1251(a) (2018) (identifying the objective of the act to improve water quality by eliminating pollutants in navigable waters); Clean Air Act, 42 U.S.C. § 7401(b) (2018) (detailing the purpose of the act to protect and improve air quality by eliminating pollutants).

⁵⁶ *Nationally Notifiable Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/statistics/surveillance/notifiable.html> [<https://perma.cc/C2JW-LXMY>].

⁵⁷ Nancy E. Kass & Andrea Carlson Gielen, *The Ethics of Contact Tracing Programs and Their Implications for Women*, 5 DUKE J. GENDER L. & POL'Y 89, 90 (1998).

⁵⁸ Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 IND. HEALTH L. REV. 1, 19–20 (2007).

⁵⁹ See, e.g., 42 U.S.C. § 264(a) (2018). Quarantine and isolation involve such an infringement on liberty that there is widespread agreement that they should be used only as a last resort. See ACLU N.J., *supra* note 37. Moreover, the United States has a history of discriminatory application of quarantine rules. E.g., *Jew Ho v. Williamson*, 103 F. 10, 26 (C.C.N.D. Cal. 1900) (invalidating a quarantine of a twelve-block area of San Francisco for failure to segregate infected from uninfected people thereby increasing the risk of spreading the disease); *Wong Wai v. Williamson*, 103 F. 1, 2–3, 9–10 (C.C.N.D. Cal. 1900) (invalidating a San Francisco ordinance requiring Chinese residents to be inoculated for the bubonic plague prior to leaving the city as violative of the Equal Protection clause when there was no evidence that Chinese residents were more susceptible to the plague than others).

⁶⁰ *Jacobsen v. Massachusetts*, 197 U.S. 11, 24–29 (1905).

⁶¹ *Id.* at 23, 26–27.

⁶² See *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

⁶³ See *id.*

⁶⁴ See *id.* at 166–68; see also *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (holding that mandatory vaccinations for school admission do not violate the Free Exercise Clause); *Brown v.*

religious freedom.⁶⁵ Other courts have come to similar conclusions. For example, bans on ferrets,⁶⁶ motorcycle helmet requirements,⁶⁷ restrictions on dangerous religious practices,⁶⁸ and seat belt laws,⁶⁹ among others, have been upheld.⁷⁰ In these cases, individuals claimed a liberty right to engage in the challenged conduct, but the courts concluded that the public's well-being was paramount to individual claims.⁷¹ When we fail to protect one another, public health law recognizes that we fail to protect ourselves.

In addition to case law, a vast range of legislation designed to promote public health has been enacted. For example, the Affordable Care Act, while falling short of universal health coverage, was enacted to vastly expand access to health care, especially among the poor, through the expansion of Medicaid. It also provided access to the individual market for those who were not otherwise insured and prohibited health insurers from excluding or charging higher premiums for people with pre-existing conditions, for whom private insurance may have been

Smith, 235 Cal. Rptr. 3d 218, 224–25 (Cal. Ct. App. 2018) (upholding law that does not provide for religious exemption from required vaccinations); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding that a religious exemption would violate Equal Protection rights of children who do not have access to that exemption and would expose them to health risks of attending school with children who have not been vaccinated).

⁶⁵ *Prince*, 321 U.S. at 166–67. A variety of more recent cases have arguably expanded religious freedom. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1723–24 (2018) (finding that the Commission showed anti-religious bias when it determined that the baker unlawfully discriminated against a gay couple by refusing to make their wedding cake); *Wheaton College v. Burwell*, 573 U.S. 958 (2014) (holding that Wheaton College was not required to complete a government form to claim a religious exemption from contraception coverage); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91, 736 (2014) (establishing that closely held for-profit corporations successfully argued that mandated contraceptive coverage under the Affordable Care Act violated their religious beliefs under the Religious Freedom and Restoration Act).

⁶⁶ *New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 540 (S.D.N.Y. 1995).

⁶⁷ *ABATE of Georgia, Inc. v. Georgia*, 137 F. Supp. 2d 1349, 1355 (N.D. Ga. 2001).

⁶⁸ *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975).

⁶⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–27 (2001).

⁷⁰ There are opponents to the idea of having strong public health laws at the federal level:

America at the end of the twentieth century was reeling under the weight of its newfound libertarianism: the collective be damned, all public health burdens and responsibilities fell to the individual. It was an odd paradigm and an about-face from the attitudes and sense of duty that had formed the foundation of American public health at the dawn of the twentieth century.
...

The nineteenth-century and early-twentieth-century creators of America's public health systems would have found this emphasis on individualism amid such grand prosperity shocking. For them, the health of a community was the key measure of its success "Everything which is detrimental to health or dangerous to life, under the freest interpretation, is regarded as coming within the province of the Health Department. So broad is the construction of the law that everything which improperly or unnecessarily interferes with the comfort or enjoyment of life . . . may become the subject of action on the part of the Board of Health."

Laurie Garrett, *BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH* 269–70 (2000) (quoting Mark Caldwell, *THE LAST CRUSADE: THE WAR ON CONSUMPTION 1862–1954* (1988)).

⁷¹ See cases cited *supra* notes 66–69.

prohibitively expensive if it was available at all.⁷² The Emergency Medical Treatment and Labor Act (EMTALA) also provides a limited safety net. It allows any person to walk into an emergency room and be screened to determine whether he or she has an emergency medical condition.⁷³ If there is an emergency medical condition, the patient must be stabilized before being discharged.⁷⁴ Although its scope is limited, and emergency care is extremely expensive compared to preventive care, it is a link in the chain of public health safety measures. Medicare and Medicaid provide more broad-based safety nets to specific populations.⁷⁵ Environmental legislation like the Clean Water Act and Clean Air Act are also designed to protect public health in the face of threats to the planet.⁷⁶ Food safety is also an integral part of public health measures, as recognized by the Federal Food, Drug, and Cosmetic Act.⁷⁷

When public health works well, it is often invisible. For example, we take for granted that the water from our faucets is suitable for drinking. Only when that clean water infrastructure fails, as it did most famously in Flint, Michigan,⁷⁸ is the failure of the public health infrastructure apparent.⁷⁹ Similarly, we take for granted that certain diseases for which we have readily available immunizations are no longer public health threats. Yet measles outbreaks in New York and Oregon in 2018 and

⁷² Patient Protection and Affordable Care Act of 2010, 42 U.S.C. §§ 18001, 18003 (2018); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (declaring Medicaid expansion optional); *infra* notes 103–109 and accompanying text for additional discussion of the ACA.

⁷³ Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd (2018). The patient can be transferred rather than stabilized under limited, clearly delineated circumstances. *Id.* § 1395dd(c)(2).

⁷⁴ *Id.* § 1395dd(b).

⁷⁵ Medicare is a social insurance program primarily for those at or over the age of sixty-five who are eligible for Social Security and for the disabled. *Who is Eligible for Medicare?*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html> [<https://perma.cc/YN8K-CCHL>]. In general, Medicaid provides health coverage for the poor. *Medicaid & CHIP Coverage*, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip/getting-medicaid-chip/> [<https://perma.cc/P5BT-9JVC>]. As a federal/state partnership, Medicaid programs vary from state to state. *State Overviews*, MEDICAID.GOV, <https://www.medicaid.gov/state-overviews> [<https://perma.cc/9RGM-TAHK>]. Since the passage of the ACA, there are great disparities between states that expanded their Medicaid programs and those that did not. *Who Could Get Covered under Medicaid Expansion? State Fact Sheets*, KAISER FAM. FOUND. (Jan. 23, 2020), <https://www.kff.org/medicaid/fact-sheet/uninsured-adults-in-states-that-did-not-expand-who-would-become-eligible-for-medicaid-under-expansion/> [<https://perma.cc/T5W6-KLVX>].

⁷⁶ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251(a) (2018) (identifying that the objective of the act is to eliminate pollutants to improve water quality); Clean Air Act, 42 U.S.C. § 7401(b) (2018) (explaining that the purpose of the act is to remove pollutants to improve air quality).

⁷⁷ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, 331–350i-1 (providing detailed prohibitions and explanations of efforts to maintain the safety of foods).

⁷⁸ Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT. RESOURCES DEF. COUNCIL (Nov. 8, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [<https://perma.cc/2JH3-33NF>].

⁷⁹ Other water failures have occurred. *E.g.*, Karen DeWitt, *Hoosick Falls Study Finds More Illnesses Linked to PFOA Exposure*, WAMC NE. PUB. RADIO (Aug. 21, 2018), <https://www.wamc.org/post/hoosick-falls-study-finds-more-illnesses-linked-pfoa-exposure> [<https://perma.cc/4B2A-UN4D>] (discussing the lasting effects of water contamination by a harmful chemical in a New York town); Lori Higgins, *33 More Schools Have High Lead, Copper in Drinking Water*, DET. FREE PRESS (Sept. 19, 2018, 5:49 PM), <https://www.freep.com/story/news/education/2018/09/19/detroit-schools-water-lead/1359606002/> [<https://perma.cc/9BSM-L5D6>] (noting that many schools in the Detroit public school system were affected by elevated levels of lead or copper in their water).

2019, respectively, demonstrate the ongoing need to monitor and contain contagious diseases.⁸⁰

There have been many other public health shortcomings. The failure to contain the Ebola outbreak in 2014, for instance, was an example of infrastructure weakness—this time in the global public health infrastructure.⁸¹ The virus primarily impacted the West African countries of Sierra Leone, Guinea, and Liberia, but also touched other countries, including the United States.⁸² With sufficient resources and commitment, the Ebola virus could have been contained months before it began to spiral out of control. The failure of developed nations to provide sufficient attention to the problem no doubt was caused by a variety of factors.⁸³ Among them was apparent politicization of the WHO and its failure to declare the outbreak as a global emergency until August 2014, notwithstanding Ebola’s spread months earlier.⁸⁴ This led noted New York Times columnist, Nicholas Kristof, to opine that the failure to contain the Ebola outbreak could be the “definitive humanitarian disaster of our generation.”⁸⁵ That was before the many failures to adequately address Covid-19.

As a new coronavirus made its way from China to other parts of the world, the United States failed to take necessary preparedness steps despite its inevitable arrival here. For example, no efforts were made to purchase or stockpile needed medical equipment or supplies.⁸⁶ Hospitals were left in dire need of such basic items as masks

⁸⁰ The recent outbreak in Rockland County, New York, for example, has been attributed to a significant number of children who had not been vaccinated. See Tom McParland, *Preliminary Injunction Halts Rockland Emergency Measles Order as Outbreak Fears Rise*, N.Y. L.J. (Apr. 11, 2019, 5:39 PM), <https://www.law.com/newyorklawjournal/2019/04/11/preliminary-injunction-halts-rockland-emergency-measles-order-as-outbreak-fears-rise/> [https://perma.cc/G2CM-ZV6G]. A Rockland County judge struck down the County Executive’s emergency declaration following a measles outbreak among more than 150 people. *Id.* Likewise, New York City declared an emergency and requiring that residents in certain parts of Brooklyn be vaccinated. Adeel Hassan & Richard A. Oppel, Jr., *New Measles Cases Reach Weekly High for 2019*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/measles-outbreak.html> [https://perma.cc/BY9Z-ED2C]. See also Gillian Flaccus, ASSOCIATED PRESS, *Officials Declare Measles Outbreak in Pacific Northwest Over*, U.S. NEWS & WORLD REP. (Apr. 29, 2019), <https://www.usnews.com/news/best-states/oregon/articles/2019-04-29/officials-declare-measles-outbreak-in-pacific-northwest-over> [https://perma.cc/6M3G-LXHJ] (detailing the measles outbreak in Oregon, as well as Washington, in 2019).

⁸¹ Kevin Sack et al., *How Ebola Roared Back*, N.Y. TIMES (Dec. 29, 2014), http://www.nytimes.com/2014/12/30/health/how-ebola-roared-back.html?_r=0 [https://perma.cc/AQ7S-6GQK]. Another Ebola outbreak in the Democratic Republic of Congo has killed more than 1,000 people since August 2018. Saleh Mwanamilongo & Krista Larson, *Ebola Outbreak Deaths Top 1,000 in Congo Amid Clinic Attacks*, AP NEWS (May 3, 2019), <https://www.apnews.com/49fcb435740b4c5b88bab2a1c873b763> [https://perma.cc/ZG2R-F7VY].

⁸² *2014–2016 Ebola Outbreak in West Africa*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html> [https://perma.cc/6LBC-QC9H].

⁸³ See Sack et al., *supra* note 81. In the end, more than 11,000 people died during the 2014 Ebola outbreak. *2014–2016 Ebola Outbreak in West Africa*, *supra* note 82.

⁸⁴ Somini Sengupta, *Effort on Ebola Hurt W.H.O. Chief*, N.Y. TIMES (Jan. 6, 2015), <https://www.nytimes.com/2015/01/07/world/leader-of-world-health-organization-defends-ebola-response.html> [https://perma.cc/VP99-2LCW].

⁸⁵ Nicholas Kristof, *How to Defeat Ebola*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/opinion/nicholas-kristof-how-to-defeat-ebola.html?searchResultPosition=1> [https://perma.cc/JJV6-MCWW].

⁸⁶ Caroline Hopkins, *“We are Desperate”: Trump’s Inaction Has Created a Crisis with Protective Medical Gear*, VOX (Mar. 23, 2020, 10:12 AM), <https://www.vox.com/2020/3/22/21189896/coronavirus-in-us-masks-n95-respirator-doctors-nurses-shortage-ppe> [https://perma.cc/ZKM3-WV37]; cf. David Leonhardt, *A Complete List of*

and personal protective equipment.⁸⁷ A severe shortage of ventilators also exacerbated the outbreak.⁸⁸ Perhaps most importantly, the CDC chose not to use coronavirus tests that had been developed by the WHO and instead elected to centralize testing through the CDC.⁸⁹ And the original tests distributed by the CDC were defective, so that precious time was lost before testing began.⁹⁰ Both the decision to centralize testing and defects in the tests led to a testing shortage and delays in obtaining test results. Weeks after the public was assured that there would be sufficient tests for everyone, the shortage remained and even symptomatic patients could not necessarily access coronavirus tests.⁹¹ As a result, tracking the spread of the disease and having the ability to engage in contact tracing, isolating the sick, and quarantining those who were potentially exposed to the virus were public health tools that were not available as a practical matter. Instead, as Covid-19 rapidly spread, some states were effectively shut down, and the economy verged on collapse.⁹²

Both Ebola and Covid-19 highlight human interdependence—both domestically and globally. Neither was simply a disease impacting one isolated group of people far from the United States. Instead, both were and, in the case of Covid-19, still is

Trump's Attempts to Play Down Coronavirus, N.Y. TIMES (Mar. 15, 2020)= (outlining the politicization of coronavirus and the downplaying of its risks and failure to expand testing capacity, among other things).

⁸⁷ Hopkins, *supra* note 86.

