

WORKING AT THE SPEED OF PROFIT: MEATPACKING WORKERS AND THE CENTURY-OLD PROBLEM OF LINE SPEED

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ABSTRACT

For over a century, worker concerns over the dangers of line speed have been well documented. Despite this, line speed—the rate at which workers are expected to perform discrete tasks along a meat processing line—is set at the federal level without any consideration of the impact on workers. The result is a persistent history of oppressive working conditions that have only worsened as processing technology has improved and as industry has pushed the federal government to authorize faster speeds. In the plants, workers suffer from frequent and, often, debilitating injury—amputations, concussions, and life-altering exposure to chemical substances—to keep pace with the demands of fast work speeds. The long-standing lack of support in law for the objectives of labor unions also hinders workers’ ability to organize in support of slower line speeds. In this environment, the clear regulatory mismatch guts any effort by workers to have a voice in the line speed determination process.

In this Article, I seek to draw attention to the ways in which workers’ lives are devalued by their exclusion from the setting of line speeds. In response, I propose technical and regulatory interventions—the most obvious being to give the Federal Occupational Safety and Health Administration direct power to regulate line speed. Additionally, I discuss what a humane work environment in the meatpacking sector might look like and the conditions of the industry that must change to make such a vision possible.

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INTRODUCTION

Vernon, California is a small city in Los Angeles County, California with a population of 222 people.¹ In contrast to the small permanent population, Vernon hosts “more than 1,800 businesses that employ approximately 50,000 people” within its boundaries of just 5.2 square miles.² Until 2023, one of those businesses was the Smithfield Foods pork processing facility, which produced bacon, sausage, hot dogs, hams, and other pork products.³ Famous for producing the “Dodger Dogs” for Los Angeles Dodgers games, the Smithfield plant was active in Vernon from 1931-2023.⁴

Nearly one hundred years into its tenure as a California meat processing facility, the Smithfield Vernon plant operated pursuant to a century-old tradition of the meat industry: running line speeds at rates sufficient to maximize profits, absent worker concerns.⁵ The Vernon Smithfield plant was an early-adopter of federal regulatory programs permitting line speeds to move faster than the majority of other plants throughout the U.S. The plant participated in a pilot program run by the United States Department of Agriculture (USDA), which permitted line speeds to operate faster than statutorily-defined maximums.⁶ Following the federal government’s approval of a new program implementing features of that pilot, the Vernon plant quickly converted to the new scheme—permitting it to operate lines with *no* upper limit, in spite of documented harms associated with a faster working pace.⁷

The plant employed roughly 1,800 workers, greater than 80% of whom were Latinx, many of whom were immigrant and first-generation, and most of whom

1. *Vernon City, California (2020 Decennial Census)*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Vernon_city,_California?g=160XX00US0682422 [<https://perma.cc/J69L-JTNZ>] (last visited Mar. 26, 2024).

2. *About Vernon*, CITY OF VERNON, CAL., <https://www.cityofvernon.org/about/about-vernon> [<https://perma.cc/7HWF-D6Q2>] (last visited Sep. 3, 2023).

3. *Operations*, SMITHFIELD FOODS, <https://www.smithfieldfoods.com/about-us/Operations> [<https://perma.cc/VF7E-DVZ9>] (last visited Sep. 3, 2023); *Our Brands*, SMITHFIELD FOODS, <https://www.smithfieldfoods.com/Our-Brands> [<https://perma.cc/LLM9-SXRM>] (last visited Nov. 16, 2023).

4. Kurtis Lee, *Why an Iconic California Meatpacking Plant Is Closing*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/us/smithfield-foods-meatpacking-plant-closing.html> [<https://perma.cc/PX6B-92WG>].

5. *See infra* Part II.

6. *List of HIMP Participating Plants*, FOOD & SAFETY INSPECTION SERV. (Mar. 23, 2020), <https://www.fsis.usda.gov/inspection/compliance-guidance/haacp/haccp-based-inspection-models-project/list-himp-participating> [<https://perma.cc/2C2L-UZ55>].

7. *See infra* Part I.C.

were over the age of fifty.⁸ In 2019, the employment count at the Smithfield plant included 1,200 unionized workers represented by the United Food and Commercial Workers (UFCW) Local 770 Union.⁹ Workers were employed directly by Smithfield or through the staffing agency CitiStaff Solutions.¹⁰

Health and safety issues had long been a concern for workers at the Vernon plant. José Guzman, a worker at the Smithfield plant, stated in a UFCW press release that “[Smithfield has] never taken our health seriously – we are disposable to them as long as their profits keep going up.”¹¹ It did not come as a surprise to workers, then, when Smithfield failed to protect them from the worst impacts of the COVID-19 pandemic. In “one of the worst outbreaks in Los Angeles County,” 135 workers at the Vernon plant had contracted COVID-19 by May 2020.¹² Between March and November 2020 more than 315 workers at the Vernon plant tested positive for COVID-19, three of whom were hospitalized for their symptoms.¹³ Workers like José refused to fall victim to the virus while Smithfield stood by comfortably making profits from their work,¹⁴ and instead called for an investigation by the California Division of Occupational Safety and Health (Cal/OSHA).¹⁵

Following the Cal/OSHA investigation, the agency issued over \$100,000 in fines to Smithfield and CitiStaff Solutions, finding, among other issues, that “Smithfield did not allow employees to physically distance . . . Smithfield did not provide training or instruction to employees and contract employees on methods to reduce the spread of the virus . . . Smithfield did not properly investigate or

8. Kurtis Lee, *Who’s to Blame for a Factory Shutdown: A Company, or California?*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/business/economy/smithfield-california-factory.html> [<https://perma.cc/UPT7-T52E>]. Nationally, meatpacking workers are 34.9% Latinx and 21.9% Black, as compared to 16.8% and 11.3% of all U.S. workers, respectively. Angela Stuesse & Nathan T. Dollar, *Who Are America’s Meat and Poultry Workers?*, ECON. POL’Y INST. (Sept. 24, 2020), <https://www.epi.org/blog/meat-and-poultry-worker-demographics/> [<https://perma.cc/UD3M-5XZ2>]. Roughly 70% of foreign-born workers in the industry are noncitizens, and the median income is \$30,485. *Id.*

9. *Organizing Is “InStyle” With Local 770 Member*, UNITED FOOD & COM. WORKERS: BLOG (Sept. 8, 2020), <https://www.ufcw.org/rina/> [<https://perma.cc/NX39-AM6C>].

10. See Tom Polansek, *Smithfield Foods, Subcontractor Fined \$100,000 for COVID-19 Violations in California*, REUTERS (Nov. 16, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-smithfield-foo-idUKKBN27W2XJ> [<https://perma.cc/MYW3-JZPD>].

11. Press Release, United Food & Com. Workers, COVID-19 Health and Safety Citations Issued at Smithfield-Owned Southern California Meatpacking Plant, Largest Packinghouse Citations Nationwide (Nov. 16, 2020), <https://ufcw770.org/farmer-john-11-16-2020/> [<https://perma.cc/6JES-VJRZ>].

12. *Id.*

13. *Id.*

14. WH GRP. LTD., ANNUAL REPORT 4, 6 (2020), https://media-whgroup.todayir.com/2021042217160130859728853_en.pdf [<https://perma.cc/GW3V-LEZK>]. Smithfield is a wholly owned subsidiary of WH Group Limited, the largest pork company in the world. *Id.*; *About Us*, WH GRP. LTD., <http://www.wh-group.com/html/about.php> [<https://perma.cc/MNB3-3QWT>] (last visited Oct. 13, 2023).