⁸⁸ Weeks after the outbreak began in the United States, several governors continued to plead with the federal government to order surge production of needed medical equipment under the Defense Production Act; the federal government refused to comply. Ayesha Rascoe, *Trump Resists Using Wartime Law to Get, Distribute Coronavirus Supplies*, NPR (Mar. 25, 2020, 5:03 AM), <https://www.npr.org/2020/03/25/821285204/trump-sends-mixed-messages-about-invoking-defense-production-act> [<https://perma.cc/6LCE-7TTR>]. Despite declaring a National Emergency, Anita Kumar, *Trump Declares National Emergency in Latest Bid to Combat Coronavirus*, POLITICO (Mar. 13, 2020, 6:59 PM), <https://www.politico.com/news/2020/03/13/coronavirus-emergency-declaration-trump-128530> [<https://perma.cc/TJY4-4QDS>], the President continued to ignore calls to compel production under the DPA, relying instead on private industry to resolve the problem, an approach that has been widely criticized. Rascoe, *supra*. Finally, on March 27th, 2020, following widespread criticism, the Trump administration ordered General Motors to manufacture ventilators. David E. Sanger et al., *Under Intense Criticism, Trump Says Government Will Buy More Ventilators*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/politics/coronavirus-trump-ventilators-gm-ventec.html> [<https://perma.cc/6MUN-7GW2>]. By this time, the number of confirmed cases in the United States had surpassed the total number in China and many hospitals were overwhelmed with equipment shortages. *U.S. Infections Top 100,000; L.A. Warns of Surge: Virus Update*, WASH. POST (Mar. 27, 2020, 7:11 PM) https://www.washingtonpost.com/business/on-small-business/us-infections-top-100000-la-warns-of-surge-virus-update/2020/03/26/dec01188-6fc0-11ea-a156-0048b62cdb51_story.html [<https://perma.cc/5EZL-H8YS>].

⁸⁹ Joanne Kenen, *How Testing Failures Allowed Coronavirus to Sweep the U.S.*, POLITICO (Mar. 8, 2020, 4:30 PM), <https://www.politico.com/news/2020/03/06/coronavirus-testing-failure-123166> [<https://perma.cc/47F9-KXVU>].

⁹⁰ *Id.*

⁹¹ See Gamio et al. *supra* note 13.

⁹² Rosie Perper et al., *Nearly a Third of Americans are Now Under Orders to Stay Home—Here's a Running List of Coronavirus Lockdowns in US States and Cities*, BUS. INSIDER (Mar. 27, 2020, 2:02 AM), <https://www.businessinsider.com/states-cities-shutting-down-bars-restaurants-concerts-curfew-2020-3> [<https://perma.cc/JR74-GAVY>]. A \$2 trillion stimulus bill was signed into law, while 3.3 million unemployment claims, the most ever filed in one week, were reported. Erica Werner et al., *Trump Signs \$2 Trillion Coronavirus Bill into Law as Companies and Households Brace for More Economic Pain*, WASH. POST (Mar. 27, 2020, 8:44 PM), <https://www.washingtonpost.com/us-policy/2020/03/27/congress-coronavirus-house-vote/> [<https://perma.cc/93P9-4XT7>].

our problem as well. Infectious diseases respect neither geographic nor political boundaries.

Other public health shortcomings include over-prescribing antibiotics, which in turn creates health risks like antibiotic resistant strains of tuberculosis and the risk of a superbug that will be stronger than our strongest antibiotics.⁹³ In addition, we arguably have not dedicated sufficient resources to the opioid/heroin drug addiction crisis plaguing the country.⁹⁴ E-cigarettes are being sold freely despite containing chemicals that have not been sufficiently tested and that pose a risk to human health.⁹⁵ We still fail to treat guns in America as a public health problem. As a result, gun control measures have generally been defeated at every turn, even those that have enjoyed widespread popularity.⁹⁶ Food insecurity and inequity continue to adversely impact poor communities and communities of color.⁹⁷ In addition, health care disparities based on race continue.⁹⁸ Social determinants of health, including race and class, seem ever-present.⁹⁹ For example, where you live (pollution), stresses of poverty, and access to healthy foods, among other things, impact our health.¹⁰⁰ When looking at social determinants of health, it has been said that “wealth equals

⁹³ GARRETT, *supra* note 70, at 467.

⁹⁴ Fortunately, the opioid crisis is now understood to be a public health problem rather than behavior that should be addressed as a criminal matter. *What is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/Q6XG-AVG2>]; *see also* Travelers Prop. Cas. Co. of Am. v. Actavis, Inc., 225 Cal. Rptr. 3d 5, 9–10 (Cal. Ct. App. 2017) (holding that insurance companies did not have a duty to defend pharmaceutical companies that were being accused of fueling the heroin epidemic); Taled El-Sabawi, *What Motivates Legislators to Act: Problem Definition & the Opioid Epidemic, A Case Study*, 15 IND. HEALTH L. REV. 189, 190–92 (2018); Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html> [<https://perma.cc/5G5T-MV9C>].

⁹⁵ Katie Thomas & Sheila Kaplan, *E-Cigarettes Went Unchecked in 10 Years of Federal Inaction*, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/10/14/health/vaping-e-cigarettes-fda.html?searchResultPosition=4> [<https://perma.cc/6827-RRQV>].

⁹⁶ One example is universal background checks legislation. Annie Karni & Maggie Haberman, *After Lobbying by Gun Rights Advocates, Trump Sounds a Familiar Retreat*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/us/politics/trump-gun-laws.html?searchResultPosition=7> [<https://perma.cc/67RH-LZLM>].

⁹⁷ Andrea Freeman, *Unconstitutional Food Inequality*, 55 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. (forthcoming 2020) (discussing food inequality as a “badge or vestige” of slavery); *cf.* Atwell, *supra* note 58, at 20 (discussing Congress’ ability to use its taxing and spending power to subsidize healthy foods, while taxing unhealthy ones).

⁹⁸ Charity Scott, *Incorporating Lawyers on the Interprofessional Team to Promote Health and Health Equity*, 14 IND. HEALTH L. REV. 54, 76 (2017); *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1443 (1991) (discussing the sterilization of black women in the 1970s); Stephen B. Thomas & Sandra Crouse Quinn, *The Tuskegee Syphilis Study, 1932 to 1972: Implications for HIV Education and AIDS Risk Education Programs in the Black Community*, 81 AM. J. PUB. HEALTH 1498, 1502–03 (1991) (discussing factors that led to barriers between African Americans and the health care community).

⁹⁹ The Department of Health and Human Services describes social determinants of health as “[c]onditions in the environments in which people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks.” *Social Determinants of Health*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> [<https://perma.cc/9MRG-YBR5>].

¹⁰⁰ *See* Atwell, *supra* note 58, at 4–5.

health.”¹⁰¹ Perhaps most importantly, the United States, unlike virtually every other developed country, does not provide universal health care coverage. While the Affordable Care Act expanded coverage and reduced the number of uninsured persons, there are still gaps in coverage. A seemingly intractable challenge is that health care has become one of the most politicized issues of our day.¹⁰² Thus, the attempt to expand health insurance coverage through the ACA is being undermined.¹⁰³ Although the Supreme Court upheld the individual mandate pursuant to Congress’s taxing power,¹⁰⁴ it held that the Medicaid expansion portion of the ACA was optional.¹⁰⁵ As a result, some states have chosen not to expand their Medicaid programs, leaving millions of poor people uninsured, despite the fact that the federal government was going to pay for almost all of the expansion costs.¹⁰⁶ And

¹⁰¹ ELIZABETH TOBIN-TYLER & JOEL B. TEITELBAUM, ESSENTIALS OF HEALTH JUSTICE—A PRIMER xii (2019); see also Elizabeth H. Bradley & Lauren Taylor, *To Fix Health, Help the Poor*, N.Y. TIMES (Dec. 8, 2011), http://www.nytimes.com/2011/12/09/opinion/to-fix-health-care-help-the-poor.html?_r=1&scp=1&sq=to%20fix%20health%20help%20the%20poor&st=cse [<https://perma.cc/9F7E-29JE>] (arguing that the United States needs to spend more on social programs as a way of improving health outcomes and arguably saving money).

¹⁰² During the first days of coronavirus detection in the United States, there were cruise ship passengers anchored near San Francisco, some of whom had been exposed to the virus. Philip Bump, *Which is Trump More Worried About: Coronavirus Numbers or Coronavirus Patients?*, WASH. POST (Mar. 7, 2020, 9:08 AM), <https://www.washingtonpost.com/politics/2020/03/07/which-is-trump-more-worried-about-coronavirus-numbers-or-coronavirus-patients/> [<https://perma.cc/64TK-987R>]. When asked about bringing the passengers to shore, Trump stated, “I would rather [not] because I like the numbers being where they are . . . I don’t need to have the numbers double because of one ship that wasn’t our fault.” *Id.* When Vice President Pence was given the lead role in handling the crisis, one of his first measures was to require all messaging go through his office. Michael D. Shear & Maggie Haberman, *Pence Will Control All Coronavirus Messaging from Health Officials*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html> [<https://perma.cc/6ZGN-EB5S>]. It was control over the messaging rather than transparent disclosure of factual information from public health experts that appeared to be of uppermost concern. See *id.*

¹⁰³ Congress voted more than 70 times to repeal the ACA. Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017, 6:53 PM), <https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832> [<https://perma.cc/B7KD-PMGW>]. Although a total repeal of the ACA was unsuccessful, it has been chipped away at since the 2016 election. *Id.*

¹⁰⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012).

¹⁰⁵ *Id.* at 584–85. Medicaid, a federal and state program designed to provide care to the poor, also falls short both in terms of who and what it covers. And a recent policy announcement to add a work requirement to Medicaid recipients is likely to exacerbate those shortcomings. Data suggests that most Medicaid recipients who are able to work already do so. Jared Bernstein & Hannah Katch, *Trump’s Medicaid Work Requirement Will Backfire*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/opinion/trumps-medicaid-backfire.html?searchResultPosition=2> [<https://perma.cc/8QKX-JFN6>].

¹⁰⁶ *Medicaid Coverage in Your State*, HEALTHINSURANCE.ORG, <https://www.healthinsurance.org/medicaid/> [<https://perma.cc/RSJ8-YKUK>]. In *National Federation of Independent Business v. Sebelius*, the United States Supreme Court held that the Medicaid expansion provisions of the ACA could not be mandated; states could voluntarily expand their Medicaid programs, but they could not be required to do so. *Sebelius*, 567 U.S. at 584–85. The Medicaid expansion provisions of the ACA were designed to encompass a group of individuals who were traditionally excluded from Medicaid—childless adults under the age of 65 with low incomes. *Id.* at 624. These individuals were traditionally not eligible for Medicaid no matter how poor they were. The ACA sought to correct this. In so doing, the federal government would pay 100% of the additional costs of the program through 2016. *CBO’s Analysis of the Major Health Care Legislation Enacted in March 2010: Testimony Before the H.*

the Tax Act of 2017 removed the individual mandate tax, undermining the mandate completely.¹⁰⁷ Therefore, individuals can remain uninsured without financial consequence. In addition, undocumented immigrants are not covered under the Affordable Care Act,¹⁰⁸ leaving another large population without timely access to health care. In perhaps the ultimate act of politicization, the Department of Justice is siding with a United States District Judge in Texas who declared the entire ACA unconstitutional, threatening the health care coverage of approximately 20 million people.¹⁰⁹

In addition to a failure to provide universal health coverage, we also do little to limit the cost of care.¹¹⁰ By contrast, virtually every other developed country limits

Subcomm. on Health Comm. on Energy & Commerce, 112th Cong. 23 (2011) (statement of Douglas W. Elmendorf, Director, Cong. Budget Office). The federal government agreed to pay 95% in 2017, 94% in 2018, 93% in 2019, and 90% in 2020 and beyond. *Id.* Thus, the federal government's contribution would never fall below 90 percent of the increased cost to the states. *Id.* The ACA, through the Medicaid expansion, would allow states to greatly expand insurance coverage for uninsured individuals while the federal government picked up almost the entire tab. Reasoning that this expansion was a change in Medicaid "in kind, not merely degree," the Court held that States should be free to decide for themselves whether to participate in the expansion. *Sebelius*, 567 U.S. at 583. In reality, there is no good reason why any state would reject Medicaid expansion given the federal government's subsidization of the cost.

Ideally, we should do away with separate programs targeted to different populations. We are all human beings who will need health care during our lives. A single system that covers everyone would save on administrative costs and be more equitable.

¹⁰⁷ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, Title I, §11081, 131 Stat. 2054.

¹⁰⁸ Samantha Artiga & Maria Diaz, *Health Coverage and Care of Undocumented Immigrants*, KAISER FAM. FOUND. (July 15, 2019), <https://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/> [<https://perma.cc/973X-6SK6>]. Undocumented immigrants, like all human beings, are subject to ill health. Denying them the right to purchase health insurance via the exchanges not only deprives insurance companies of a larger insurance pool, which could lead to lower premiums for everyone, but it will likely increase the cost of care for people who are undocumented. Federal law requires that hospitals triage everyone who enters a hospital emergency room (assuming the hospital participates in Medicare) and stabilize emergency conditions. Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2018). Those who are uninsured are likely to wait longer to seek medical care, often using the emergency room as a last resort. As a result, by the time they show up, their underlying condition may be much more advanced and difficult and expensive to treat. EMTALA only requires that the patient be stabilized—not that he or she be treated for the underlying condition. *Id.* § 1395dd(b)(1)(A). By failing to see our shared humanity and the very real threat that we all have of accident and illness, we not only harm undocumented immigrants, but we harm ourselves in the process.

¹⁰⁹ Nicholas Bagley, *Why Trump's New Push to Kill Obamacare is So Alarming*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/opinion/trump-obamacare-affordable-care-act.html> [<https://perma.cc/DT8Y-B4DP>] (discussing the United States Department of Justice's role to defend our laws); see also *Texas v. United States*, 340 F. Supp. 3d 579, 593 (N.D. Tex. 2018), *aff'd in part, vacated in part*, 945 F.3d 355 (2019), *cert. granted sub nom. Texas v. California*, 206 L. Ed. 2d 253 (U.S. 2020); Robert Pear, *Justice Dept. Says Crucial Provisions of Obamacare are Unconstitutional*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/politics/trump-affordable-care-act.html?searchResultPosition=1> [<https://perma.cc/TS2D-CV7S>]; Mark Joseph Stern, *William Barr's Justice Department Just Filed the Most Nakedly Political Brief in the Agency's History*, SLATE (May 2, 2019, 4:38 PM), <https://slate.com/news-and-politics/2019/05/william-barr-doj-obamacare-brief-partisan-hack.html> [<https://perma.cc/LP3Z-8PKL>]. The brief was filed on May 1, 2019 in the United States Court of Appeals for the Fifth Circuit. Brief for State Appellees, *Texas v. United States*, No. 19-10011 (5th Cir. May 1, 2019).

¹¹⁰ See Elisabeth Rosenthal, *After Surgery, Surprise \$117,000 Medical Bill From Doctor He Didn't Know*, N.Y. TIMES (Sept. 20, 2014), <https://www.nytimes.com/2014/09/21/us/drive-by-doctoring-surprise-medical-bills.html> [<https://perma.cc/YHB3-RCTE>], for a discussion of how a patient received a

the cost of health care by controlling the prices that hospitals and health care providers can charge.¹¹¹ While Medicare and Medicaid impose some price restrictions, our health care system is largely run as a free market enterprise, as illustrated by the high cost of prescription drugs.¹¹²

Environmental protections are also being scaled back.¹¹³ The EPA, founded to protect us from the health risks associated with water and air pollution as well as the detrimental impact of climate change, is currently led by an administration that does not believe in its mission or in climate change. As a result, auto emissions standards are being relaxed and new oil drilling in the Atlantic is being encouraged, among other things.¹¹⁴ This may be the biggest public health failure currently confronting us.

In addition to shortcomings in public health law, courts also fail to protect the community when they perceive a public health claim as unduly interfering with business decision-making. When that happens, free market philosophy generally prevails.¹¹⁵ In *Lochner v. New York*, for example, the Supreme Court struck down a provision limiting the maximum number of hours per day that bakers could work, viewing the law as interfering with the right and freedom to contract with respect to working terms and conditions rather than as a public health measure.¹¹⁶ While the Supreme Court subsequently upheld the constitutionality of minimum wage laws,¹¹⁷ and other laws protecting workers, we continue to treat financial markets much more freely than health related regulations. Thus, courts have distinguished between what they perceive to be legitimate public health measures designed to protect the common good, on one hand, and economic provisions, on the other. In the latter instance, the Court generally fails to see a need to regulate for the common good. Public health law's objective—to keep communities healthy—stands in stark contrast to laws that impact financial well-being, laws that embrace an individualistic world view. The next Part explores that contrast.

\$117,000 bill from an out-of-network doctor he never saw or met, but who was in the operating room during surgery.

¹¹¹ Japan and the U.K. are examples. *Sick Around the World: Five Capitalist Democracies & How They Do It*, FRONTLINE (Apr. 15, 2008), <https://www.pbs.org/wgbh/pages/frontline/sickaroundtheworld/countries/> [https://perma.cc/MP2H-KXME].

¹¹² Tyler Marquez, *The Phenomenon of Financial Toxicity: Healthcare's Insatiable Disease*, 74 FOOD & DRUG L.J. 170, 174 (2019).

¹¹³ Eric Lipton, *The Chemical Industry Scores a Big Win at the E.P.A.*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/politics/epa-toxic-chemicals.html?searchResultPosition=1> [https://perma.cc/P5CF-YP2H].

¹¹⁴ Coral Davenport, *Interior Dept. Delays Its Plan to Open U.S. Coastline to Drilling*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/climate/offshore-drilling-delay.html?searchResultPosition=2> [https://perma.cc/M8MN-P3C3]; Hiroko Tabuchi, *Calling Car Pollution Standards 'Too High,' E.P.A. Sets Up Fight with California*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/climate/trump-auto-emissions-rules.html?searchResultPosition=4> [https://perma.cc/99FK-5TC6].

¹¹⁵ See discussion *infra* Part II.

¹¹⁶ *Lochner v. New York*, 198 U.S. 45, 52–53, 64 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), *and* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹¹⁷ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937).

II. PUBLIC HEALTH, BUT PRIVATE WEALTH

“OF THE 1%, BY THE 1%, FOR THE 1%”¹¹⁸

As set forth above, both the United States Constitution and state police power articulate goals of promoting the general welfare.¹¹⁹ Public health law is consistent with those goals and therefore works well as a legal paradigm because its objective is to maximize the common good, despite the fact that it sometimes falls short.¹²⁰ While Part I explored the government’s role in protecting the general welfare in the context of public health, this Part examines the government’s role in protecting the general welfare financially. Unfortunately, in matters of financial well-being, laws at all levels of government take a relatively hands-off approach, leaving the economic well-being of the community largely on its own.

We take pride in a free market economy, in the freedom to contract, and in corporate doctrines like shareholder primacy. One argument favoring a free market economy is that it encourages innovation and creativity.¹²¹ Another is that it is a meritocracy, allowing individuals to succeed or fail based on their ability. If someone fails to pull him or herself up by the bootstraps, that is considered an individual failure rather than a structural one. In truth, however, capitalism is not a meritocracy.¹²² As currently structured, it is a system that perpetuates economic inequality. The United States has the highest levels of income inequality in the industrialized world¹²³:

In terms of income, between 1979 and 2014 the top 10 percent in the United States saw their wages rise by a third, while the median wage rose by just 8 percent and the bottom 10 percent flatlined. Today, twenty million Americans live in extreme poverty, members of one in twelve

¹¹⁸ Stiglitz, *supra* note 21.

¹¹⁹ See *supra* text accompanying notes 3–6.

¹²⁰ See discussion *supra* Part I (arguing that states have an interest in, and the ability to, protect their citizens).

¹²¹ Kenneth M. Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 *ASIAN-PAC. L. & POL’Y J.* 71, 80–81 (2005).

¹²² See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (discussing, in detail, de jure discrimination in the housing market, including the exclusion of African Americans from New Deal programs, along with the harms of redlining and exclusionary zoning. Since most people’s home is their largest source of wealth, redlining, exclusionary zoning and similar programs disproportionately impacted the ability of people of color to build wealth.); see also Rachel Sherman, *The Rich Kid Revolutionaries*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/opinion/sunday/rich-social-inequality.html?action=click&login=email&auth=login-email> [<https://perma.cc/ZA95-JUFR>] (discussing young, wealthy people who acknowledge that we do not live in a meritocracy and who question our capitalist system as it exists—some have family wealth that came about from things like “dispossession of indigenous peoples, enslavement of African-Americans, production of fossil fuels or obvious exploitation of workers”).

¹²³ Stiglitz, *supra* note 22 (“[T]he United States has the highest level of inequality among the advanced countries and one of the lowest levels of opportunity—with the fortunes of young Americans more dependent on the income and education of their parents than elsewhere.”); see also DAMBISA MOYO, *EDGE OF CHAOS: WHY DEMOCRACY IS FAILING TO DELIVER ECONOMIC GROWTH—AND HOW TO FIX IT* xiv (2018); Ezra Rosser, *Pulling from a Dated Playbook: President Trump’s Executive Order on Poverty*, HARV. L. REV. BLOG (Apr. 18, 2019), <https://blog.harvardlawreview.org/pulling-from-a-dated-playbook-president-trumps-executive-order-on-poverty/> [<https://perma.cc/UQ5F-TFS4>] (“[E]xtreme poverty, defined as less than half the official poverty line, is [also] on the rise.” (citing PETER EDELMAN, *SO RICH, SO POOR: WHY IT’S SO HARD TO END POVERTY IN AMERICA* (2012) and KATHRYN J. EDIN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* (2015))).

American households go hungry, and . . . the proportion of US citizens living below the poverty line increased from 11 percent in 2000 to almost 16 percent in 2012. Joblessness, in terms of both unemployment and underemployment, has systematically worsened over the past decades. . . . Worse still, . . . the prospects of achieving social mobility and escaping economic destitution have fallen over time.¹²⁴

Laws that support free market capitalism are not serving the general welfare. This is due in large part to the fact that we do not view financial well-being through the same lens of shared interdependence as public health laws. An array of laws reinforce the vast levels of inequality, from corporate and tax laws,¹²⁵ to minimum wage laws,¹²⁶ to contract law,¹²⁷ and beyond. They ignore our financial interdependence, focusing instead on the individual. For example, the federal minimum wage remains stagnant at \$7.25 per hour and has not been raised since 2009,¹²⁸ showing little

¹²⁴ MOYO, *supra* note 123, at xiv–xv (footnote omitted); *see also* Stiglitz, *supra* note 22 (“The neoliberal fantasy that unfettered markets will deliver prosperity to everyone should be put to rest.”).

¹²⁵ *See infra* notes 131–134 and accompanying text.

¹²⁶ *See infra* notes 128–29 and accompanying text.

¹²⁷ *See supra* note 21 and accompanying text.

¹²⁸ *Minimum Wage*, U.S. DEP’T. LABOR, <https://www.dol.gov/agencies/whd/minimum-wage> [<https://perma.cc/JW2E-PS6L>]. The House of Representatives recently voted to raise the federal minimum wage to \$15.00 per hour, but the Republican-led Senate has thus far refused to bring that bill to a vote on the floor. *See* Sheryl Gay Stolberg & Jeanna Smialek, *House Passes Bill to Raise Minimum Wage to \$15, a Victory for Liberals*, N.Y. TIMES (July 18, 2019), <https://www.nytimes.com/2019/07/18/us/politics/minimum-wage.html> [<https://perma.cc/C8CN-8RQ6>]. And some workers are not protected by the federal minimum wage. *See* 29 U.S.C. § 213 (2018) (exempting certain categories of workers from FLSA coverage). While the minimum wage law provides some protection to the collective, the current rate is so substandard that it effectively permits employers to pay their employees poverty-level wages. *See* Eric Ravenscraft, *What a ‘Living Wage’ Actually Means*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html> [<https://perma.cc/MSM2-5MRJ>]. Some states and localities have done a better job of implementing minimum wages that exceed the federal rate. *See Consolidated Minimum Wage Table*, U.S. DEP’T. LABOR (July 1, 2019), <https://www.dol.gov/whd/minwage/mw-consolidated.htm> [<https://perma.cc/4MEB-VNMH>] (providing a state by state minimum wage analysis). Instead of a minimum wage, the law should be set at living wage with automatic increases for inflation. Successful corporations often benefit from a low minimum wage through what is effectively corporate welfare. *See* Barry Ritholtz, *The Minimum Wage and McDonald’s Welfare*, BLOOMBERG (Dec. 17, 2013, 7:46 AM), <https://www.bloomberg.com/opinion/articles/2013-12-17/the-minimum-wage-and-mcdonald-s-welfare> [<https://perma.cc/8DVE-AAYF>] (discussing McDonald’s and Wal-Mart as examples).

Corporate welfare is alive and well, and there is little, if any, stigma associated with it. Meanwhile, however, the individual who falls on hard times and needs government assistance is frequently made to feel inadequate. Thus, corporations keep their labor costs down while their employees qualify for welfare programs like Medicaid, programs that rely on taxpayer support. *Id.* Moreover, those most in need are likely to be subject to the harshest rules. For example, those whose credit rating slips are likely to be charged higher rates of interest when they can least afford it, while the wealthy can pay lower interest rates, or no interest at all, because they can afford to avoid debt. In public health, by contrast, officials tend to the neediest among us. Meanwhile top corporate executives are included on the Forbes 400 list. Corporate resistance to higher wages is arguably based, at least in part, on the doctrine of shareholder primacy. With a sole focus on shareholder primacy, the mission becomes one of maximizing profits, with a focus on the next quarterly report. With a broader mission, the focus could be on *reasonable*, rather than maximum, profitability while serving the well-being of employees, customers and the community at large, as well as its shareholders. We may also want to reevaluate what jobs we value most. Why, for example, do we value investment bankers and hedge fund operators, who move money around, more than we value

concern for those stuck in minimum wage, poverty-level jobs. Not only is the minimum wage insufficient to permit workers who earn it to live a dignified life,¹²⁹ but many employers keep employee hours below full-time status, further limiting their ability to earn living wages.¹³⁰ In addition, analysts uniformly note that the 2017 Tax Cut and Jobs Act¹³¹ favors the wealthy, despite the fact that the wealth of those at the top of the income scale have benefited disproportionately in recent decades.¹³² Moreover, it is exploding the federal deficit.¹³³ In fact, leading legislators who voted for the 2017 tax law turned around almost immediately to support cutting social programs in the name of *fiscal responsibility*.¹³⁴

the teachers who educate our children? The gig economy, with low wages and no benefits, also needs to be reconsidered.

¹²⁹ See Tracy Jan, *A Minimum-Wage Worker Can't Afford a 2-Bedroom Apartment Anywhere in the U.S.*, WASH. POST (June 13, 2018, 10:00 AM), https://www.washingtonpost.com/news/wonk/wp/2018/06/13/a-minimum-wage-worker-cant-afford-a-2-bedroom-apartment-anywhere-in-the-u-s/?utm_term=.07cb5caf47d5 [<https://perma.cc/TX3P-9EJX>] (“[T]here is still nowhere in the country where someone working a full-time minimum wage job could afford to rent a modest two-bedroom apartment, according to an annual report released Wednesday by the National Low Income Housing Coalition.”).

¹³⁰ See, e.g., Nandita Bose, *Half of Walmart's Workforce are Part-Time Workers: Labor Group*, REUTERS (May 25, 2018, 11:16 AM), <https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN11Q295> [<https://perma.cc/SX46-CUNC>]. Under the Affordable Care Act, employer-based incentives to provide health insurance to employees are based in part on the number of full-time equivalent employees. Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H (2018). Employees who work 30 hours or more are considered full time. *Id.*

¹³¹ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

¹³² Richard E. Davis & Danielle J. Halachoff, *Back to the Past: A Return to the Gilded Age?*, 28 OHIO PROB. L.J. 7 (2018); see also Chuck Jones, *Trump's Additional Budget Deficit was Largely Due to the Corporate Tax Cut*, FORBES (Oct. 31, 2018, 2:16 PM), <https://www.forbes.com/sites/chuckjones/2018/10/31/trumps-additional-budget-deficit-was-largely-due-to-the-corporate-tax-cut/#43a8c27d58f7> [<https://perma.cc/F6FW-U9EQ>]; John McClelland & Jeffrey Werling, *How the 2017 Tax Act Affects CBO's Projections*, CONG. BUDGET OFF. (Apr. 20, 2018), <https://www.cbo.gov/publication/53787> [<https://perma.cc/U2RV-2HS5>] (“To construct its baseline budget projections, CBO incorporated the effects of the tax act, taking into account economic feedback—that is, the ways in which the act is likely to affect the economy and in turn affect the budget. Doing so raised the 11-year projection of the cumulative primary deficit (that is, the deficit excluding the costs of servicing the debt) by \$1.3 trillion and raised projected debt-service costs by roughly \$600 billion. The act therefore increases the total projected deficit over the 2018–2028 period by about \$1.9 trillion.”); see generally Amanda Becker, *Republican Tax Cuts to Fuel Historic U.S. Deficits: CBO*, REUTERS (Apr. 9, 2018, 2:05 PM), <https://www.reuters.com/article/us-usa-fiscal-deficit/republican-tax-cuts-to-fuel-historic-u-s-deficits-cbo-idUSKBN1HG2RW> [<https://perma.cc/B2CV-QDMK>] (illustrating that the deficit expanded in the wake of TCJA’s passage). Even before the 2017 tax law, Warren Buffet famously noted that his secretary had a higher marginal tax rate than he did. Chris Isidore, *Buffet Says He's Still Paying Lower Tax Rate Than His Secretary*, CNN (Mar. 4, 2013, 11:20 AM), <https://money.cnn.com/2013/03/04/news/economy/buffett-secretary-taxes/index.html> [<https://perma.cc/BF7Y-RFM6>].

¹³³ CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2019 TO 2029 (Aug. 21, 2019), https://www.cbo.gov/system/files/2019-08/55551-CBO-outlook-update_0.pdf [<https://perma.cc/MD6A-NDSJ>] (“In CBO’s projections, the federal budget deficit . . . averages \$1.2 trillion between 2020 and 2029”). The widespread concern among Republicans during the Obama presidency seems to have disappeared, as has the myth that the 2017 tax cut would pay for itself. See Emily Stewart, *What the Republican Tax Bill Did—and Didn’t—Do, One Year Later*, VOX (Dec. 22, 2018, 12:40 PM), <https://www.vox.com/policy-and-politics/2018/12/18/18146253/tax-cuts-and-jobs-act-stock-market-economy> [<https://perma.cc/EQ93-5LL2>].