15. Press Release, United Food & Com. Workers, *supra* note 11.

notify employees of COVID exposure . . . [and] Smithfield did not notify Cal/OSHA of three separate hospitalizations of employees due to COVID.”¹⁶ While the fines still pale in comparison to profits earned by Smithfield’s parent company, over \$1.7 billion in 2020,¹⁷ the California fines were still far greater than fines of \$13,494 imposed by the federal OSHA following 1,294 positive cases and 4 deaths at a South Dakota Smithfield plant around the same time.¹⁸

The workers and the union thus secured one of the largest fines against a meatpacking employer during the course of the pandemic, a victory that should have put the wind at workers’ backs when entering into new negotiations for their union bargaining agreement set to begin in late 2022. Instead, rumors began to circulate in June of 2022 that Smithfield would close its Vernon plant.¹⁹ By August, the rumors were confirmed.²⁰ Smithfield cited a common refrain, stating it had to leave California because the costs of doing business had simply become too high, although representatives of the state refute that claim.²¹ In the plant, workers have reasonably expressed frustration at the closure, even to the point of feeling betrayed by Smithfield after working so hard to keep up with work demands throughout the COVID-19 pandemic, putting their own and their families’ lives at risk.²²

The story of the Smithfield plant in Vernon illustrates the problems of meatpacking work this Article discusses. First, the meatpacking workers in Vernon work in a geographic location highly favorable to industry, a condition in part necessitated by the community’s desire to increase economic development and job opportunities.²³ This arrangement tracks a long-term influence of manufacturing employers that curry favor from geographic jurisdictions with the promise of jobs and economic stability, to the detriment of workers.²⁴

Second, Vernon workers have been subjected to oppressive work speeds set at the federal level by a regulatory structure entirely devoid of worker safety considerations. These regulations are part of a USDA program outside of the purview of state or federal OSHA agencies whose mission is to keep workers safe.²⁵ To

16. *Id.*

17. WH GRP. LTD., ANNUAL REPORT, *supra* note 14, at 4.

18. Polansek, *supra* note 10; Press Release, United Food & Com. Workers, *supra* note 11.

19. Lee, *supra* note 8.

20. *Id.*

21. *Id.*

22. *See id.*

23. *See generally Incentives for New and Existing Businesses*, CITY OF VERNON, CAL., <https://www.cityofvernon.org/doing-business/incentives-for-new-and-existing-businesses> [<https://perma.cc/SHE2-BVHF>] (last visited Oct. 27, 2023); *Doing Business, Discover Vernon*, CITY OF VERNON, CAL., <https://www.cityofvernon.org/doing-business/reimagine-vernon> [<https://perma.cc/UAL4-DMHH>] (last visited Oct. 13, 2023); *Industries*, VERNON CHAMBER OF COMM., <https://www.vernonchamber.org/about-vernon/industries/> [<https://perma.cc/E2Y3-C48K>] (last visited Jan. 28, 2024).

24. *See infra* Part II.B.

25. *See infra* Part II.A.

date, no organized campaign has succeeded in getting a meatpacking plant to run lines at a rate slower than the maximums permitted by law out of concern for worker safety.

Third, the workers are primarily low-income, immigrants, and people of color, whose respective statuses—in the eyes of their employers—make them easy targets for work intensification.²⁶ In combination with the conditions of meatpacking work—low-wage, “unskilled,” and dangerous—this provides the perfect constellation of circumstances for rampant worker exploitation. As discussed below, one exploitative tactic is the continued effort to speed up processing lines—whatever the cost.²⁷

Finally, despite organizing power evidenced by the COVID-19-related OSHA citations, workers like those in Vernon ultimately fall victim to the whims of industry, which may threaten to or actually close work sites without concern for the impact on the workforce. In the case of the Vernon plant closure, Smithfield’s 1,800 employees, many of whom have worked for the plant for a number of years, suddenly found themselves re-entering the job market competing for fewer and fewer available opportunities.²⁸

This Article proceeds as follows: Part I details the physical conditions of the working environment in meatpacking facilities, including the harms workers face due to faster line speeds.²⁹ Part II describes conditions of the meatpacking industry that lead to worker exploitation and explores the limited mechanisms available to workers seeking to advocate for reduced line speeds. Finally, Part III outlines recommendations to combat worker exploitation, including regulatory reform and bolstering broader conceptions of worker power through the law.

I.

ANIMAL PROCESSING AND KEEPING UP THE PACE

Meatpacking is a dangerous profession.³⁰ Injuries due to repetitive motion, typical of a packaging or processing job, are rampant and are a recognized aspect

26. See Johanna Bunner, Roman Prem, & Christian Korunka, *How Work Intensification Relates to Organization-Level Safety Performance: The Mediating Roles of Safety Climate, Safety Motivation, and Safety Knowledge*, 9 FRONTIERS PSYCHOLOGY 1, 2 (2018) (“Work intensification refers to the increasing amount of effort an employee must invest during the working day that oftentimes results from increased economic pressure and other societal changes.”).

27. See *id.*

28. See *infra* Part II.B.

29. This Article refers throughout to the meatpacking industry as a whole. Broader trends discussed herein, for example in relation to union power and increasing line speeds generally, describe activity in all sectors of the meatpacking industry. However, examples given in relation to work, regulations, and market consolidation are specific to pork processing of the type carried out by the Smithfield plant in Vernon, California.

30. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-337, WORKPLACE HEALTH AND SAFETY: ADDITIONAL DATA NEEDED TO ADDRESS CONTINUED HAZARDS IN THE MEAT AND POULTRY INDUSTRY 13 (2016) [hereinafter GAO 2016 REPORT].

of daily life on a meatpacking line.³¹ Worse, workers on killing or butchering lines work both with sharp knives and in close proximity to one another, exacerbating injury risks.³² Industry keeps assembly lines moving fast, generating greater outputs, hoping to increase profits.³³ Additionally, as detailed in a recent article by Professor Sherley Cruz, racialized narratives “based on stereotyped beliefs about strong work ethics and the ability to adapt to harsh working conditions,”³⁴ combined with the prevalence of Black, Brown, and immigrant workers in the meatpacking sector³⁵ allow industry to lean into exploitative conditions. In part, these narratives regarding the ability of people of color to “endure labor-intensive work,” such as quickly moving meatpacking lines, conceal harms to communities of color.³⁶

This Part describes work on a meatpacking plant line, including injuries meatpacking workers have come to expect as part of the job, and the enhanced risk of injury workers face as a result of increasing line speeds. Finally, this Part summarizes trends toward speeding up processing lines in order to increase a plant’s production output, to the detriment of worker health.

A. Work on the Disassembly Line

Work in meat and poultry plants flows stepwise from initial slaughter to the processing of finished meat products.³⁷ Workers typically carry out one discrete task along the line.³⁸ First, workers bring animals to a “kill floor” area, where the

31. *Id.* at 22; see also *Meatpacking: Overview*, U.S. DEP’T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/meatpacking> [<https://perma.cc/FSP5-F2GR>] (last visited Oct. 28, 2023).

32. GAO 2016 REPORT, *supra* note 30, at 26–27.

33. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-775, *FOOD SAFETY: MORE DISCLOSURE AND DATA NEEDED TO CLARIFY IMPACT OF CHANGES TO POULTRY AND HOG INSPECTIONS* 19, 24 (2013) [hereinafter GAO 2013 REPORT]; see also Lynn Petrak, *Poultry Processing Tech: The Importance of Speed*, FOOD BUS. NEWS (Feb. 17, 2019), <https://www.foodbusinessnews.net/articles/13279-poultry-processing-tech-the-importance-of-speed> [<https://perma.cc/RW4V-5R75>].

34. Sherley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 663 (2022).

35. Haley Brown, Shawn Fremstad, & Hye Jin Rho, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL’Y RSCH. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-divers-group-who-need-better-protections/> [<https://perma.cc/RXM5-QPQW>] (“People of color, immigrants, and people in relatively low-income families are disproportionately employed in meatpacking plants. Almost one-half (44.4 percent) of meatpacking workers are Hispanic, and one-quarter (25.2 percent) are Black.”).

36. See Cruz, *supra* note 34, at 664 (citing Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt, & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. U.S.A. 4296, 4297 (2016)).

37. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-12, *WORKPLACE SAFETY AND HEALTH: BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT WORKERS AT MEAT AND POULTRY PLANTS* 5–6 (2017) [hereinafter GAO 2017 REPORT].