¹³⁴ Tara Golshan, *Top Republicans Are Already Talking About Cutting Medicare and Social Security Next*, VOX (Dec. 20, 2017, 12:56 PM), <https://www.vox.com/policy-and-politics/2017/12/18/16741730/gop-agenda-medicare-social-security> [<https://perma.cc/GG3N-7B5X>]. One Republican even began the call to cut social programs before the passage of the tax law. Jeff Stein,

A quintessential example of the individualism that undergirds our free market society is the corporate doctrine of shareholder primacy. While a corporation cannot be successful without a community of employees and customers, the shareholder primacy doctrine suggests that publicly traded corporations exist solely to benefit their owners, that is to maximize shareholder value.¹³⁵ This has been a prevailing view of corporate purpose for many years.¹³⁶ In *Dodge v. Ford Motor Co.*, a case often cited to bolster this argument, the court stated, “[t]here should be no confusion A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”¹³⁷ Notwithstanding *Ford Motor*, others have argued that there is no solid legal foundation for shareholder primacy: “[T]he law gives [corporate boards] a wide range of discretion to run public corporations with other goals in mind, including growing the firm, creating quality products, protecting employees, and serving the public interest. Chasing shareholder value is a managerial choice, not a legal requirement.”¹³⁸

Ryan Says Republicans to Target Welfare, Medicare, Medicaid Spending in 2018, WASH. POST (Dec. 6, 2017, 2:30 PM), https://www.washingtonpost.com/news/wonk/wp/2017/12/01/gop-eyes-post-tax-cut-changes-to-welfare-medicare-and-social-security/?utm_term=.2d88232c3602 [<https://perma.cc/ZH8M-QGRZ>]. President Trump announced the cancellation of a previously planned pay raise for most federal employees scheduled to take effect in January 2019, citing budgetary concerns, concerns that the 2017 tax cut for the wealthy only exacerbated. Adam Edelman, *Trump Cancels Scheduled Pay Raises for Most Federal Employees*, NBC NEWS (Aug. 30, 2018, 2:35 PM), <https://www.nbcnews.com/politics/white-house/trump-cancels-scheduled-pay-raises-most-federal-employees-n905151> [<https://perma.cc/PGY4-FZWZ>]. After substantial pressure, he backed down, agreeing to a 1.9 percent increase. *Guidance on Pay Raise, New Pay Tables Still Pending*, FEDWEEK (Feb. 20, 2019), <https://www.fedweek.com/fedweek/guidance-on-pay-raise-new-pay-tables-still-pending/> [<https://perma.cc/HAW4-EKMW>] (“Although President Trump signed a budget measure on February 15 providing for an average 1.9 percent federal employee raise retroactive to January 6, as of Tuesday morning—Feb. 26—he still had not issued the executive order needed to carry it out.”). More recently, he proposed issuing an executive order that would deprive approximately three million people of continuing to receive SNAP benefits. Lola Fadulu, *Trump Administration Tries Again to Cut Back on Food Stamps*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/politics/trump-food-stamps.html> [<https://perma.cc/5R39-BB9T>] (arguing proposed rule will limit cheating).

¹³⁵ See Ritsa Gountoumas, *The Hybrid Approach: Balancing a Corporation’s Economic Desires against Its Social Responsibility*, 17 U.C. DAVIS BUS. L.J. 197, 212–13 (2017) (discussing problems with the shareholder primacy doctrine).

¹³⁶ Compare A. A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365 (1932) (advocating for shareholder primacy), with E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1163 (1932) (suggesting a concept of corporate purpose broader than maximizing shareholder value).

¹³⁷ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

¹³⁸ STOUT, *supra* note 25, at 4. The business judgment rule also gives corporations substantial latitude to adhere to or dismiss shareholder primacy as they see fit. Compare Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 533 (2006) (examining two theories that have called into doubt the general consensus of the shareholder primacy doctrine), with Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–24 (1993) (arguing that the shareholder primacy doctrine is still the norm); see also Hedrick Smith, *When Capitalists Cared*, N.Y. TIMES (Sept. 2, 2012), <https://www.nytimes.com/2012/09/03/opinion/henry-ford-when-capitalists-cared.html> [<https://perma.cc/H3GD-DR9U>] (noting that Henry Ford believed that paying his workers well was “a matter of social justice . . . [and] smart business. . . . business is more secure because workers earn enough to become good customers”).

Indeed, for much of our history, corporations viewed their missions much more broadly, as encompassing these other constituencies¹³⁹. For example, “providing secure jobs for employees, quality products for consumers, and contributions to the broader society” were once considered the norm.¹⁴⁰ Not only is maximizing shareholder value not legally required, it is arguably a flawed policy for all involved. Without dedicated employees and loyal customers, businesses could not survive.¹⁴¹ Therefore, it is in both the corporation’s interest and in the employees’ interest that widespread economic justice for workers always be regarded as a fundamental part of the equation. This would include providing employees with a living wage and a healthy work environment. Moreover, if the government fails to provide universal health coverage, corporations should continue to provide it for their employees, as needed.

Instead, however, corporations consistently seek to lower labor costs, paying the bulk of the workforce relatively little, while senior executives are paid astronomical salaries.¹⁴² Corporate boards look abroad, seeking the lowest paid labor force.¹⁴³ Stock options and other benefits simply serve to widen the gap between executive pay and the average worker. For example, Jeff Bezos, the founder and CEO of Amazon, is reportedly the richest man in the world.¹⁴⁴ His net worth is estimated at

¹³⁹ STOUT, *supra* note 25, at 3; see Smith, *supra* note 138. After decades of adherence to shareholder primacy, a number of CEOs have acknowledged that corporate responsibility runs to a broader set of constituencies, including employees, customers, and the community at large. BUS. ROUNDTABLE, *Statement on the Purpose of a Corporation* (Aug. 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf> [<https://perma.cc/Y79R-RST8>]; see also David Gelles & David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html?smid=nytcore-ios-share> [<https://perma.cc/3KZK-B6DC>].

¹⁴⁰ STOUT, *supra* note 25, at 17 (summarizing Dodd’s view of the purpose of public corporations).

¹⁴¹ This fact has been brought into stark relief by the novel coronavirus that causes Covid-19. With many nonessential businesses closed, and individuals sheltering in their homes, the economy largely stalled in the first three months of 2020, with some experts predicting a coming depression as the virus continues to spread. Ezra Klein, *How the Covid-19 Recession Could Become a Depression*, VOX (Mar. 23, 2020, 9:20 AM), <https://www.vox.com/2020/3/23/21188900/coronavirus-stock-market-recession-depression-trump-jobs-unemployment> [<https://perma.cc/NZ7Y-B9SK>].

¹⁴² Patricia Cohen, *Paychecks Lag as Profits Soar, and Prices Erode Wage Gains*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/business/economy/wages-workers-profits.html> [<https://perma.cc/4C29-NHXE>] (“Corporate profits have rarely swept up a bigger share of the nation’s wealth, and workers have rarely shared a smaller one.”).

¹⁴³ In the garment industry, for example, companies often move production to countries with the lowest wages simply to maximize profits. *Report: Ethiopia’s Garment Workers are World’s Lowest Paid*, CNBC (May 7, 2019, 5:47 AM), <https://www.cnbc.com/2019/05/07/report-ethiopias-garment-workers-are-worlds-lowest-paid.html> [<https://perma.cc/NK2L-88CB>] (explaining that Ethiopian garment workers are paid the equivalent of approximately \$26 per month). There is a growing awareness on the part of consumers to consider where their clothes are manufactured and how the workers are treated. See *Seven Forms of Sustainable Fashion*, GREEN STRATEGY, <http://www.greenstrategy.se/sustainable-fashion/seven-forms-of-sustainable-fashion/> [<https://perma.cc/R8Z5-FKNQ>]. The garment industry is not alone. Lizzie O’Leary, *The Modern Supply Chain is Snapping*, ATLANTIC (Mar. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/supply-chains-and-coronavirus/608329/> [<https://perma.cc/V65G-YH6J>] (“We’ve built a global supply chain that runs on outsourcing and thin margins, and the coronavirus has exposed just how delicate it is.”).

¹⁴⁴ Peter Cohan, *Is Jeff Bezos Worth \$131.4B? If Not, Should You Bet He Can Earn Back Mackenzie’s \$66B?*, FORBES (Feb. 9, 2019, 1:44 PM), <https://www.forbes.com/sites/petercohan/2019/02/09/is-jeff->

between 130–150 billion dollars.¹⁴⁵ And Amazon's profit last year was reportedly over 10 billion dollars, on which the company will pay zero dollars in taxes.¹⁴⁶ Yet the median annual compensation of Amazon workers is only \$28,446.¹⁴⁷ And Amazon has resisted employee efforts to unionize.¹⁴⁸ Moreover, in seeking to select a site for a second headquarters, Amazon sought an extensive corporate welfare package that it clearly did not need.¹⁴⁹

In addition to its need for employees, Amazon needs customers to thrive. It also needs workers who can efficiently package and deliver orders to those customers. Without a community of workers and customers, Amazon would cease to exist. Structurally, therefore, Amazon's constituencies, like those of other corporations, consist not only of investors/shareholders, but also include workers, customers, and the community at large. Yet the interdependence of these communities is often overlooked, with the corporate focus limited to the next quarterly earnings report. By

bezos-worth-131-4b-if-not-should-you-bet-he-can-earn-back-mackenzies-66b/#2af636928a0d
[<https://perma.cc/ZXS2-2KG6>].

¹⁴⁵ Compare *id.* (\$131.4 billion), with Kathleen Chaykowski, *Jeff Bezos' Net Worth Hits Record \$151 Billion After Strong Amazon 'Prime Day,'* FORBES (July 17, 2018, 5:39 PM), <https://www.forbes.com/sites/kathleenchaykowski/2018/07/17/jeff-bezos-net-worth-hits-record-151-billion-after-strong-amazon-prime-day/#340b64472e80> [<https://perma.cc/SZ95-HZL4>] (\$151.4 billion).

¹⁴⁶ Dominic Rushe, *Amazon Made an \$11.2bn Profit in 2018 but Paid No Federal Tax,* GUARDIAN (Feb. 16, 2019), <https://www.theguardian.com/technology/2019/feb/15/amazon-tax-bill-2018-no-taxes-despite-billions-profit> [<https://perma.cc/NXU6-PWYJ>]. Other major companies also reportedly paid no federal taxes in 2018. David Leonhardt, *Their Tax Rate is 0%,* N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/04/15/opinion/corporation-taxes-cohen-russia.html> [<https://perma.cc/88CP-9V55>]. They include Delta Airlines, Chevron, IBM, General Motors, Molson Coors, and Eli Lilly. *Id.*; see also Stephanie Saul & Patricia Cohen, *Profitable Giants Like Amazon Pay \$0 in Corporate Taxes. Some Voters are Sick of It.,* N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/democrats-taxes-2020.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/SET7-SCWZ>].

¹⁴⁷ Shira Ovide, *Amazon is Defined by Billions, but its Workers' Median Pay is \$28,446,* L.A. TIMES (Apr. 19, 2018, 10:00 AM), <http://www.latimes.com/business/la-fi-amazon-net-worth-hits-record-151-billion-20180419-story.html> [<https://perma.cc/88LF-8D2Y>]; see also David Gelles, *Six C.E.O. Pay Packages that Explain Soaring Executive Compensation,* N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/business/top-ceo-pay-packages.html> [<https://perma.cc/ZQF6-QNL8>] (“At a time when too many Walmart workers face stagnant wages and tens of thousands still qualify for public assistance, is paying your C.E.O. 1,188 times the median employee really the best investment for Walmart? . . . Walmart needs to make the necessary investment to eradicate poverty within and among its own work force.” (quoting Randy Parraz, Director, Making Change at Walmart)); *The Highest-Paid C.E.O.s in 2017,* N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/interactive/2018/05/25/business/ceo-pay-2017.html> [<https://perma.cc/BJV9-SE96>] (explaining that the CEO to median salary ratio is as high as 5,000 to one, and is routinely many hundreds of times the median salary).

¹⁴⁸ Katie Schoolov, *How Amazon is Fighting Back Against Workers' Increasing Efforts to Unionize,* CNBC (Aug. 22, 2019, 1:34 PM), <https://www.cnbc.com/2019/08/22/how-amazon-is-fighting-back-against-workers-efforts-to-unionize.html> [<https://perma.cc/FQ2N-NQMJ>]. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the United States Supreme Court weakened the power of public sector unions by holding that public employees do not have to pay union dues. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). While worker rights are undermined, corporate welfare stands strong.

¹⁴⁹ See *Amazon's HQ2 and the Hidden Cost of Corporate Welfare,* AMS. FOR PROSPERITY (Jan. 25, 2018), <https://americansforprosperity.org/amazons-hq2-hidden-cost-corporate-welfare/> [<https://perma.cc/Q8BH-TRAH>]; see also David Brunori, *Where is the Outrage Over Corporate Welfare?,* FORBES (Mar. 14, 2014, 10:09 AM), <https://www.forbes.com/sites/taxanalysts/2014/03/14/where-is-the-outrage-over-corporate-welfare/#5418c94e27dd> [<https://perma.cc/Y2GJ-DZD6>] (explaining why companies seek these corporate welfare packages).

neglecting corporate constituencies beyond shareholders, the shareholder primacy doctrine erodes the sense of shared purpose that is always a concern of public health law.¹⁵⁰

Amazon is but one example of a corporate structure that fails to consider the collective. There are other powerful corporations that engage in similar practices. We are living in an age of mega corporations that wield extraordinary influence, economically, socially, and politically.¹⁵¹ Meanwhile, there is no place in America where a person can afford a two-bedroom apartment on the federal minimum wage.¹⁵² Some companies have now announced increased minimum wages for their lower income workers, perhaps responding to public discourse over the inadequacy of the federal minimum wage.¹⁵³

In addition to its adverse impact on workers, shareholder primacy also leads to practices that are not necessarily consumer friendly. Companies shield themselves from liability in ways that limit consumer recourse, for example, through clickwrap agreements that courts have enforced, despite the virtual impossibility of providing true consent to the terms.¹⁵⁴ These agreements and others often include binding arbitration clauses, which are pervasive in consumer transactions, thereby depriving

¹⁵⁰ See David Leonhardt, *A C.E.O. Who's Scared for America*, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/opinion/peter-georgescu-capitalism.html> [<https://perma.cc/C4SX-5CBS>] (discussing Peter Georgescu, former CEO of Young & Rubicam: “Things began to change after the 1970s. Stakeholder capitalism—which, Georgescu says, optimized the well-being of customers, employees, shareholders and the nation—gave way to short-term shareholder-only capitalism.”).

¹⁵¹ Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 2 (2015) (“We are living in an era of behemoth corporations, consolidated industries, and enormous wealth flowing into the hands of a few people.”). Bogus suggests that antitrust laws are a matter of public concern and are crucial to “democracy and society.” *Id.*; see also Paul R. La Monica, *Companies Have Spent a Stunning \$2 Trillion on Mergers So Far This Year*, CNN (May 24, 2018, 12:25 PM), <http://money.cnn.com/2018/05/24/investing/merger-boom/index.html> [<https://perma.cc/DY75-JZE7>] (illustrating the continuing trend of large-scale mergers and acquisitions). There is a renewed focus on tech giants like Facebook and Google, particularly given the use of various of their platforms for political influence. Cecilia Kang & Kenneth P. Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html> [<https://perma.cc/Q6FL-FHEB>].

¹⁵² See Jan, *supra* note 129.

¹⁵³ Wells Fargo, for example, has a corporate minimum wage of \$15.00 per hour. Emily Flitter, *Bank of America Will Lift Minimum Wage to \$20, as Lawmakers Spotlight Inequality*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/business/bank-of-america-minimum-wage.html#targetText=Some%20rank%2Dand%2Dfile%20employees,an%20hour%2C%20up%20from%20%2413.50> [<https://perma.cc/KTD6-SZS6>].

¹⁵⁴ Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017); Sgouros v. TransUnion Corp., 817 F.3d 1029, 1033–34 (7th Cir. 2016); see also Editorial Board, *How Silicon Valley Puts the ‘Con’ in Consent*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html> [<https://perma.cc/6QT2-AH7Y>] (“The average person would have to spend 76 working days reading all of the digital privacy policies they agree to in the span of a year. Reading Amazon’s terms and conditions alone out loud takes approximately nine hours.”).

aggrieved customers of access to court.¹⁵⁵ They also often include terms that require consumers to give up a certain amount of privacy.¹⁵⁶ In short, workers and customers, as well as society at large, are not considered part of a community to be served, but as a community to be exploited.¹⁵⁷ Legally, we have made a choice to let that free market reign.

This sink or swim attitude toward financial well-being is getting worse. For example, while the Consumer Financial Protection Bureau (CFPB) was created specifically to protect consumers from predatory financial practices,¹⁵⁸ it is currently being undermined. The CFPB was the brain child of Elizabeth Warren, who first proposed it in 2007.¹⁵⁹ Following the great recession of 2008, it was abundantly clear that consumers needed assistance. The CFPB was designed to do in the financial sector what public health law does with respect to health: protect the public. The idea behind its creation was to improve the regulatory structure of mortgages, student loans, and other financial products.¹⁶⁰ It was a big step toward protecting everyday consumers. It was also controversial from the outset.¹⁶¹ Once President Obama left office, his successor appointed Mick Mulvaney as Director of the CFPB, a leader who fundamentally disagreed with its very existence.¹⁶² He requested a zero dollar

¹⁵⁵ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (enforcing an arbitration provision prohibiting employees from bringing a class action against employers); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013) (upholding a binding arbitration provision prohibiting merchants from bringing class action lawsuits); see generally Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 *FORDHAM L. REV.* 2119 (2017).

¹⁵⁶ *How Silicon Valley Puts the 'Con' in Consent*, *supra* note 154.

¹⁵⁷ See *supra* notes 142–143 and accompanying text. The norm of providing millions, if not billions, of dollars in corporate welfare even for corporations that clearly do not need it is an example of serving the owners first, while benefits to everyone else comes in a far second. See James G. Wilson, *Does Centralized Private Power Corrode the Rule of Law?*, 64 *CLEV. ST. L. REV.* 157, 159 (2016) (“Large corporations routinely extract wealth from local communities by threatening to move operations elsewhere.”); Robert Reich, *Corporate Welfare is Ravaging American Taxpayers*, *SALON* (Aug. 22, 2015, 7:00 PM), https://www.salon.com/2015/08/22/reich_leveling_the_playing_field_for_all_businesses_will_make_the_californi_a_economy_more_efficient_partner/ [<https://perma.cc/3DCT-BKR5>] (noting that “[c]orporate welfare is often camouflaged in taxes that seem neutral on their face but give windfalls to big entrenched corporations at the expense of average people and small businesses”).

¹⁵⁸ *Creating the Consumer Bureau*, *CONSUMER FIN. PROTECTION BUREAU*, <https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/> [<https://perma.cc/C7UV-53EB>]. The CFPB came about after the great recession of 2008 and was created pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Id.*

¹⁵⁹ Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, *WASH. POST* (Jan. 11, 2014, 9:28 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/01/11/a-watchdog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau/> [<https://perma.cc/RV88-4TAZ>].

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² Devin Leonard & Elizabeth Dexheimer, *Mick Mulvaney is Having a Blast Running the Agency He Detests*, *BLOOMBERG* (May 25, 2018 4:00 AM), <https://www.bloomberg.com/news/features/2018-05-25/mick-mulvaney-on-the-cfpb-we-re-still-elizabeth-warren-s-child> [<https://perma.cc/8MT4-APBP>] (“Mulvaney was no fan of the agency, having repeatedly attacked its very premise during his three terms as a Tea Party Republican in Congress.”). This has been a theme of the Trump presidency; for example, he appointed someone as Secretary of the Interior who has no interest in protecting the environment. See Umair Irfan, *A Brief Guide to David Bernhardt, Ryan Zinke’s Replacement at the Interior Department*, *VOX* (Apr. 11, 2019, 2:59 PM), <https://www.vox.com/energy-and-environment/2019/1/3/18165562/david-bernhardt-interior-ryan-zinke> [<https://perma.cc/9H2Q-B3VC>]. In December 2018, the Senate confirmed Kathy Kraninger as the Director of the CFPB. *Kathy Kraninger, Director*,

budget,¹⁶³ and disbanded the Consumer Advisory Board designed to provide insight into areas most in need of consumer protection.¹⁶⁴ In a meeting in which community leaders urged the CFPB to regulate payday loans, the Director reportedly opined that “[i]t wasn’t up to the federal government to stop people from taking the kind of credit that suited them.”¹⁶⁵ In other words, the CFPB is letting the market flow freely with minimal governmental oversight. This abandonment of its mission to provide consumer financial protection is a step backward and reflects an ideology that in matters of personal finance, the federal government will take a hands-off approach. This view must be re-examined and modified to achieve economic justice. Rather than serving the general welfare, free market capitalism has resulted in extreme economic inequality.¹⁶⁶ And the outsized influence of wealthy individuals and corporations is not serving the interests of the public at large.¹⁶⁷ Moreover, cases like *Citizens United v. FEC*,¹⁶⁸ allowing virtually unlimited money in politics, threaten to derail the values we claim to stand for.

While wealthy donors, corporations, and special interest groups have long had an outsized influence in elections, that sway has dramatically expanded since the *Citizens United* decision, with negative repercussions for American democracy and the fight against political corruption. . . . [A] very small group of Americans

Consumer Financial Protection Bureau, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/about-director/> [https://perma.cc/9YZW-G3RS].

¹⁶³ Yuka Hayashi, *CFPB Requests \$0 Budget, Will Draw Down Reserves Instead*, WALL STREET J. (Jan. 18, 2018, 2:21 PM), <https://www.wsj.com/articles/cfpb-requests-0-budget-will-draw-down-reserves-instead-1516291949> [https://perma.cc/N938-F2EU].

¹⁶⁴ Michelle Price & Pete Schroeder, *Trump’s Consumer Financial Chief Disbands Key Advisory Boards*, REUTERS (June 6, 2018, 3:40 PM), <https://www.reuters.com/article/us-usa-cfpb-boards/trumps-consumer-financial-chief-disbands-key-advisory-boards-idUSKCN1J22PN> [https://perma.cc/8AVZ-9VN3]; see also Chris Arnold & Avie Schneider, *Mick Mulvaney Effectively Fires CFPB Advisory Council*, NPR (June 6, 2018, 5:30 PM), <https://www.npr.org/2018/06/06/617612219/mick-mulvaney-effectively-fires-cfpb-advisory-council> [https://perma.cc/5433-7JH4].

¹⁶⁵ Nicholas Confessore, *Mick Mulvaney’s Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES SUNDAY MAG. (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html> [https://perma.cc/E5AD-WDCA] (“The C.F.P.B. was created to protect Americans from predatory lenders after the financial crisis. President Trump’s new chief of staff took it apart on his way to [the] White House.”).

¹⁶⁶ See Paul Krugman, *For Whom the Economy Grows*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/opinion/economy-gdp-income-inequality.html> [https://perma.cc/C5ZF-AK7H] (noting that a Senate bill was introduced that “would direct the Bureau of Economic Analysis, which produces estimates of gross domestic product, to produce estimates telling us who benefits from growth”); see also Emily Stewart, *Senate Democrats Want the Government to Say if GDP Growth is Helping the Middle Class*, VOX (Aug. 28, 2018, 1:30 PM), <https://www.vox.com/policy-and-politics/2018/8/28/17790800/gdp-growth-income-inequality-q2-schumer-heinrich> [https://perma.cc/3DCL-RNET].

¹⁶⁷ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010) (holding that political spending is a form of protected speech under the First Amendment, and the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections); Hiroko Tabuchi, *How the Koch Brothers are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/climate/koch-brothers-public-transit.html> [https://perma.cc/MX6Z-6LRZ] (discussing the Koch Brothers’ lobbying efforts against public transit and arguing such efforts stem from the brothers’ investment in the natural gas and automotive industries).

¹⁶⁸ 558 U.S. 310 (2010).

now wield “more power than at any time since Watergate, while many of the rest seem to be disengaging from politics.”

“This is perhaps the most troubling result of *Citizens United*: in a time of historic wealth inequality,” . . . “the decision has helped reinforce the growing sense that our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value.”¹⁶⁹

In the midst of this inequality, the average worker is being left further and further behind. Corporations often resist paying average workers higher wages that they could easily afford.¹⁷⁰

As a nation of laws,¹⁷¹ it is essential that those laws be just and fair because unjust laws undermine society itself.¹⁷² It is also critical that they be equitably

¹⁶⁹ Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019) (quoting Daniel I. Weiner), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/9YE3-PVCF>]; see also Michael Tomasky, *Is America Becoming an Oligarchy?*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/opinion/america-economic-inequality.html> [<https://perma.cc/LBY7-FWB7>] (“Democracy can’t flourish in a context of grotesque concentration of wealth. This idea is neither new nor radical nor alien. It is old, mainstream and as American as Thomas Jefferson.”). Tomasky also noted Jefferson’s efforts to abolish inheritance laws: “He believed, as the founders did generally, that excess inherited wealth was fundamentally incompatible with democracy.” *Id.*; see also MOYO, *supra* note 123, at xiii (“The United States now has the highest level of income inequality in the industrialized world, a fact that some regard as ‘a threat to American democracy.’” (quoting Tim Glynn-Burke, *Inequality is a Threat to American Democracy. Who Will Ring the Bell?*, MEDIUM (Dec. 17, 2013), <https://medium.com/challenges-to-democracy/inequality-is-a-threat-to-american-democracy-who-will-ring-the-bell-7d77c25c1123> [<https://perma.cc/39R9-FYY8>])).

¹⁷⁰ Some companies have now announced increased minimum wages for their lower income workers, arguably responding to public pressure resulting from increased discourse over the struggles of low wage workers. See Courtney Connley, *Amazon, Facebook and 8 Other Companies that have Committed to Raising their Minimum Wage*, CNBC (May 25, 2019, 9:30 AM), <https://www.cnbc.com/2019/05/24/glassdoor-10-companies-that-have-committed-to-raising-minimum-wage.html> [<https://perma.cc/Z4UC-SVL6>]; Erik Sherman, *Why Did Amazon Raise Its Minimum Wage to \$15? Public Pressure*, FORBES (Oct. 2, 2018, 10:23 AM), <https://www.forbes.com/sites/eriksherman/2018/10/02/amazon-sets-a-15-minimum-wage-for-all-its-us-workers-after-public-pressure/#3dae1eda3937> [<https://perma.cc/7X9J-NECW>].

¹⁷¹ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

¹⁷² For example, slavery was once legal, and the extreme injustice of that legal paradigm led to a civil war. While there is apparently a narrative that the Civil War was fought over states’ rights, it was, in fact, a war fought over slavery. Frank James, *Slavery, Not States’ Rights, Caused Civil War Whose Political Effects Linger*, NPR (Apr. 12, 2011, 4:42 PM), <https://www.npr.org/sections/itsallpolitics/2011/04/12/135353655/slavery-not-states-rights-was-civil-wars-cause> [<https://perma.cc/2HUV-MA5C>]. Laws permitting slavery, the 3/5ths clause, Dred Scott and Jim Crow laws, and others that treated blacks as “the other,” were ultimately struck down—both because of the African American community’s continued resistance and because of many others who also resisted. See Kenneth R. Janken, *The Civil Rights Movement: 1919–1960s*, TEACHERSERVE, <http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/crm.htm> [<https://perma.cc/6CH5-2ZA7>]. Laws focused on race were not the only unjust laws. Poverty laws, for example, tend to incorporate onerous requirements because of the small percentage of people who would abuse the safety net, rather than focusing on the majority who follow the rules but simply need assistance. For example, the new rule that Medicaid recipients must work ignores the fact that most Medicaid recipients who can work already do so. Those who cannot work will still have health care needs that must be addressed. Judith Solomon,

enforced.¹⁷³ Yet as noted above, corporations, which are legal entities created and permitted to exist by state law,¹⁷⁴ do not view their mission as one that should help the entire community. They are largely free to run themselves with little regard for the general welfare. Because the state, through its police power, is charged with protecting public health, safety, and welfare,¹⁷⁵ state law and policy governing corporations should also serve the public good. Otherwise the legal system is complicit in perpetuating inequality.

While states engage in minimal corporate oversight, corporations have become enormously powerful. They are considered persons and can even assert the right to religious freedom.¹⁷⁶ They exercise their wealth and power in numerous ways, including by lobbying for and even drafting desired legislation.¹⁷⁷ Corporate directors are often handsomely paid¹⁷⁸ and legally protected from many of their

Medicaid Work Requirements Can't Be Fixed, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 10, 2019), <https://www.cbpp.org/research/health/medicaid-work-requirements-cant-be-fixed> [<https://perma.cc/FA34-3ZLD>].

¹⁷³ Any number of examples highlight the ways in which our laws have been unjustly applied. *See generally*, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (detailing injustice in the criminal justice system); ROTHSTEIN, *supra* note 122 (describing the history of de jure discrimination in housing); Brian Mann, *The Drug Laws that Changed How We Punish*, NPR (Feb. 14, 2013, 3:04 AM), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> [<https://perma.cc/M35Q-APRR>] (discussing the Rockefeller drug laws); DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW* (Oct. 2006), https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf [<https://perma.cc/8JM7-YP9F>] (discussing the crack cocaine versus powder cocaine sentencing disparities). The list goes on.

¹⁷⁴ Corporations exist because they are legally permitted to do so by the state:

A corporation is a government-defined legal structure for doing business. A corporation is created and defined by state legislatures to advance what the state deems to be in the public interest. Corporations as entities are government policy tools; only government makes incorporation possible. Unlike other associations or ways of doing business, a corporation cannot exist by private arrangement.

JEFFREY D. CLEMENTS, *CORPORATIONS ARE NOT PEOPLE—WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* 60 (1st ed. 2012) (footnote omitted).

¹⁷⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

¹⁷⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 719, 736 (2014) (holding that mandated contraceptive coverage under the Affordable Care Act violated the religious beliefs of a closely held for-profit corporation under the Religious Freedom and Restoration Act).

¹⁷⁷ In the context of reviewing two books, one from the left and one from the right, Hasen notes:

The books demonstrate that lobbying can thwart the public interest, especially when players with much at stake use lobbyists to block or alter legislation [B]oth books illustrate that much of the problem with the relationship among money, politics, and lobbying stems from what is legal, not illegal. . . . [T]he real concern should be less with exchanges of dollars for political favors and more with the decline in national economic welfare that occurs thanks to lobbyist-facilitated rent-seeking.

Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 551–52 (2012).

¹⁷⁸ Many large corporations pay their directors hundreds of thousands of dollars per year. *See* Douglas A. McIntyre & Samuel Weigley, *The 12 Companies with the Highest-Paid Boards of Directors*, 24/7 WALL ST. (June 7, 2012, 6:19 AM), <https://247wallst.com/special-report/2012/06/07/the-12-companies-with-the-highest-paid-boards-of-directors/> [<https://perma.cc/6A5R-AB8K>] (“More than a dozen public company boards had directors whose compensation averaged more than \$500,000 in 2011.”).

business decisions through the broad range of discretion afforded them under the business judgment rule. “Under the business judgment rule, in the absence of bad faith, fraud, illegality or gross overreaching, courts will not interfere with the exercise of business judgment by corporate directors.”¹⁷⁹ Thus, corporate board members can easily avoid liability even when their decisions are deeply flawed.