38. See WILLIAM G. WHITTAKER, CONG. RSCH. SERV., RL33002, *LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW* 7 (2006).

animals are rendered unconscious and slaughtered.³⁹ At this point in the process, workers might be responsible for hoisting animals up onto shackles, administering the facility's chosen stunning method, or slaughtering the animal.⁴⁰ The next steps include beheading, evisceration, and ultimately chilling the animal product, often after a first inspection by the Food and Safety Inspection Service (FSIS), a branch of the USDA.⁴¹ Workers often stand shoulder to shoulder to perform their tasks,⁴² which require the use of sharp knives, saws, and other tools.⁴³

Next, workers cut and debone animal product, as necessary, to prepare it for transportation to grocery stores, again with the use of sharp knives and instruments.⁴⁴ Finally, workers on various packing and processing lines cut each portion of the meat product into its final form and package it for shipment.⁴⁵ This work, too, includes repetitive motion, and workers argue the pace of the work at earlier stages of the process directly affects later packing roles.⁴⁶

B. Line Speed-Induced Injury and Harm

Worker concerns about the quick pace of work in meatpacking facilities date back to at least the early 1900s.⁴⁷ In 1904, John Commons wrote that line speed was the chief concern leading to union organization: “[F]or the first act of the union was not directed towards wages or hours, but towards a reduction of the output.”⁴⁸ The trend continues today. According to a 2013 U.S. Government Accountability Office (GAO) Report, “representatives of 7 stakeholder groups stated that faster line speed creates food safety and worker safety concerns.”⁴⁹ However, in large part due to conditions described in later sections of this Article, workers and unions have thus far been unable to get packing facilities to slow down the

39. GAO 2017 REPORT, *supra* note 37, at 5.

40. *Id.*

41. *Id.*

42. Cruz, *supra* note 34, at 682.

43. *Id.*

44. *Id.* at 5–6.

45. *Id.*

46. See Order, United Food & Com. Workers Union, Local No. 663 v. U.S. Dep't of Agric., 532 F. Supp. 3d 741 (D. Minn. 2021) (19-cv-02660-JNE-TNL), ECF No. 125 [hereinafter D. Minn. Order on Summary Judgment]. In a recent case, a Seaboard Foods packing facility in Oklahoma was cited and required by OSHA to restructure part of the packing workspace as workers were suffering from a high degree of repetitive motion injuries. Seaboard had assigned workers to “repeatedly lift 50-to-90-pound boxes onto conveyor belts, exposing them to possible shoulder and lower back disorders.” Madison McVan, *In Rare Case, a Large Meatpacking Plant Is Being Forced to Address Workers' Repetitive Motion Injuries*, INVESTIGATE MIDWEST (May 19, 2022), <https://investigatamidwest.org/2022/05/19/in-rare-case-a-large-meatpacking-plant-is-being-forced-to-address-workers-repetitive-motion-injuries/> [https://perma.cc/UST9-4ZS7].

47. WHITTAKER, *supra* note 38, at 47.

48. John R. Commons, *Labor Conditions in Meat Packing and the Recent Strike*, 19 Q. J. ECON. 1, 7 (1904).

49. GAO 2013 REPORT, *supra* note 33, at 19.

lines. Even in the midst of a global pandemic, industry was resistant to slowing speeds to permit fewer workers on lines, which would have allowed for social distancing.⁵⁰ This Section details the injuries and harms workers face as a result of ever-quickening work pace, demonstrating why it is particularly unconscionable that line speeds have failed to account for worker concerns for over a century.

As a part of litigation in Minnesota over the USDA's most recent attempt to speed up the pace of work in meatpacking facilities,⁵¹ the court gathered significant testimony from workers concerning the impact of line speed on their work.⁵² One such worker, whose job required him to "maneuver and lift hog carcasses that weigh approximately 400 pounds," said that "hog carcasses will sometimes fall from the hooks, injuring workers," a risk that "increases as they work at higher speeds."⁵³ Another worker in the same department shared that he has accidentally hooked himself because of the quick working pace and has "had hogs fall on him" and "seen workers injured by falling hogs."⁵⁴

At workstations where workers use knives, the dangers take another form but are no less severe. A worker on the kill floor in a meatpacking facility, where she is required to make specific incisions as hogs pass in front of her, testified that when workers get behind because the line is moving too quickly "they must scoot over to reach hogs that have already passed their area, making it more likely they will collide with and possibly cut other workers."⁵⁵ Another worker on a trimming station cutting pork loins stated that as a result of faster line speed he experiences pain. He further commented on his experience: "I see that workers' hands [are] so mangled I cannot imagine they could even write a check."⁵⁶

Unfortunately, data confirm the high degree of injuries in the meatpacking sector reported by these workers. One investigation found "[a]mputations, fractured fingers, second-degree burns and head trauma" are suffered on a weekly basis by workers in the meatpacking industry.⁵⁷ The nature of potential injury varies, including: concussions and cuts to the head; chemical burns to the eyes; hearing loss; musculoskeletal disorders; respiratory irritation or asphyxiation from chemical, pathogen, or gas exposure; bruises, fractures, and cuts to the extremities;

50. See Press Release, United Food & Com. Workers, As COVID-19 Threatens America's Food Supply Chain, UFCW Calls on Congress to Prioritize Safety by Slowing Production Speeds in Meatpacking Plants (Sept. 7, 2020), <https://www.ufcw.org/press-releases/packingsafety/> [<https://perma.cc/UG9A-3LRB>]; D. Minn. Order on Summary Judgment, *supra* note 46, at 16.

51. See *infra* Part I.C.

52. See D. Minn. Order on Summary Judgment, *supra* note 46.

53. *Id.* at 15.

54. *Id.*

55. *Id.*

56. *Id.* (quoting Decl. of Pablo Martinez ¶¶ 1–2).

57. Andrew Wasley, Christopher D. Cook, & Natalie Jones, *Two Amputations a Week: The Cost of Working in a US Meat Plant*, *GUARDIAN* (July 5, 2018), <https://www.theguardian.com/environment/2018/jul/05/amputations-serious-injuries-us-meat-industry-plant> [<https://perma.cc/6GN4-ZL2Z>].

back sprains and strains; cuts, lacerations, and amputations of the hand or fingers; and exposure to infectious diseases and chemical burns.⁵⁸

The history of injuries sustained on meatpacking lines is well-documented. For example, repetitive trauma disorders reported to the Bureau of Labor Statistics rose from 18% in 1980 to roughly 60% in 1993, with the highest incidences recorded in the meatpacking industry.⁵⁹ More recently, independent studies and data from OSHA have linked faster line speeds with additional risk of injury, and with risk of increased likelihood of contracting COVID-19.⁶⁰ Finally, line speed has been reported to increase acute injuries and musculoskeletal disorders.⁶¹ On top of the data that is reported, injuries are likely underreported in the meatpacking industry due to fear of retaliation.⁶²

C. Trending Toward Faster Line Speeds

Despite the harms described above, industry continues to push for, and regulatory structures continue to accommodate, faster line speeds in order to meet ever-increasing production demands. For example, for pork processing facilities, a USDA final rule went into effect in December 2019 that eliminated the maximum line speed at which they could operate and established an optional new inspection system called the New Swine Inspection System (NSIS).⁶³ Under the NSIS, the rate at which animals could be processed, previously a maximum of 1,106 market hogs per hour, was eliminated.⁶⁴ A facility need only ensure the safety of its meat

58. GAO 2016 REPORT, *supra* note 30, at 8.

59. Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RESV. L. REV. 33, 35 (1995) (citing BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., BULL. 2399, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY, 1990 5 (1990); U.S. DEP'T OF LAB., USDL-94-600, WORKPLACE INJURIES AND ILLNESSES IN 1993 2 (1994)).