These are just some of the shortcomings of a free market paradigm as currently constituted. Instead of continued focus on individualism, we can begin to think of money as medicine—as something needed in just proportions to serve the larger community. It was recently reported, for example, that approximately 40% of Americans cannot afford a \$400 emergency.¹⁸⁰ The Occupy Movement was, in part, an effort to highlight the chasm between the 99% and the 1%.¹⁸¹ Today, three men own as much wealth as the bottom half of all Americans.¹⁸² While these three men may be outliers, even the wealthiest individuals need a functioning society to support that wealth, whether it is a need for customers, workers, strong infrastructure, or a stable enough society to avoid rebellions.¹⁸³

Just as we are linked when it comes to public health, we are also financially interdependent, even when we fail to recognize it. It is not acceptable that so many of our fellow human beings are living at or near the poverty level. The goal should be to help everyone achieve economic justice. Viewing the financial community more broadly will lead to legal and normative changes that will enhance the quality of life for a greater swath of society. This will be a natural outgrowth of the law when we address the needs of the many rather than those of the few. This is why the public

¹⁷⁹ *Henderson Square Condo. Ass’n v. LAB Townhomes, L.L.C.*, 46 N.E. 3d 706, 727 (Ill. 2015); see also *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, Cty. of Clark*, 399 P.3d. 334, 341–42 (Nev. 2017); see generally Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013).

¹⁸⁰ Sarah O’Brien, *Fed Survey Shows 40 Percent of Adults Still Can’t Cover a \$400 Emergency Expense*, CNBC (May 23, 2018, 8:58 AM), <https://www.cnbc.com/2018/05/22/fed-survey-40-percent-of-adults-cant-cover-400-emergency-expense.html> [<https://perma.cc/8UGH-R9TT>]. The desperation of those who live in poverty becomes even more acute during public health and other emergencies. Manny Fernandez, *Coronavirus and Poverty: A Mother Skips Meals So Her Children can Eat*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/20/us/coronavirus-poverty-school-lunch.html> [<https://perma.cc/G5Y4-N7R4>].

¹⁸¹ Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> [<https://perma.cc/MN6Z-9HJV>].

¹⁸² *Wealth Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/> [<https://perma.cc/8CAZ-D97T>] (“In the United States, wealth inequality runs even more pronounced than income inequality.”).

¹⁸³ One scholar discussed how capitalism has led to extreme inequalities in wealth:

We live in a revolutionary moment. The disastrous economic and political experiment that attempted to organize human behavior around the dictates of the global marketplace has failed. The promised prosperity that was to have raised the living standards of workers through trickle-down economics has been exposed as a lie. A tiny global oligarchy has amassed obscene wealth, while the engine of unfettered corporate capitalism plunders resources; exploits cheap, unorganized labor; and creates pliable, corrupt governments that abandon the common good to serve corporate profit.

CHRIS HEDGES, *WAGES OF REBELLION: THE MORAL IMPERATIVE OF REVOLT 1* (2015). Hedges goes on to note that “[t]he citizen has become irrelevant. He or she can participate in heavily choreographed elections, but the demands of corporations and banks are paramount.” *Id.*

health law approach of addressing the well-being of the community can, and arguably should, be applied universally.¹⁸⁴ The law is a vessel that we put our values into. Using public health law as a paradigm, there would always be a focus on the well-being of the community, whether the issue is one of economic justice, criminal justice, racial justice, or some other area of concern.

As President John F. Kennedy has said, “a rising tide lifts all the boats.”¹⁸⁵ When those at the bottom of the economic ladder are doing well, they help stimulate the entire economy. They can purchase the goods and services that businesses offer. Those who are free from the daily stresses of poverty or near poverty conditions enjoy better health and miss fewer days of work,¹⁸⁶ and people whose basic needs are assured are freer to think creatively about more than simply making it from one day to the next. In order to improve, a new paradigm—one that recognizes our shared common good in financial matters—a progressive capitalism—must be implemented. Individual rights are important, but extreme individualism without regard to the greater community can be devastating, be it a contagious disease or a diseased economy.¹⁸⁷ In the case of the economy, the wealthy often fail to appreciate that their well-being is inextricably intertwined with their less wealthy counterparts.¹⁸⁸ That is incorrect.

Two examples demonstrate the point. First, consider what would happen if all Amazon fulfillment center employees went on strike. This would arguably bring Amazon to its knees very quickly. Amazon would be unable to fill orders, and customers would purchase from competing vendors. To avoid such a scenario, Amazon could try to discourage collective bargaining, unionization, and other worker efforts to expand their rights by joining together. Alternatively, it could welcome collective bargaining, recognizing that without its workers, it would be unable to serve its customers. By engaging in a dialogue of mutual respect and understanding, and acknowledging their shared well-being, Amazon could meet reasonable requests of its employees and perhaps lower its turnover rates and enjoy a much better reputation as an employer and as a corporate citizen. Its sales might increase as a result because there are increasing numbers of socially conscious consumers who endeavor to make responsible purchasing decisions.¹⁸⁹ This includes purchasing from companies that honor their workers, the larger community, and the environment.

¹⁸⁴ For example, by focusing on the collective well-being, we would re-evaluate our criminal justice system to explore not only why we criminalize so many non-violent behaviors, but also how we treat those who are incarcerated. See generally MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* (5th ed. 2019).

¹⁸⁵ President John F. Kennedy, Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam (Oct. 3, 1963) (transcript available with the American Presidency Project).

¹⁸⁶ See Tom Sightings, *Why the Wealthy are Healthy*, U.S. NEWS & WORLD REP. (May 15, 2012, 10:50 AM), <https://money.usnews.com/money/blogs/on-retirement/2012/05/15/why-the-wealthy-are-healthy> [<https://perma.cc/H7WJ-872F>].

¹⁸⁷ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (recognizing that the threat of smallpox, a highly contagious and deadly disease, made clear to the populace that its collective well-being was inextricably intertwined).

¹⁸⁸ Stiglitz, *supra* note 21.

¹⁸⁹ Lynn Sudbury-Riley & Florian Kohlbacher, *Ethically Minded Consumer Behavior: Scale Review, Development, and Validation*, 69 J. BUS. RES. 2697, 2698 (2016).

A second, non-corporate example of our interconnectedness is that of the New York City sanitation workers' strike in 1968.¹⁹⁰ After a nine-day strike, New York City met the sanitation workers' demands, and the strike ended:

It takes a week before the realization begins to kick in: The garbagemen are actually going to win. "New York is helpless before them," the editors of the *New York Times* declare despairingly. "This greatest of cities must surrender or see itself sink in filth." . . . *Time* magazine later reported, [] "that it pays to strike."¹⁹¹

While Wall Street bankers and others in the financial industry may think little of the workers on the ground who keep the city functioning, those workers are indispensable—not just sanitation workers, but those who transport workers to and from their jobs, teachers, cooks, and others. This has become abundantly clear during the coronavirus pandemic of 2020. During a single week in March, a record 3 million people applied for unemployment insurance, and with many nonessential businesses closed, much of our consumer-driven economy came to a halt.¹⁹² The federal government passed a 2 trillion dollar stimulus package to avert an economic collapse, and more measures are needed. It has taken a public health emergency for us, as a society, to see, at least for this moment in time, that we are interconnected both with respect to health and wealth.

The vast income and wealth inequality we are experiencing today is, in part, a consequence of failing to view the system holistically, to ensure that all workers share in our prosperity. One effort to highlight the true health or lack thereof in the economy is the introduction of a senate bill that "would direct the Bureau of Economic Analysis, which produces estimates of gross domestic product, to produce estimates telling us who benefits from growth."¹⁹³ We know that even in matters involving private enterprise and financial wellness, the government has a role to play to achieve economic justice.¹⁹⁴ The next section explores possible solutions.

¹⁹⁰ RUTGER BREGMAN, *UTOPIA FOR REALISTS* 153–54 (Elizabeth Manton trans., 2017).

¹⁹¹ *Id.* at 154. By contrast, Bregman suggests that if bankers, Wall Street traders, and others in the financial sector went on strike, it would have minimal impact because "[i]nstead of *creating* wealth, these jobs mostly just *shift* it around." *Id.* at 154–55.

¹⁹² Jeff Cox, *Jobless Claims Soar Past 3 Million to Record High*, CNBC (Mar. 26, 2020, 10:22 AM), <https://www.cnbc.com/2020/03/26/weekly-jobless-claims.html> [<https://perma.cc/5S3R-SZCU>]; see Erin Schumaker, *Here are the States that have Shut Down Nonessential Businesses*, ABC NEWS (Mar. 26, 2020, 8:18 PM), <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806> [<https://perma.cc/YN39-7B66>]; see also Klein, *supra* note 140.

¹⁹³ Krugman, *supra* note 166; see also Stewart, *supra* note 166.

¹⁹⁴ The federal government often intervenes into private corporate affairs when it feels there is a strong public policy interest in doing so. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o (2018)) (noting that the purpose of the act is to "improv[e] accountability and transparency in the financial system," "to end 'too big to fail,'" and to "end[] bailouts"); David John Marotta, *The Purpose of the Federal Reserve*, FORBES (May 10, 2014, 12:00 AM), <https://www.forbes.com/sites/davidmarotta/2014/05/10/the-purpose-of-the-federal-reserve/> [<https://perma.cc/6U7G-3AZ6>]. We have a number of social safety nets for those who fall below the federal poverty level, but that level is set at such a low number that there are many families whose incomes

III. “WHAT IF MONEY COULD HEAL US?”¹⁹⁵

“A progressive capitalism based on an understanding of what gives rise to growth and societal well-being gives us a way out of this quagmire and a way up for our living standards.”¹⁹⁶

There are a multitude of ideas for transforming our economic system into one of “progressive capitalism”—one that addresses our collective, economic well-being.¹⁹⁷ For example, a more progressive tax code would further the goal of financial equity. As noted above, the 2017 tax law is designed to do the opposite—it continued the trend of helping the well-to-do over others, thus continuing to widen the income gap.¹⁹⁸ During Elizabeth Warren’s presidential campaign, she proposed a 2% wealth tax on those with fortunes of more than \$50,000,000.¹⁹⁹ This would have been a step toward reducing inequality, and the added tax revenue would have helped ordinary people by expanding access to higher education, among other things.²⁰⁰ We could also add greater fairness to our tax system by eliminating loopholes that favor the wealthy, like that for carried interest.²⁰¹ Increasing the top tax rate to 70% is another progressive income tax proposal.²⁰² Changing long-standing corporate narratives and policies that support

are well above the federal poverty line, but who still struggle. M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN ST. L. REV. 61, 90–91 (2016).

¹⁹⁵ EDGAR VILLANUEVA, *DECOLONIZING WEALTH: INDIGENOUS WISDOM TO HEAL DIVIDES AND RESTORE BALANCE* 1 (2018) (“[W]e are all relatives We are also all infected with . . . the ‘colonizer virus,’ which urges us to divide, control, and exploit. Nowhere is the virus more symptomatic than in how we deal with wealth.”).

¹⁹⁶ Stiglitz, *supra* note 22; see also JOHN LENNON, *Imagine*, on *IMAGINE* (Apple Records 1971) (“Imagine all the people, sharing all the world.”).

¹⁹⁷ See *infra* notes 201–253 and accompanying text. Senator Elizabeth Warren, for example, has proposed a 2% wealth tax on fortunes over 50 million dollars. *Ultra-Millionaire Tax*, WARREN FOR PRESIDENT, <https://elizabethwarren.com/ultra-millionaire-tax/> [<https://perma.cc/JMM5-PJE9>]. She also advocates for reforming student loans and providing access to free public higher education. Elizabeth Warren, *Universal Free Public College and Cancellation of Student Loan Debt*, WARREN FOR PRESIDENT, <https://elizabethwarren.com/m-universal-free-public-college-student-debt-cancellation> [<https://perma.cc/X9DA-RD2F>].

¹⁹⁸ See *supra* notes 131–134 and accompanying text.

¹⁹⁹ *Ultra-Millionaire Tax*, *supra* note 197. Senator Warren suspended her presidential campaign in March 2020. Shane Goldmacher & Astead W. Herndon, *Elizabeth Warren, Once a Front-Runner, Drops Out of Presidential Race*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/05/us/politics/elizabeth-warren-drops-out.html> [<https://perma.cc/57G8-6MYR>].

²⁰⁰ *Ultra-Millionaire Tax*, *supra* note 197.

²⁰¹ See generally Michael R. Pieczonka, *The Largest Loophole in Federal Tax Law: Preferential Capital Gain Treatment for Private Equity and Hedge Fund Managers’ Carried Interest*, 42 J. MARSHALL L. REV. 529 (2009).

²⁰² Higher tax rates on the wealthy are not unprecedented. *History of Federal Income Tax Rates: 1913–2020*, BRADFORD TAX INST., https://bradfordtaxinstitute.com/Free_Resources/Federal-Income-Tax-Rates.aspx [<https://perma.cc/MUL5-HMF3>] (showing that between the 1950s and 1970s, the top income tax rate never went below 70%). Rep. Alexandria Ocasio-Cortez proposed that we bring back higher tax rates on high-income individuals. Veronica Stracqualursi, *Ocasio-Cortez Suggests 70% Tax for Wealthy to Fund Climate Change Plan*, CNN (Jan. 4, 2019, 10:57 AM), <https://www.cnn.com/2019/01/04/politics/alexandria-ocasio-cortez-tax-climate-change-plan> [<https://perma.cc/KG88-9UJM>].

shareholder primacy would also provide space to focus on greater equity for employees, customers, and the community at large.²⁰³

Implementing a universal basic income could also help alleviate poverty and narrow the income gap.²⁰⁴ This could be especially useful for those whose jobs have been displaced by technology. Increasing the minimum wage would be another step forward, as would broad-based student loan forgiveness.²⁰⁵ Expanding social security and re-thinking 401k plans rather than pensions could also be part of the mix,²⁰⁶ given that the 401k approach leaves millions unable to retire.²⁰⁷ All these ideas would help to spread the wealth of the nation among a broader swath of society. In this manner, these proposals are consistent with the purpose of public health law in that they demonstrate concern for everyone.

This Article focuses on two areas that have received less attention. First, it proposes changes to rules regarding board composition and accountability. It suggests that we eliminate the business judgment rule in matters of executive compensation and that employees elect forty percent of corporate board members.²⁰⁸ Second, keeping in mind that political and economic powers are intertwined, this

²⁰³ A number of CEOs have recently acknowledged a broader corporate purpose than shareholder primacy. See *supra* note 139.