60. *Report: 27 Workers a Day Suffer Amputation or Hospitalization, Acc. to OSHA Severe Injury Data from 29 States*, NAT'L EMP. L. PROJECT (Apr. 27, 2017), <https://www.nelp.org/news-releases/osha-severe-injury-data-report/> [<https://perma.cc/M392-XS8X>]; Charles A. Taylor, Christopher Boulos, & Douglas Almond, *Livestock Plants and COVID-19 Transmission*, 117 PROC. OF THE NAT'L ACAD. OF SCIS. U.S.A. 31706, 31708 (Nov. 19, 2020) ("An analysis of the relationship between line speed waivers and local COVID-19 incidence suggests . . . that waivers predict increases in county-level case rates double those in counties with nonwaiver poultry plants . . . Among plants issued a [line speed] waiver in 2020, the relationship is even greater in magnitude.") (internal citation omitted); *Meat and Poultry Processing Workers and Employers, Interim Guidance from CDC and OSHA*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION (June 11, 2021), <https://stacks.cdc.gov/view/cdc/87280> [<https://perma.cc/EXA6-FQV3>].

61. GAO 2016 REPORT, *supra* note 30, at 30.

62. *Id.* at 33.

63. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300, 52315 (Oct. 1, 2019) (amending 9 C.F.R. §§ 301, 309, 310); *see also* Amy Braunschweiger & Matt McConnell, *Interview: How the US is Making Meatpacking Jobs Even More Dangerous*, HUM. RTS. WATCH (Sept. 4, 2019), <https://www.hrw.org/news/2019/09/04/interview-how-us-making-meatpacking-jobs-even-more-dangerous#> [<https://perma.cc/2ZER-M66K>].

64. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. at 52314.

products for consumption in order to run lines at any rate of speed.⁶⁵ The NSIS incorporated features of a twenty-year USDA pilot program, in which the Vernon Smithfield plant was a participant.⁶⁶ By March of 2020, the Vernon plant had converted to the NSIS.⁶⁷ Largely as a result of worker advocacy, the Minnesota federal district court vacated the final rule in March 2021 for failing to take potential worker harm into account.⁶⁸

Even in the face of a global pandemic, workers at great risk of COVID-19 saw no relief from crippling line speeds. In response to potential pandemic disruptions to industry, meatpacking workers were designated as essential workers by then-President Trump.⁶⁹ As a result, meatpacking plants remained open despite the public health emergency.⁷⁰ With this designation came the now well-documented ways in which workers deemed “essential” were subjected to substantial risk of exposure to, and death from, COVID-19.⁷¹ Early in the pandemic, one study showed that as many as eight percent of nationwide COVID-19 cases were workers in meatpacking facilities.⁷² A year later, the House Subcommittee on the Coronavirus found that COVID-19 cases at the top five meatpacking companies,

65. *Id.* at 52300. The program included the ability for processing facilities to self-inspect to satisfy the safe-for-consumption requirement, eliminating the need for an FSIS inspector to ever set foot in a facility. *Id.*

66. *Id.* at 52302; *see also* FOOD & SAFETY INSPECTION SERV., *supra* note 6. The original framework for inspection was adopted by the FSIS in 1996, called the Hazard Analysis Critical Control Point System (“HACCP”). *Id.* Along with the HACCP, a pilot program was created, which intended to find more efficient systems for inspection. The pilot program was called the HACCP-Based Inspection Models Project (HIMP). *Id.* The USDA Office of Inspector General (OIG) and the Government Accountability Office (GAO) audited HIMP and both agencies found it had not been adequately overseen by FSIS, and that HIMP led to dangerously faster line speeds. OFF. INSPECTOR GEN., USDA, AUDIT REP. 24601-0001-41, FOOD SAFETY AND INSPECTION SERVICE – INSPECTION AND ENFORCEMENT ACTIVITIES AT SWINE SLAUGHTER PLANTS 17–18 (May 2013); GAO 2013 REPORT, *supra* note 33, at 19–20. In contrast to these reports, the FSIS’s own evaluation of the HIMP program found only that HIMP establishments demonstrated “greater compliance with sanitation and HACCP regulations.” 83 Fed. Reg. 4780, 4790 (proposed Feb. 1, 2018).

67. D. Minn. Order on Summary Judgment, *supra* note 46 (Decl. of Hany Sidrak ¶ 5).

68. D. Minn. Order on Summary Judgment, *supra* note 46 (holding that USDA violated the Administrative Procedure Act by failing to engage in reasoned decision-making, evidenced by neglecting to address comments solicited in the proposed rule concerning potential impact to worker safety).

69. *See* Proclamation No. 13,917, 85 Fed. Reg. 26313 (Apr. 28, 2020) (ordering the Secretary of Agriculture “to ensure that meat and poultry processors continue operations” during the COVID-19 pandemic).

70. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, IDENTIFYING CRITICAL INFRASTRUCTURE DURING COVID-19 (2021), <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> [<https://perma.cc/TK89-ECPX>]; *Essential Workforce*, CAL. FOR ALL, (2020), <https://covid19.ca.gov/essential-workforce/> [<https://perma.cc/UTD2-GNYS>].

71. Aaron Nelsen, *The Disposable US Workforce: Life as an ‘Essential’ Meatpacking Plant Worker*, GUARDIAN (Nov. 19, 2021), <https://www.theguardian.com/environment/2021/nov/19/the-disposable-us-workforce-life-as-an-essential-meatpacking-plant-worker> [<https://perma.cc/N7CJ-QM5U>].

72. Taylor, Boulos, & Almond, *supra* note 60, at 31706.

including Smithfield Foods, were three times the number that the companies had reported.⁷³ During this time, long-standing issues over line speeds in plants were exacerbated as the USDA-approved line speed increases, permitting meatpacking lines to move more quickly, ostensibly to curb a potential meat shortage.⁷⁴

Despite the documented harms to workers caused by increased line speeds, the Biden Administration is still seeking to revise and implement a new rule for swine inspection (likely inclusive of line speed increases) following the completion of a time-limited trial.⁷⁵ The trial program, intended to last one year, was developed by the USDA in collaboration with OSHA, and allows meatpacking facilities to “experiment with ergonomics, automation, and crewing to create custom work environments that will protect food and worker safety while increasing productivity.”⁷⁶ In order to participate, a facility must “implement worker safety measures included in an agreement with the workers’ union or worker safety committee that represents their employees.”⁷⁷ The USDA published notice of the one-year trial on November 12, 2021.⁷⁸ After an initial ninety-day extension,⁷⁹ the USDA announced on February 27, 2024 that the time-limited trial, which permits increased line speeds beyond statutorily-defined maximums, may continue to operate through January 15, 2025.⁸⁰

73. Press Release, Select Subcomm. on the Coronavirus Crisis, House of Representatives, Select Subcomm. Releases Data Showing Coronavirus Infections And Deaths Among Meatpacking Workers At Top Five Companies Were Nearly Three Times Higher Than Previous Estimates (Oct. 27, 2021), <https://coronavirus-democrats-oversight.house.gov/news/press-releases/select-subcommittee-releases-data-showing-coronavirus-infections-and-deaths> [<https://perma.cc/5ZPA-MP2D>]; Taylor Telford, *Covid Cases and Deaths Grossly Underestimated Among Meatpackers, House Investigation Finds*, WASH. POST, <https://www.washingtonpost.com/business/2021/10/27/meatpacking-house-report/> [<https://perma.cc/9GPR-HGZR>].

74. Cruz, *supra* note 34, at 647, n. 41.

75. Tom Polansek, *U.S. to Allow Pork Plants to Operate Faster in Trial Program*, REUTERS (Nov. 10, 2021), <https://www.reuters.com/world/us/us-allow-pork-plants-operate-faster-trial-program-2021-11-10/> [<https://perma.cc/7YFK-AWQK>]; *USDA Pilot Program to Allow Faster Line Speeds at Some Pork-Processing Facilities*, SAFETY+HEALTH MAG. (Jan. 5, 2022), <https://www.safetyandhealthmagazine.com/articles/22093-usda-trial-to-allow-pork-processing-facilities-to-operate-at-faster-line-speeds> [<https://perma.cc/4JWB-25GT>].

76. Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., Constituent Update – November 12, 2021: Time-Limited Trial for NSIS Establishments (Nov. 12, 2021), <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021> [<https://perma.cc/46EE-TWKJ>].

77. *Id.*

78. *Id.*

79. Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., Special Alert: Constituent Update – November 28, 2023: FSIS Extends Time-Limited Trials at NSIS Establishments (Nov. 28, 2023), <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-november-28-2023> [<https://perma.cc/G3WR-27MD>].

80. Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., Constituent Update – February 27, 2024: Modified Swine Time-Limited Trial and Worker Safety Study (Feb. 27, 2024), <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-february-27-2024> [<https://perma.cc/B4ZK-MP6S>].

II.

EXPLOITATIVE WORKING CONDITIONS AND INADEQUATE PROTECTIONS

While the primary thrust of this Article addresses line speed governance in the meatpacking industry, the current structure of line speed regulation does not stand alone in engendering a climate of worker exploitation in meatpacking. This Article calls attention to two specific circumstances of meatpacking work that are additional major contributors to meatpacking worker exploitation. The first is the underlying tension between prioritization of food sanitation and consumer safety over worker health and safety. This manifests in the law as a fundamental mismatch in agency power between the FSIS—concerned with consumer safety—and OSHA—concerned with worker safety—to regulate line speeds.

The second circumstance is that, like many modern labor movements,⁸¹ meatpacking unions face declining membership.⁸² Section II.B details a typical union complaint procedure, which a worker might utilize to formalize a line-speed complaint. This Section identifies ways the complaint procedure is lacking and argues that the union itself lacks power, without additional support from the law, to achieve slower lines speeds.

A. Regulatory Mismatch: Worker Health and Food Safety

The tension between worker health and food safety in the meatpacking industry has been prevalent since the early 1900s. In 1905, the work of Upton Sinclair famously spurred then-President Roosevelt to set up a working group to investigate the conditions in Chicago meatpacking facilities.⁸³ Combined with public outrage about the reported unsanitary conditions in Sinclair's work,⁸⁴ the investigation's results encouraged Roosevelt to swiftly mandate changes to meatpacking sanitation practices. The Meat Inspection Act of 1906 soon followed,⁸⁵ and one

81. *Union Members Summary*, U.S. BUREAU OF LAB. STATS., (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/6X56-HGPX>].

82. See Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density and Employment by Industry, 1983*, UNION MEMBERSHIP COVERAGE DATABASE CPS (2021), <https://unionstats.com/> [<https://perma.cc/D6PF-42RW>] [hereinafter Hirsch & Macpherson 1983]; Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density and Employment by Industry, 2021*, UNION MEMBERSHIP COVERAGE DATABASE CPS (2021), <https://unionstats.com/> [<https://perma.cc/D6PF-42RW>] [hereinafter Hirsch & Macpherson 2021].

83. Upton Sinclair, *Whose Muckraking Changed the Meat Industry*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/interactive/projects/cp/obituaries/archives/upton-sinclair-meat-industry> [<https://perma.cc/M6PM-7XEN>].

84. *Id.*

85. Kristen L. Rouse, *Meat Inspection Act of 1906*, ENCYC. BRITANNICA (Nov. 17, 2022), <https://www.britannica.com/topic/Meat-Inspection-Act> [<https://perma.cc/3JT2-DDUY>].

among many pieces of legislation ultimately regulating each facet of food and drug consumption in America was born.⁸⁶

Sinclair, however, was not aiming for “America’s stomachs” in describing the working conditions in these facilities, but rather hoped to generate awareness of the conditions faced by immigrant workers.⁸⁷ In *The Jungle*, Sinclair, a vocal socialist who advocated for radical change, detailed not only the working conditions in Packingtown but also the predatory lending practices, housing scarcity, and American-bootstrap ideology that plagued immigrants to the United States during this period.⁸⁸ Sinclair stated that he “wished to frighten the country by a picture of what its industrial masters were doing to their victims.”⁸⁹ Sinclair’s critique suffered from a common deterrent in policymaking—that of problem definition.⁹⁰ Where Sinclair saw the conditions of meatpacking work and identified the problem as rooted in worker-safety, the political response only saw (or chose to see) a food safety problem.⁹¹

The legislation enacted after the release of *The Jungle* required the USDA to inspect meat products processed for human consumption.⁹² A far cry from a socialist response to worker exploitation, the legislative focus was squarely and narrowly tailored to address consumer health concerns. In order to implement the inspection mandate, the USDA set line speed rates dependent on the staffing level of federal inspectors.⁹³ This arrangement persists today as the only control mechanism wielded by a regulatory agency over meatpacking facilities’ line speeds.

Regulatory focus on food safety imparts little government-induced incentive on employers in the meatpacking sector to reduce line speeds below the statutory maximums for the benefit of worker health. This in turn allows employers to benefit from increased rates of production with minimal thought given to working conditions.

Today, USDA maintains sole authority to regulate line speeds, while OSHA—the agency charged with ensuring workers’ health in their place of employment—has no power to directly regulate line speeds in the meatpacking sector. The remainder of this Section identifies the source of the line speed regulatory

86. See, e.g., Federal Meat Inspection Act, 21 U.S.C. §§ 601–695; Poultry Products Inspection Act, 21 U.S.C. §§ 451–472; Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399i.

87. Arvind Dilawar, *America’s Most Famous Novel About Meat Was Actually About Immigrant Labor Abuses*, TALK POVERTY (Jan. 10, 2019), <https://talkpoverty.org/2019/01/10/sinclair-jungle-immigrant-narrative/> [<https://perma.cc/GZ5V-V2T5>].

88. See generally UPTON SINCLAIR, *THE JUNGLE* (1906).

89. Upton Sinclair, *What Life Means to Me*, *COSMOPOLITAN*, Oct. 31, 1906, at 591–95, <https://undercover.hosting.nyu.edu/s/undercover-reporting/item/12158> [<https://perma.cc/G2QL-AT4E>].

90. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 109–115 (Updated 2nd ed. 2011) (distinguishing between “conditions” and “problems” as targets for policymaking).

91. See Rouse, *supra* note 85.

92. *Id.*

93. 9 C.F.R. § 310.1(b)(3) (2024).

power under FSIS, and the non-mandatory efforts made by OSHA to encourage employers to remain cognizant of worker health and safety in light of quick-moving lines.

1. FSIS Line Speed Regulations

Line speeds in meatpacking facilities are determined by how many FSIS inspectors are staffed at a given facility, ensuring speeds permit product inspectors to adequately assess and remove poor quality meats from the lines.⁹⁴ Pre-2019, the maximum inspection rate for swine was 1,106 market hogs⁹⁵ per hour.⁹⁶ However, the USDA may waive line speed provisions, eliminating maximum speeds altogether, in order to permit “necessary action in the event of a public health emergency,” or to “permit experimentation so that new procedures, equipment, and/or processing techniques may be tested to facilitate definite improvements.”⁹⁷

A 2019 final rule published by the USDA amended the pork inspection regulations, establishing an “optional new inspection system for market hog slaughter establishments,” NSIS, which went into effect on December 2, 2019.⁹⁸ The NSIS, in part, revoked maximum line speeds, authorizing establishments to “determine their own line speeds based on their ability to maintain process control for preventing fecal contamination and meeting microbial performance measures for carcasses during the slaughter operation.”⁹⁹ The regulatory process did not include consideration of the impact on workers of increased line speeds.¹⁰⁰

In light of this oversight, the UFCW and local affiliates, among others, challenged the Final Rule implementing the NSIS.¹⁰¹ In March 2021, the Minnesota District Court granted summary judgment against the USDA, vacating the provisions of the Final Rule that eliminated the maximum line speed cap.¹⁰² The prior line speed maximum of 1,106 hogs per hour went back into effect on June 30, 2021.¹⁰³ Since the rule was vacated, the Biden Administration has authorized a “time-limited” trial permitting establishments to operate faster than the current

94. *See id.*

95. I.e., a hog intended for slaughter weighing between 225 and 275 pounds. *Finished Market Hogs*, PENNSSTATE EXTENSION (last visited Oct. 24, 2023), <https://extension.psu.edu/programs/courses/swine/marketing/swine-marketing-options/finished-market-hogs> [<https://perma.cc/VHL9-SSXR>].