²⁰⁴ Universal basic income (UBI) is enjoying growing support as technological advances and other changes displace large portions of the workforce. Annie Nova, *More Americans Now Support a Universal Basic Income*, CNBC (Feb. 26, 2018, 3:35 PM), <https://www.cnbc.com/2018/02/26/roughly-half-of-americans-now-support-universal-basic-income.html> [<https://perma.cc/GQX4-M6ZY>]. UBI was a central campaign theme of Andrew Yang, a 2020 presidential candidate. *The Freedom Dividend*, YANG2020, <https://www.yang2020.com/policies/the-freedom-dividend/> [<https://perma.cc/82NZ-WDX5>]. Yang suspended his campaign in February 2020. Pema Levy, *Andrew Yang Suspends His Campaign*, MOTHER JONES (Feb. 11, 2020), <https://www.motherjones.com/politics/2020/02/andrew-yang-drops-out/> [<https://perma.cc/9UCY-6ZEV>]. The philosophy behind UBI is to pay everyone a basic income. It has been tried in Stockton, California, solely to help certain low-income individuals. Sigal Samuel, *A California City Gave Some Residents \$500 a Month, No Strings Attached. Here's How They Spent It*, VOX (Oct. 8, 2019, 10:50 AM), <https://www.vox.com/future-perfect/2019/10/8/20902839/universal-basic-income-stockton-trial> [<https://perma.cc/S4CJ-9YEP>]. UBI has also been tried in Finland. Laura Paddison, *Finland Gave People \$640 a Month, No Strings Attached. Here's What Happened*, HUFFPOST (Feb. 8, 2019, 11:05 AM), https://www.huffpost.com/entry/universal-basic-income-finland-ontario-stockton_n_5c5c3679e4b00187b558e5ab [<https://perma.cc/9J42-QTQX>]. Although it is unclear at this point, it is possible that a UBI could displace a plethora of anti-poverty programs, reducing the administrative burden that those programs entail.

²⁰⁵ Student loans now account for over 1.5 trillion dollars in debt. Zack Friedman, *Student Loan Debt Statistics in 2019: A \$1.5 Trillion Crisis*, FORBES (Feb. 25, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/> [<https://perma.cc/B9NS-NC96>]. A variety of legal changes could be implemented to relieve the burden that about 45 million people are shouldering. *Id.* The interest rates could be lowered, or the principal amounts could be halved, if not forgiven. Other measures can be taken to help those who are harmed by structural wealth inequality and had to take out loans for their educations. This would help them compete on a level playing field and help to build wealth following college rather than continuing with an ongoing financial struggle.

²⁰⁶ Automatic enrollment in 401k plans is one small step that can help. Employers could be encouraged to contribute to 401k plans as well.

²⁰⁷ Howard Gold, *Even 75% of Americans in the Best 401(k) Plans Won't Have Enough to Retire*, MARKETWATCH (Apr. 18, 2019, 6:23 PM), <https://www.marketwatch.com/story/even-75-of-americans-in-the-best-401k-plans-wont-have-enough-to-retire-2019-04-18> [<https://perma.cc/SNW4-TR3Z>].

²⁰⁸ This is a proposal that was put forth by Elizabeth Warren. Accountable Capitalism Act, S. 3348, 115th Cong. §§ 5(c)(5)(A), 6(b)(1) (2018); see also Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL STREET J. (Aug. 14, 2018, 7:01 PM), <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687> [<https://perma.cc/82VH-LW2T>].

Article advocates that we restore power to the Voting Rights Act, power that was removed in *Shelby County v. Holder*,²⁰⁹ and that we create a public financing system for elections. This will empower people at the political level so that their voices will be considered when elected officials make financial decisions.

A. Board Composition and Accountability

i. Eliminate the business judgment rule in matters of executive compensation

One step toward progressive capitalism would be to eliminate the business judgment rule on matters of executive compensation. The business judgment rule protects decisions made by boards of directors as long as they adhere to proper procedures and act in good faith.²¹⁰ This makes it very difficult to impose liability on corporate directors and, as a result, their substantive decisions are rarely challenged. As long as the directors seek expert advice and follow it, they are unlikely to face liability. When it comes to executive compensation, the only thing at issue is basic common sense, not some esoteric question, for example, of whether a particular board decision is legal under tax or fraud and abuse laws.²¹¹ As a society, we can take the equivalent of judicial notice to determine when a salary is unreasonably high. By eliminating the business judgment rule for executive compensation decisions, we can place the burden on the directors to justify those compensation decisions.

In fact, an executive compensation package that pays executives more than 50 times the average worker's salary could be considered presumptively unreasonable. Even this level of compensation sounds unreasonably high. But many corporate executives earn much more. "Americans, on average, think that corporate C.E.O.s are paid about 30 times as much as ordinary workers, which hasn't been true since the 1970s. These days the ratio is more like 300 to 1."²¹² This was not always the case, as Nobel Prize winning economist Paul Krugman²¹³ noted:

There was a time when asking who benefits from economic growth didn't seem urgent, because income was rising steadily for just about everyone. Since the 1970s, however, the link between overall growth and individual incomes seems to have been broken for many Americans. On one side, wages have stagnated for many; adjusted for inflation, the median male

²⁰⁹ *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (striking down § 4(b) of the Voting Rights Act, which required certain states to obtain preclearance from the federal government before changing their voting procedures, as an unconstitutional violation of states' power to regulate elections.).

²¹⁰ See *supra* text accompanying note 179.

²¹¹ Cf. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (holding that a corporation's directors are required to make good faith efforts to ensure that reporting systems exist, but that directors have significant discretion to determine the extent of such a system under the business judgment rule).

²¹² Paul Krugman, *Bernie Sanders and the Myth of the 1 Percent*, N.Y. TIMES (Apr. 18, 2019), <https://www.nytimes.com/2019/04/18/opinion/bernie-sanders-tax.html> [https://perma.cc/SSF7-25UZ]; Sherman, *supra* note 122 (noting that Roy Disney's granddaughter pointed out that Disney's CEO's compensation is "1,424 times the median pay of a Disney worker").

²¹³ Krugman, *supra* note 212; Krugman, *supra* note 166.

worker earns less now than he did in 1979. On the other side, some have seen their incomes grow much faster than the income of the nation as a whole. Thus C.E.O.s at the largest companies now make 270 times as much as the average worker, up from 27 times as much in 1980.²¹⁴

Corporate board members who sit on compensation committees should have to justify executive compensation packages without the protection of the business judgment rule. Yet, courts have routinely protected directors' executive pay decisions, relying on the business judgment rule.²¹⁵ Directors' fiduciary duty to the corporation should require both their independence and reasonable decision-making, not simply a *process* that makes the decision seem appropriately deliberative, as is often the inquiry under the business judgment rule. The business judgment rule should not be used as a tool to elevate form over substance.²¹⁶ As state-created and approved entities subject to state laws, corporations should be held accountable. States can change their interpretation of the business judgment rule when it comes to pay disparities, recognizing that it is not serving large segments of the community. States' police power arguably requires them to provide better oversight, not just over executive compensation, but also over the general welfare.²¹⁷

Limiting executive compensation will still permit corporate executives to enjoy substantial wealth. It would simply be a small measure to assist the larger corporate community. In some cases, it would mean that when the CEO gets a raise, the average worker would get one as well. It is hard to imagine, for example, that Jeff Bezos would suffer or become less creative if he shared some of his many billions of dollars of wealth with Amazon workers by raising average employee wages. He would simply share a larger portion of profits with workers who make amazon.com and, therefore, Bezos' success possible. Even CEOs have only 24 hours in a day. To suggest that their time is worth 300 times more than the average worker strains credulity.²¹⁸

In conjunction with holding corporate directors more accountable for executive compensation, there should be greater salary transparency. In order to know what the gap is between executive and average worker compensation, salary data must be kept

²¹⁴ Krugman, *supra* note 166.

²¹⁵ *Cf. Gaskins v. Nahmad*, No. 15-24707, 2017 WL1335166, at *5-6 (S.D. Fla. Jan. 19, 2017) (denying defendants' motion to dismiss an excessive compensation claim against board members, while finding that compensation decisions are protected by the business judgment rule); *In re Biglari Holdings, Inc. Shareholder Derivative Litig.*, 93 F. Supp. 3d 936, 954 (S.D. Ind. 2015) ("Deference to directors' business judgment is particularly broad in matters of executive compensation." (quoting *White v. Panic*, 793 A.2d 356, 369 (Del. Ch. 2000))).

²¹⁶ *See Sample v. Morgan*, 914 A.2d. 647, 650-53 (Del. Ch. 2007) (holding the business judgment rule not applicable where a newly formed committee approved a compensation package formulated by the CEO after a mere 20 minutes of deliberation). Compensation fairness should be based on the merits, not just on whether the board dotted its i's and crossed its t's.

²¹⁷ As noted above, states' police power to protect the public health, safety, and welfare has been broadly construed. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

²¹⁸ Moreover, the myth of trickle-down economics has been shown to be just that—a myth. Press Release, Oxfam International, *Inequality Trapping Hundreds of Millions in Extreme Poverty* (Sept. 20, 2015), <https://www.oxfam.org/en/pressroom/pressreleases/2015-09-21/inequality-trapping-hundreds-millions-extreme-poverty> [<https://perma.cc/F7KQ-UYKS>].

and disclosed. Salary transparency not only provides additional information overall, but can allow women and people of color, individuals whose salaries are routinely found to be a fraction of white men, to demand salary equity.²¹⁹ In addition to eliminating the business judgment rule on matters of executive compensation, there are some existing guidelines that can help narrow the gap between CEO and average worker pay. The SEC, for example, requires companies to report the pay ratio between CEOs and average workers, creating some level of transparency.²²⁰ In addition, the New York Stock Exchange requires a level of independence on the part of board members of corporations listed on the exchange.²²¹ While these are steps in the right direction, eliminating the business judgment rule for executive compensation decisions would be a substantial improvement in corporate governance.

ii. Workers Should Elect 40% of Board Members

Second, workers should be given a greater role in selecting corporate board members. Elizabeth Warren has proposed that workers elect 40% of the board members of large corporations.²²² As discussed above, large corporations enjoy outsized influence in America. But it is not the average worker employed by corporations who benefits from that outsized influence. Power lies with top executives and board members who make key decisions. If employees elected 40% of the board members, the board members, by necessity, would be more accountable to those employees. This will arguably give them a different insight into and concern for all corporate constituencies, leading to more widespread benefits. This will also make them better corporate citizens.

Giving employees greater input into board composition, and therefore making board members accountable to them, will also strengthen their ability to engage in collective bargaining. Union membership has declined significantly in recent

²¹⁹ Cf. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 650–51 (2007) (Ginsburg, J., dissenting) (describing the realities and hardships of gender-based pay disparities); Kirk Mitchell, *University of Denver Will Pay \$2.7 Million to Settle Unequal-Pay Lawsuit Brought by Female Law Professors*, DENV. POST (May 17, 2018, 3:18 PM), <https://www.denverpost.com/2018/05/17/university-of-denver-unequal-pay-lawsuit-settlement/> [<https://perma.cc/X7D4-EFTT>] (recognizing the importance of salary transparency for achieving salary equity, the settlement requires the University of Denver law school to make all professor salaries “available on an internal webpage”).

²²⁰ Press Release, U.S. Sec. & Exch. Comm’n, SEC Adopts Interpretive Guidance on Pay Ratio Rule (Sept. 21, 2017), <https://www.sec.gov/news/press-release/2017-172> [<https://perma.cc/XAQ5-4YAF>].

²²¹ N.Y. STOCK EXCH., INDEPENDENCE POLICY OF THE BOARD OF DIRECTORS OF NEW YORK STOCK EXCHANGE LLC (2019), https://www.nyse.com/publicdocs/nyse/regulation/nyse/Director_Independence_Policy_of_New_York_Stock_Exchange_LLC.pdf [<https://perma.cc/YV9V-3ZFE>]; see also DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR’S LAST BEST WEAPON* 5 (2018).

²²² We should “transform[] large American companies by letting their workers elect at least 40% of the company’s board members to give them a powerful voice in decisions about wages and outsourcing.” *What Elizabeth Will Do*, WARREN FOR PRESIDENT, <https://elizabethwarren.com/plans> [<https://perma.cc/6QRT-GFA7>].

decades.²²³ So has collective bargaining. But there is strength in numbers, and employees could engage in more effective advocacy by joining together.²²⁴ With board accountability to employees and unions, the board is more likely to treat workers fairly. Our cultural norm is to pit labor against corporate executives, despite the fact that they are all working for the benefit of the corporation. It is not just employees, but employers, who can benefit from employee organizing. Rather than viewing employees' use of collective bargaining as a threat, it can be viewed as a valuable form of communication. By working with union or other employee representatives, employers can do a better job of keeping its workforce content, leading to greater productivity and lower turnover rates, among other things.

The National Labor Relations Act (NLRA) gives employees a general right "to engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection."²²⁵ It also gives them a specific right to strike: "Nothing in this [act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."²²⁶

If and when communications break down between an employer and its employees, the right to strike can be a very effective tool, as can the right to boycott.²²⁷ Striking can demonstrate to employers the importance of employee concerns. It can be effective even when it is illegal, as was the case of the sanitation workers' New York City strike in 1968.²²⁸ Even a strike or walkout of limited

²²³ Dwyer Gunn, *What Caused the Decline of Unions in America?*, PAC. STANDARD (Apr. 24, 2018), <https://psmag.com/economics/what-caused-the-decline-of-unions-in-america> [<https://perma.cc/65JR-4NBK>]. One reason for the decline is globalization. *Id.* Corporations can seek the lowest paid, and least demanding, employees not just domestically, but internationally as well. *Id.* Nonetheless, in many other countries, unionization rates remain high as does collective bargaining, even in the absence of unions. *Id.*

²²⁴ Webber describes the typical strike as follows:

[T]he CEO would announce a steep pay cut for workers. The cut would be so sharp that it would be too demoralizing to return to work without a fight. . . . So the workers would strike. . . . The CEO would wait and wait, knowing exactly what the strike would cost his workers—more than it would cost him. That's how he would play it, by the numbers, by the math In time, the workers would vote to accept his offer and get back to work before things got even worse, to agree to some face-saving concessions and move on with their lives.

WEBBER, *supra* note 221, at 1–2.

²²⁵ National Labor Relations Act, 29 U.S.C. § 157 (2018).

²²⁶ *Id.* § 163; *see also id.* §§ 157–58 (setting forth unfair labor standards).

²²⁷ The National Labor Relations Board stated:

[I]t is lawful for a union to urge employees of a secondary supplier at the primary employer's plant not to cross a picket line there. Section 8(b)(4)(B) also does not proscribe union action to prevent an employer from contracting out work customarily performed by its employees, even though an incidental effect of such conduct might be to compel that employer to cease doing business with the subcontractor.

NAT'L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [<https://perma.cc/5TRQ-AC4M>].

²²⁸ *See supra* notes 190–92 and accompanying text. Many states prohibit public employees, like sanitation workers, from striking. *See, e.g.,* New York's Taylor Act, N.Y. CIV. SERV. LAW § 210 (McKinney 2019). Arguably, all public employees who provide vital services should also enjoy the right

duration can be quite effective.²²⁹ For example, in 2012, fast food workers began a series of walkouts in their “fight for \$15.”²³⁰ The walkouts highlighted the substandard wages earned by many fast food workers and created a national conversation about raising the minimum wage. Now, virtually every Democratic candidate for president embraces a \$15 (or higher) minimum wage. A fifteen-dollar minimum wage also enjoys widespread popularity throughout the country. All of these labor actions would be enhanced by board accountability to workers.

Boycotting is another powerful tool.²³¹ The NLRA permits employees to boycott, within limits, although secondary or sympathy boycotts are prohibited.²³² Consumers, of course, can also boycott.²³³ With conscious consumerism on the rise, many people will, with adequate information and organization, boycott companies to better protect the larger community. The key challenge to boycotting is effective organization because a single individual who chooses to boycott will have no impact.