96. 9 C.F.R. § 310.1 (2024).

97. 9 C.F.R. 303.1(h) (2024).

98. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300 (Oct. 1, 2019) (codified at 9 C.F.R. pts. 301, 309, and 310).

99. *Id.*

100. *See id.* at 52315.

101. D. Minn. Order on Summary Judgment, *supra* note 46, at 1.

102. Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., USDA’s Response to the Minnesota Court Decision (May 26, 2021), <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-may-26-2021> [<https://perma.cc/Z95J-2T33>].

103. *Id.*; Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., *supra* note 76.

maximum line speed.¹⁰⁴ To participate in the trial, meatpacking facilities must comply with additional worker-safety measures approved by the union representing workers at the facility or a worker safety committee representing employees at the facility.¹⁰⁵ As a part of the time-limited trial, plants are expected to submit data to the OSHA on how line speeds affect workers.¹⁰⁶

As a result of this arrangement, the FSIS—whose mission is to “ensur[e] that the nation’s commercial supply of meat, poultry, and egg products . . . is safe, wholesome, and correctly labeled and packaged”¹⁰⁷—retains sole authority to regulate the pace of work in meatpacking plants.

2. OSHA Guidance

Despite not having direct authority to set maximum line speeds, OSHA creates resources to guide employers in the ergonomic design of repetitive work of the type undertaken in a meatpacking plant. These resources include specifications for standing and reaching, among other things.¹⁰⁸ In one such resource, published in 1993, modifying line speed is described as “one means of work method design that may be appropriate.”¹⁰⁹ Ergonomics are an important issue in this industry because work intensification leads to worse outcomes for safety performance.¹¹⁰ Poor ergonomic design is also a direct contributor to repetitive stress injuries such as musculoskeletal disorders prevalent in the meatpacking sector.¹¹¹ However,

104. Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., *supra* note 76.

105. *Id.*

106. Donnelle Eller, *USDA to Invite Ottumwa JBS Pork Plant to Speed up Processing Lines in ‘Limited Trial’*, DES MOINES REG. (Nov. 10, 2021), <https://www.desmoinesregister.com/story/money/agriculture/2021/11/10/usda-safety-trial-ottumwa-jbs-pork-processing-meatpacking-plants-line-speeds-worker-safety/6376900001/> [<https://perma.cc/CYC2-5RA3>]; Press Release, Food Safety & Inspection Serv., U.S. Dep’t of Agric., Constituent Update – November 12, 2021: Time-Limited Trial for NSIS Establishments (Nov. 12, 2021), <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021> [<https://perma.cc/46EE-TWKJ>].

107. Alfred V. Almanza, *FSIS 101: Mission of the Food Safety and Inspection Service*, FOOD SAFETY & INSPECTION SERV. (Aug. 16, 2020), <https://www.fsis.usda.gov/news-events/news-press-releases/fsis-101-mission-food-safety-and-inspection-service> [<https://perma.cc/46GH-PMYE>].

108. *See, e.g., Meatpacking: Standards*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., <https://www.osha.gov/meatpacking/standards> [<https://perma.cc/4EPH-A2FG>] (last visited Oct. 27, 2023); *State Plans—California*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., <https://www.osha.gov/stateplans/ca> [<https://perma.cc/XL6S-K736>] (last visited Oct. 27, 2023).

109. ROBERT B. REICH & JOSEPH A. DEAR, U.S. DEP’T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., ERGONOMICS PROGRAM MANAGEMENT GUIDELINES FOR MEATPACKING PLANTS (1993), <https://www.osha.gov/publications/OSHA3123> [<https://perma.cc/3Y6Q-5ETM>].

110. Bunner, Prem, & Korunka, *supra* note 26; *see supra* Part I.B.

111. *Ergonomics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., <https://www.osha.gov/ergonomics> [<https://perma.cc/566A-VTFC>] (last visited Nov. 2, 2023).

despite its importance, adherence to the guidance included in these resources is not mandatory.¹¹²

The tenor of OSHA's meatpacking guidance was no stricter during the height of the COVID-19 pandemic. Despite the thousands of worker complaints received by the agency, OSHA never promulgated emergency temporary standards for meatpacking facilities, which would inform OSHA's inspection and citation standards when investigating workplace complaints.¹¹³ OSHA "only issued voluntary 'guidance' on COVID-19 workplace safety protocols and practices."¹¹⁴

When OSHA does take enforcement actions, in many cases it must rely on its power to regulate employer activity through the issuance of citations for violations of the "general duty" clause¹¹⁵ of the Occupational Safety and Health Act.¹¹⁶ The general duty clause states that "[e]ach employer shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."¹¹⁷ To show that an employer violated the general duty clause, OSHA must "establish that (1) the employer failed to render its work place free of a hazard; (2) the hazard was recognized; . . . (3) the hazard caused or was likely to cause death or serious physical harm and (4) the hazard was preventable."¹¹⁸

The definition of "hazard" is regularly at issue in these cases and is likely to cause difficulty for workers in the line speed context. A "hazard" is defined as a condition or practice deemed unsafe, over which an employer "can reasonably be expected to exercise control."¹¹⁹ As line speed maximums are set by FSIS regulations, they are not a condition which an employer or the industry is likely to agree is "unsafe." Adding to the difficulty, no worker-safety determination is included in USDA's process for setting line speeds.¹²⁰

112. John S. Ho, *OSHA and Ergonomics: The Past, Present and Future*, EHS TODAY (June 22, 2017), <https://www.ehstoday.com/standards/osha/article/21919092/osha-and-ergonomics-the-past-present-and-future> [<https://perma.cc/9F7G-HXNP>].

113. Cruz, *supra* note 34, at 641.

114. *Id.* at 677.

115. 29 U.S.C. § 654(a).

116. Linder, *supra* note 59, at 116 (citing 29 U.S.C. § 658(a) (providing the statutory authority to OSHA to issue citations)).

117. 29 U.S.C. § 654(a).

118. *Pepper Contracting Servs. v. Occupational Safety and Health Admin.*, 657 F. App'x 844, 847–48 (11th Cir. 2016). Aside from being particularly susceptible to legal challenges, OSHA rarely uses the general duty clause in citations to begin with. In 2018, the clause was applied in just 1.5% of all OSHA citations, according to the National Safety Council. Rebecca Rainey, *Clash over Government Role in Worker Safety Intensifies as Businesses Reopen*, POLITICO (May 18, 2020), <https://www.politico.com/news/2020/05/18/clash-over-government-role-in-worker-safety-intensifies-as-businesses-reopen-265888> [<https://perma.cc/6K8G-WEK8>].

119. *Pepper Contracting Servs.*, 657 F. App'x at 848.

120. See Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300 (Oct. 1, 2019) (codified at 9 C.F.R. §§ 301, 309, 310).

OSHA's lack of power, and its significantly limited ability to regulate line speeds, serves to disempower workers in meatpacking plants. As the agency most directly tied to worker safety and health is powerless to directly regulate work pace, workers seeking relief from a federal agency with regard to line speed lack a clear target at which to direct their advocacy.

B. Limitations on Labor Union Power in the Meatpacking Sector

In theory, labor unions serve as a model legal structure for facilitating power among poor and working-class individuals.¹²¹ However, despite unions' successes as organizing bodies, the law falls short in supporting union efforts in myriad ways: labor law leaves workers "effectively unprotected from retaliation," limits the "form and content of the right to strike," and requires that collective bargaining "occur only at the worksite level."¹²² Despite this, there are legal interventions available that could provide labor unions with better protections, thereby increasing the likelihood of successful collective actions.

Limits on union power are numerous, each with their own literature and proposed outcomes beyond the scope of this Article.¹²³ This Section briefly discusses the historical trends and present composition of labor unions in the meatpacking sector, and the limitations that the lack of union density places on workers' ability to organize. It then identifies further limitations on organizing in the meatpacking context: complicated internal complaint procedures, the arbitrability of grievances, union bargaining orientation, the lack of sectoral union bargaining, and insufficient protections from retaliation.

121. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 576 (2021).

122. *Id.* at 577. One example from the COVID-19 pandemic relates to the relative power of industry and workers in negotiating safety protections for workers during the pandemic. During the height of the pandemic, the federal government did not enact binding recommendations for meatpacking workplaces but relied instead on non-mandatory guidance. Alexia Brunet Marks, *Essential but Ignored: COVID-19 Litigation and the Meatpacking Industry*, 14 NE. U. L. REV. 47, 70–71 (2022). In contrast, government actors provided for multiple supports on the side of industry, incentivizing and even mandating adherence to orders to stay operational, as well as to make good on production contracts overseas. *Id.* at 71.

123. One significant source of limitations on labor union power is the issue of National Labor Relations Act preemption, which reserves many labor disputes to the sole jurisdiction of the National Labor Relations Board (NLRB). Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011). This Article does not dive into the specifics of this jurisdictional preemption nor suggest alternatives, as this topic is one that has been treated with significant care by others and any additional suggestions here would not add substantially to existing literature. For more on NLRA preemption, see *id.*; Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429 (1998); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Michael Schultz & John Husband, *Federal Preemption under the NLRA: A Rule in Search of a Reason*, 62 DENV. L. REV. 531 (1985).

1. Trends in Meatpacking Labor Power

The late nineteenth and early twentieth centuries saw a gradual increase in unionization in the meatpacking sector, despite workers facing highly organized employers.¹²⁴ Beginning in the 1950s, large meatpacking entities sought to reduce labor costs and package and ship products more efficiently, and they found a solution in relocating meatpacking facilities to rural areas.¹²⁵ Historically located in centralized cities, where labor was cheapest and in largest supply, facilities in urban areas faced high costs in part due to rising wages and benefits hard-fought and won by labor unions.¹²⁶ Led by the example of a “new breed” of meatpacker, Iowa Beef Processors (IBP), entities began consolidating and relocating, allowing them to leave behind previously bargained union agreements and take advantage of incentives rural areas provided to encourage economic development.¹²⁷ IBP dramatically altered labor relations in the meatpacking sector primarily through three contributions: utilizing new technologies to reduce the need for “skilled” workers (trained butchers), relocating plants to rural areas, and actively recruiting immigrant workers at lower wages.¹²⁸

The trend of locating meatpacking facilities in rural areas continues today, and there are currently “56 counties in the United States – 49 in rural (nonmetro) counties and 7 in urban (metro) counties – where meatpacking is estimated to account for more than 20 percent of all county employment.”¹²⁹ Being a majority employer in a region, with control of a substantial portion of the local labor market, gives a meatpacking facility significant power at the bargaining table.¹³⁰ This is compounded where, as in the case of the Vernon Smithfield plant, an employer may threaten—or act on threats—to relocate the plant altogether.¹³¹ Taken together, these conditions provide the employer with significant leverage over workers whose communities rely on jobs from the facility.

124. WHITTAKER, *supra* note 38, at 2–3.

125. *Id.* at 3–4; John Brueggemann & Cliff Brown, *The Decline of Industrial Unionism in the Meatpacking Industry: Event-Structure Analyses of Labor Unrest, 1946–1987*, 30 WORK OCCUPATIONS 327, 334 (2003).

126. See WHITTAKER, *supra* note 38, at 3–4.

127. *Id.* at 3, 25.

128. Brueggemann & Brown, *supra* note 125, at 333–35.

129. *The Meatpacking Industry in Rural America During the COVID-19 Pandemic*, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC. (Oct. 28, 2021), <https://www.ers.usda.gov/covid-19/rural-america/meatpacking-industry> [<https://perma.cc/ZJF2-CU5X>].

130. Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1870 (2018) (“In the labor market, monopsonistic employers can pay lower wages to workers than would otherwise prevail in a competitive market without losing those workers to competing employers.”).

131. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 26–27 (2016) (“Further weakening unions’ bargaining position, the Court has strictly limited the scope of mandatory subjects of bargaining, concluding that matters of entrepreneurial judgment need not be negotiated. For this reason, the employer may avoid unionization by closing its operations . . . or by moving production.”).

IBP and other meat packers' practice of recruiting immigrant workers furthered racial and ethnic division among meatpacking workers.¹³² Unions were not unfamiliar with this challenge, as employers historically sowed division between factions of workers based on race, sex, and craft.¹³³ As Professor Cruz writes, over time, industry has routinized recruitment of workers "from 'new-comer' communities that are trying to enter a workforce, with little knowledge of workplace rights or an inability to complain about working conditions due to socio-economic, racial, cultural, or other factors."¹³⁴ Division between workers is often still a barrier to effective organizing. For example, divisiveness between union and non-union employees is bolstered by employers who threaten plant closures, blaming union organizers for increasing the cost of doing business by engaging in organizing activities.¹³⁵

Finally, declining membership has impacted organizing in the meatpacking sector, as the unions draw strength from both membership numbers and dues.¹³⁶ The UFCW, which purports to be the largest union in the country representing meatpacking workers,¹³⁷ was formed through a merger of the Amalgamated Union and the Retail Clerks International Union (RCIU) in 1979.¹³⁸ Shortly thereafter, labor union membership in the meatpacking industry continued its stark decline from the 1950s,¹³⁹ which saw highs of 90% of workers unionized, to 33% in 1983,¹⁴⁰ and just 14.5% of the sector in 2021.¹⁴¹

132. Brueggemann & Brown, *supra* note 125, at 335.

133. WHITTAKER, *supra* note 38, at 9–10; Daniel Calamuci, *Return to the Jungle: The Rise and Fall of Meatpacking Work*, 17 NEW LAB. F. 66, 73–74 (2008); Brueggemann & Brown, *supra* note 125, at 331; *see also* Commons, *supra* note 48, at 18–19 (describing early 1900s strike which led to female replacement of male workers in particular packing roles).

134. Cruz, *supra* note 34, at 656.

135. *See* Robert H. Bliss, *Labor's Plant Closure Pains*, 24 SW. L.J. 259, 274–75 (1970); WHITTAKER, *supra* note 38, at 27 (quoting meatpacking industry representative stating: "If we paid the base rate the union wants . . . our whole program would fail.").

136. Andrias, *supra* note 131, at 33.

137. UFCW had over 1.1 million members in 2023 across organizing sectors. OFF. OF LAB.-MGMT. STANDARDS, DEP'T OF LAB., NO. 000-056 FORM LM-2, LABOR ORGANIZATION ANNUAL REPORT, UNITED FOOD & COMMERCIAL WORKERS (2023), <https://olmsapps.dol.gov/query/orgReport.do?rptId=887565&rptForm=LM2Form> [<https://perma.cc/9W66-3ZTX>] (available at: <https://www.dol.gov/agencies/olms/public-disclosure-room>, follow hyperlink, select "Union Search" hyperlink, on the resulting page, in the second column labeled "Latest Report" select "LM-2" from the drop down menu, in the fourth column titled "Abbr" select "UFCW" from the drop down menu, scroll to reports for the year 2023); Press Release, United Food & Com. Workers, America's Largest Meatpacking Union Calls on White House for Real Accountability and Action to Protect Workers on Frontlines of COVID-19 Pandemic (Sept. 12, 2020), <https://www.ufcw.org/press-releases/americas-largest-meatpacking-union-calls-on-white-house-for-real-accountability-and-action-to-protect-workers-on-frontlines-of-covid-19-pandemic/> [<https://perma.cc/9HP3-6SGG>].

138. WHITTAKER, *supra* note 38, at 20.

139. BUREAU OF LAB. STATS., DEP'T OF LAB., COLLECTIVE BARGAINING IN THE MEAT-PACKING INDUSTRY, BULLETIN NO: 1063, 1 (1952) [hereinafter COLLECTIVE BARGAINING DOL REPORT].