Notwithstanding the concerted activity protection provided by the NLRA, state “right to work” laws can and have weakened union bargaining power. Right to work laws prohibit employers from mandating union membership or requiring employees

to strike. In fact, in the most recent government shutdown, it was only when air traffic controllers stayed home that the government was pressured to reopen. Ellie Kaufman & Rene Marsh, *The Government Shutdown Ended After Only 10 Air Traffic Controllers Stayed Home*, CNN (Feb. 6, 2019, 5:56 PM), <https://www.cnn.com/2019/02/06/politics/ten-air-traffic-controllers-shutdown/index.html> [<https://perma.cc/62PS-8LSZ>]. This kind of employee power should be encouraged, not only because workers deserve better treatment, but also because the outcome is often positive.

²²⁹ Workers’ contribution to the overall economy is sometimes brought starkly to corporate executive minds. For example, a strike by Safeway workers in 2003 following the company’s announced benefit cuts and proposed wage freeze did not progress as the corporate executives anticipated. WEBBER, *supra* note 221, at 2–3. Instead, a group of “labor and labor-affiliated shareholders and their allies” sided with the strikers. *Id.* at 7. These groups included retirement systems that controlled trillions of dollars. *Id.* at 7–8.

²³⁰ *About Us*, FIGHT FOR \$15, <https://fightfor15.org/about-us/> [<https://perma.cc/5E86-B4CN>]; Steven Ashby, *In Defense of the Stunning Fight for Fifteen Movement*, WORK IN PROGRESS (June 6, 2018), <http://www.wipsociology.org/2018/06/06/in-defense-of-the-stunning-fight-for-fifteen-movement/> [<https://perma.cc/4MF5-H329>] (“The Fight for Fifteen movement . . . [was] one of the most vital, innovative, and militant struggles in recent US labor history. *As one Fight for Fifteen organizer put it, now many young workers* ‘are looking at the union movement, not as something that’s stodgy, old, and past its prime . . . Fight for Fifteen is making the union movement cool again.’”).

²³¹ See Christina Goldbaum, *The New York Post Inspires Boycott with 9/11 Photo and Ilhan Omar Quote*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/nyregion/new-york-post-boycott.html> [<https://perma.cc/4PZQ-K7FA>].

²³² See National Labor Relations Act, 29 U.S.C. § 158(b)(4) (2018); Int’l Longshoremen’s Ass’n, AFL-CIO v. Allied Int’l, Inc., 456 U.S. 212, 218, 221–22 (1982) (holding that the refusal by union members to unload cargo shipped from the Soviet Union, as a manner of protesting invasion of Afghanistan, constituted a violation of the secondary boycott provisions of the NLRA).

²³³ See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982) (finding no legal basis to impose liability on non-violent boycotts by civil rights organizations); see also Citizens United v. FEC, 558 U.S. 310, 372 (2010) (recognizing a First Amendment right to spend money as one sees fit). The global and controversial Boycott, Divestment and Sanctions (BDS) movement has been subject to legal challenges. See, e.g., Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1050–51 (D. Ariz. 2018); Koontz v. Watson, 283 F. Supp. 3d 1007, 1012, 1021–22, 1024 (D. Kan. 2018) (granting a preliminary injunction to a public school teacher challenging a Kansas law requiring all persons who entered into a contract with the state of Kansas to certify that they were not engaged in a boycott of Israel and finding a probable First Amendment violation).

to pay union dues.²³⁴ In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the United States Supreme Court weakened the power of public sector unions by holding that public employees who choose not to join the union do not have to pay fair-share fees even though they benefit from the union's collective bargaining on their behalf.²³⁵ In essence, *Janus* expanded right to work laws to public sector employees.

Rethinking corporate board composition and accountability by having employees elect a significant portion of the board will make corporate board members give greater regard to employees. Given the level of income inequality, this fundamental rethinking of corporate governance is long overdue. We are all one,²³⁶ and we should strive toward universal well-being, whether in the area of health or wealth.

B. Reinforce Democracy

Vast income and wealth inequality impacts more than how much money people have in their pockets. It impacts democracy itself.²³⁷ In order to fully stabilize our democracy, the United States Supreme Court should overrule both *Shelby County v. Holder*²³⁸ and *Citizens United v. Federal Election Commission*.²³⁹ It should also end gerrymandering and require independent bi-partisan commissions to draw electoral districts.²⁴⁰ Instead, the Supreme Court has held that “partisan gerrymandering [] present[s] political questions beyond the reach of federal courts,” thus allowing the practice to continue.²⁴¹

In *Shelby County v. Holder*, the Supreme Court gutted Section 5 of the Voting Rights Act, the provision that required certain jurisdictions with a history of voting discrimination from changing voting rules without pre-clearance from the Justice Department.²⁴² The Court found that “the coverage formula in Section 4(b) of the Voting Rights Act—which determines which jurisdictions are covered by Section 5—is unconstitutional because it is based on an old formula.”²⁴³ “As a practical matter this means that Section 5 is inoperable until Congress enacts a new coverage formula, which the decision invited Congress to do.”²⁴⁴ In the immediate aftermath of *Shelby County*, a number of states that were previously subject to pre-clearance

²³⁴ Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 104, 136 (2005).

²³⁵ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478, 2486 (2018).

²³⁶ CAROLINE MYSS, ANATOMY OF THE SPIRIT: THE SEVEN STAGES OF POWER AND HEALING 104–05 (1996).

²³⁷ See *supra* text accompanying notes 168–54.

²³⁸ 570 U.S. 529 (2013).

²³⁹ 558 U.S. 310 (2010).

²⁴⁰ Former Attorney General Eric Holder, in an effort to end gerrymandering, has taken up the cause of redistricting. *About the NDRC*, NAT’L DEMOCRATIC REDISTRICTING COMMITTEE, <https://democraticredistricting.com/about/> [<https://perma.cc/DF8M-WZTE>].

²⁴¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

²⁴² See *Shelby County*, 570 U.S. at 552, 555–57. The Voting Rights Act of 1965 was enacted specifically to counter the many efforts to disenfranchise African American voters.

²⁴³ *Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 4, 2018), <https://www.brennancenter.org/legal-work/shelby-county-v-holder> [<https://perma.cc/2FGE-84ML>].

²⁴⁴ *Id.*

requirements began to restrict voting rights.²⁴⁵ For example, voter ID requirements were broadened,²⁴⁶ some voting locations were closed, and in North Carolina, a court found that the legislature’s voter suppression efforts targeted African-American voters with “almost surgical precision.”²⁴⁷ None of these measures could have been taken had the pre-clearance provision been in place. It is unclear whether the Supreme Court was simply naïve, or unconcerned with voting rights when it decided *Shelby County*. At any rate, Congress can and should act by updating the formulas used to determine which jurisdictions will remain subject to pre-clearance requirements, thereby restoring full strength to the Voting Rights Act.

In *Citizens United*, the Supreme Court held that political campaign donations were a form of free speech that could not be limited as they had been previously.²⁴⁸ As the Court acknowledged at the outset of its opinion:

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*. . . . [and] *Austin v. Michigan Chamber of Commerce*. *Austin* had held that political speech may be banned based on the speaker’s corporate identity.²⁴⁹

Despite this longstanding precedent, the *Citizens United* Court determined that corporations and unions had a free speech right to spend unlimited resources on political campaigns.²⁵⁰ As a result, political campaigns now cost billions of dollars, with politicians beholden to large donors to a greater extent than ever.²⁵¹ The 2016 presidential and congressional elections, for example, reportedly cost a total of 6.5

²⁴⁵ *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/V2BX-HE75>].

²⁴⁶ See *Veasey v. Abbott*, 830 F.3d 216, 264–65 (5th Cir. 2016) (striking down a Texas voter ID law for being racially discriminatory). These laws must now be challenged only after they are put in place, under Section 2 of the Voting Rights Act, because pre-clearance review is unavailable under *Shelby County*.

²⁴⁷ North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

²⁴⁸ Daniel I. Weiner, *Citizens United Five Years Later*, BRENNAN CTR. FOR JUST. (Jan. 15, 2015), <https://www.brennancenter.org/publication/citizens-united-five-years-later> [<https://perma.cc/Q9LL-J7LU>] (“[T]he Supreme Court upended a century of precedent to declare that corporations (and, by extension, labor unions) have a First Amendment right to spend unlimited money on elections.”). The Brennan Center’s five-year review of *Citizens United* concluded that wealthy individuals, more than corporations or unions, have most exerted their money for political influence. See *id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010).

²⁴⁹ *Citizens United*, 558 U.S. at 318–19 (citations omitted).

²⁵⁰ See *id.* at 356.

²⁵¹ There is now a counter movement in which some politicians, like Bernie Sanders and Elizabeth Warren, endeavor to raise money primarily from small donors. Ella Nilsen, *Warren and Sanders Raised Significantly More Money than Biden in the Third Quarter*, VOX (Oct. 4, 2019, 2:10 PM), <https://www.vox.com/policy-and-politics/2019/10/4/20898742/warren-sanders-biden-third-quarter-fundraising> [<https://perma.cc/E634-4XRH>].

billion dollars.²⁵² It is nearly impossible for an ordinary low or middle income earner to have an impact when the wealthy can speak so much more forcefully with substantial contributions. As a result, many citizens see our system of democracy as being inherently unfair.

The Supreme Court should revisit *Shelby County*, *Citizens United*, and *Rucho* and overrule them all. Absent that, Congress can and should update the Voting Rights Act in compliance with *Shelby County* so that Section 5 pre-clearance will once again be effective. And *Citizens United*'s anti-democratic impact should either bring about a constitutional amendment reversing it, or the Supreme Court should overrule the decision itself. Also important to a fully functioning democracy is the recognition that gerrymandering, which effectively lets some elected officials pick their voters rather than the other way around, is inherently undemocratic. Enhancing voting rights and limiting money in campaigns will permit ordinary citizens to have a more effective voice in our democracy.²⁵³ And true change often requires bottom up activism rather than top down dictates. We are beginning to see the results of bottom up activism with calls for Medicare for all or some other form of universal health coverage, something that can enhance both public health and public wealth,²⁵⁴ but that activism is still confronting big money in politics. Public campaign financing would help level the playing field.

CONCLUSION

Health care is unique. It is a necessity that everyone should have access to—a human right that should not be treated as just another commodity.²⁵⁵ Public health law recognizes the importance of protecting everyone's health because what impacts one can, before long, impact many.²⁵⁶ Financial well-being, arguably is less urgent. To be sure, economic

²⁵² Christopher Ingraham, *Somebody Just Put a Price Tag on the 2016 Election. It's a Doozy.*, WASH. POST (Apr. 14, 2017, 12:19 PM), https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?utm_term=.19bb9d8a472b [<https://perma.cc/MD6T-AXZ5>].

²⁵³ The For the People Act, passed by the House of Representatives but not taken up in the Senate, addresses voting, campaign finance, and ethic reform. Miles Parks, *House Passes Extensive Election and Campaign Finance Overhaul Bill*, NPR (Mar. 8, 2019, 11:32 AM), <https://www.npr.org/2019/03/08/701455283/house-passes-extensive-election-and-campaign-finance-overhaul-bill> [<https://perma.cc/477W-4YMS>]. It would, for example, promote internet voter registration, increase access to the polls, and require independent redistricting commissions to eliminate gerrymandering. See H.R. 1, 116th Cong. (2019). It would also restrict purging of voter rolls and put in place campaign finance limits. See *id.*

²⁵⁴ Health-related costs are one of the prime drivers of individuals filing for bankruptcy. Lorie Konish, *This is the Real Reason Most Americans File for Bankruptcy*, CNBC (Feb. 11, 2019, 2:20 PM), <https://www.cnbc.com/2019/02/11/this-is-the-real-reason-most-americans-file-for-bankruptcy.html> [<https://perma.cc/6WEK-X2MK>]. Affordable health care, ideally, will eliminate the need to file for bankruptcy. At the same time, the administrative costs associated with Medicare are far lower than they are in the private, for profit health care sector. Therefore, moving more people onto Medicare or some other public option can reduce overall health care costs, which, as of the end of 2018, accounted for 3.6 trillion dollars and 17.7% of the United States economy. *National Health Expenditure Data: Historical*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical> [<https://perma.cc/YQQ5-PBX9>].

²⁵⁵ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Art. 25) (Dec. 10, 1948).

²⁵⁶ See Polly J. Price, *If Tuberculosis Spreads . . .*, N.Y. TIMES (July 8, 2014), http://www.nytimes.com/2014/07/09/opinion/if-tuberculosis-spreads.html?module=Search&mabReward=refbias%3Ar%2C%7B%221%22%3A%22RI%3A10%22%7D&_f=0

interdependence is not as stark as the interdependence we share when infectious diseases run rampant. The wealthy will not suddenly lose their fortunes because of economic inequality. Instead, the deterioration of our society will take place more gradually, just as climate change has happened relatively gradually.²⁵⁷ Yet laws related to the economy and financial well-being do not simply reflect private matters in which individuals are left to fend for themselves.

There are at least two reasons for applying a more community minded, public health approach to the economy. First, just as we are interdependent when it comes to public health, we are also interdependent when it comes to financial health. It is not true that the poor have no impact on the well-being of the wealthy. If the bulk of the population is poor or barely making ends meet, they cannot create demand for goods and services produced by those with greater wealth. More importantly, it is morally the right thing to do and the law, as a tool of justice, must take into account public wealth as well as public health. If we constantly permit corporate America and the wealthy to take more and more for itself at the expense of a large portion of the population, we will fail to have the kind of freedom upon which this nation was theoretically built.²⁵⁸ It is critical that we address income and wealth inequities if we are to create a more just America:

America arrived at this sorry state of affairs because we forgot that the true source of the wealth of a nation is the creativity and innovation of its people. One can get rich either by adding to the nation's economic pie or by grabbing a larger share of the pie by exploiting others—abusing, for instance, market power or informational advantages. We confused the hard work of wealth creation with wealth-grabbing²⁵⁹

The recommendations set forth above, eliminating the business judgment rule in matters of executive compensation, allowing employees to elect 40 percent of corporate board members, and strengthening democracy undoubtedly will improve the public's wealth.

[<https://perma.cc/4QJT-HUVG>] (“[T]uberculosis’s greatest lesson is that the health problems of poor people in poor areas are everyone’s problem. . . . [D]rug-resistant tuberculosis will not obey political or economic boundaries.”).

²⁵⁷ See *National Climate Assessment: Overview*, GLOBALCHANGE.GOV, <http://nca2014.globalchange.gov/highlights/overview/overview> [<https://perma.cc/T3VC-PNVZ>] (“Climate change, once considered an issue for a distant future, has moved firmly into the present.”). There is evidence that climate change has actually been more rapid and severe than most scientists had predicted. Naomi Oreskes, *Playing Dumb on Climate Change*, N.Y. TIMES (Jan. 3, 2015), <http://www.nytimes.com/2015/01/04/opinion/sunday/playing-dumb-on-climate-change.html> [<https://perma.cc/B9EB-URTZ>] (suggesting that “climate change is happening faster than scientists predicted”).

²⁵⁸ See generally Nikole Hannah-Jones, *Our Democracy’s Founding Ideals were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>

[<https://perma.cc/6WCX-6AR5>] (“Our founding ideals of liberty and equality were false when they were written. Black Americans fought to make them true. Without the idealistic, strenuous and patriotic efforts of black Americans, our democracy today would most likely look very different—it might not be a democracy at all.”).

²⁵⁹ Stiglitz, *supra* note 22.