140. Hirsch & Macpherson 1983, *supra* note 82.

141. Hirsch & Macpherson 2021, *supra* note 82.

In the context of COVID-19, labor unions reportedly provided workers in various sectors with greater job stability during the pandemic.¹⁴² Further, workers in other sectors saw unions as a potential avenue for redressing inequality in distribution of profits from pandemic profit surges.¹⁴³ The recognition of the potential for union power has contributed to a “moment” for labor unions broadly,¹⁴⁴ marked by increased approval ratings from the general public,¹⁴⁵ and a stark increase in union petitions filed at the NLRB.¹⁴⁶ In 2023, this flurry of activity was borne out in the total number of labor union members in the United States, which grew by 139,000.¹⁴⁷ The full picture is somewhat murky, however, as despite this growth, the rate of union membership fell to 10% of the labor market overall in large part due to the stark growth in jobs during the same period.¹⁴⁸

Given the present state of the modern labor union in the meatpacking sector, it is highly unlikely that workers could successfully garner enough power, absent support from government and the law, to implore employers to reduce line speeds below permitted statutory maximums. The following Section comments on limitations imposed by the law that contribute to this status quo.

2. Limitations on Worker Power Facilitated by Law

Internal complaint procedures limit workers’ ability to organize by bringing groups of similar claims against an employer because they are overly complex. Much of the internal complaint process, ostensibly designed to weed out non-meritorious claims, has the effect of deterring meritorious claims as well. Even in

142. CELINE McNICHOLAS, HEIDI SHIERHOLZ, & MARGARET POYDOCK, ECON. POL’Y INST., UNION WORKERS HAD MORE JOB SECURITY DURING THE PANDEMIC, BUT UNIONIZATION REMAINS HISTORICALLY LOW (2021), <https://www.epi.org/publication/union-workers-had-more-job-security-during-the-pandemic-but-unionization-remains-historically-low-data-on-union-representation-in-2020-reinforce-the-need-for-dismantling-barriers-to-union-organizing/> [https://perma.cc/7VNJ-ZP87].

143. Molly Kinder & Laura Stater, *Frontline Workers Were Excluded from Companies’ Pandemic Windfalls. No Wonder so Many are Forming Unions.*, BROOKINGS INST. (May 4, 2022), <https://www.brookings.edu/blog/the-avenue/2022/05/04/frontline-workers-were-excluded-from-companies-pandemic-windfalls-no-wonder-so-many-are-forming-unions/> [https://perma.cc/4WY8-22M3].

144. Ian Kullgren, Brian Eckhouse, & Deena Shanker, *U.S. Labor Unions Are Having a Moment*, TIME (Oct. 17, 2021), <https://time.com/6107676/labor-unions/> [https://perma.cc/Q99D-Z5YC].

145. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/7TWM-ELFH].

146. *Union Election Petitions Increase 57% in First Half of Fiscal Year 2022*, NAT’L LAB. RELS. BD. (Apr. 6, 2022), <https://www.nlr.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022> [https://perma.cc/B2CS-MGAA].

147. Lauren Kaori Gurley, *Union Membership Rate Hit Record Low in 2023, Though Unions Picked up Workers*, WASH. POST (Jan. 23, 2024), <https://www.washingtonpost.com/business/2024/01/23/union-membership-low-strikes-labor/> [https://perma.cc/L3U2-ADQL].

148. *Id.*

workplaces with unionized workers, which typically feature stronger health and safety protections for workers,¹⁴⁹ internal complaint procedures are overly complicated and time-consuming. Complaints, or “grievances” as they are termed in collective bargaining agreements, typically proceed stepwise from reporting to a departmental representative to, ultimately, participating in an arbitration proceeding.¹⁵⁰ As a part of this process, workers are often asked to formalize complaints by reducing their grievance to writing.¹⁵¹ The more formalized complaint procedures must become, the higher likelihood that some workers will choose not to participate for fear of being caught up in a formal legal proceeding or being retaliated against.¹⁵²

Should a grievance proceed to arbitration, it is often newly subject, after surviving all the previous steps, to an “arbitrability” clause.¹⁵³ Such a clause defines which grievances are eligible for the arbitration process. A familiar restriction, for example in a UFCW Local 770 Agreement, is that the grievance “must genuinely involve the interpretation, application, or enforcement of a specified provision or provisions of [the] Agreement.”¹⁵⁴ As line speed is set through a process external to the Agreement, it is possible that issues related to slowing down the lines would be non-arbitrable unless there was a broader worker-safety provision at issue. For this reason, even after surviving a stringent internal complaint process, remediation through the arbitration process may continue to be limited.

Unions face a difficult challenge at the outset of the bargaining process: whether to adopt a vision inclusive of the entire workforce and the community,¹⁵⁵ or a vision which seeks to capitalize on gains for unionized workers. Workplaces are often composed of both union and non-union workers, which can serve as a

149. See generally Megan M. Reynolds & David Brady, *Bringing You More Than the Weekend: Union Membership and Self-rated Health in the United States*, 90 SOC. FORCES 1023 (2012) (presenting data on self-reported health and wellness in unionized and non-unionized industries in the United States).

150. See, e.g., *Agreement Between Overhill Farms, Inc. and United Food and Commercial Workers Union, Local 770*, 3–4, (Sept. 1, 2022), <https://ufcw770.org/wp-content/uploads/2022/02/UFCW-Overhill-CBA-2021-2025-Fully-Executed.pdf> [<https://perma.cc/467T-CA2E>] [hereinafter *Overhill-UFCW Agreement*]; COLLECTIVE BARGAINING DOL REPORT, *supra* note 139, at 46 (describing arbitration as final step in grievance procedure is accepted standard in the industry).

151. See *Overhill-UFCW Agreement*, *supra* note 150.

152. See Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1295 (2016) (finding that low-income respondents were reluctant to pursue civil legal action because past experiences with the legal system, as well as other non-legal public institutions, had “made them feel ashamed, inadequate, degraded, and confused”).

153. *Overhill-UFCW Agreement*, *supra* note 150, at 4.

154. *Id.*

155. For example, using a framework such as Bargaining for the Common Good, a network of bargaining groups that seek to “benefit not just the bargaining unit, but also the wider community as a whole.” BARGAINING FOR THE COMMON GOOD, CONCRETE EXAMPLES OF BARGAINING FOR THE COMMON GOOD 1 (2018).

first point of division for employers seeking to divide worker power.¹⁵⁶ Under a framework such as Bargaining for the Common Good, as discussed by Joseph McCartin and others in the context of teachers' unions, union goals are tied in directly with the goals of community advocates.¹⁵⁷ Unions, understandably, have limited resources to tackle broad issues when faced with direct worker concerns and administrative expenses.¹⁵⁸ This tension between the needs of unionized workers and the broader community is a false dichotomy imposed by the insufficient resources of unions to challenge employers' sheer wealth and political influence.

Unions are further limited by the bargaining relationship between individual plant locations and individual local bargaining units. In a recent article, Kate Andrias calls for a rejection of the "employer-employee dyad," which locates decisions at the most local level as between an individual employer and its workforce.¹⁵⁹ Decision-making at the regional or sectoral level may have a better chance at obtaining solutions targeting "greater economic and political equality in society."¹⁶⁰ Bargaining on a plant-by-plant basis is impractical, Andrias argues, given a "contemporary economy in which employers are fissured and work is increasingly global, contingent, shared and automated."¹⁶¹ In the meatpacking context, this argument harkens back to the era of "master agreements" between the then-Big Four of the meatpacking industry and the prominent unions in the sector in the 1940s and '50s.¹⁶² Today, sectoral bargaining is one approach that could combat intentional geographic separation.¹⁶³ Additionally, sectoral bargaining addresses collective bargaining limitations imposed by workplace fissuring.¹⁶⁴ As

156. See GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING (2020) (describing "[h]aving managers tell employees that pro-union workers are 'the enemy within'" as a common union avoidance tactic); Andrias, *supra* note 131, at 34.

157. Joseph A. McCartin, Marilyn Sneiderman, & Maurice BP-Weeks, *Combustible Convergence: Bargaining for the Common Good and the #RedforEd Uprisings of 2018*, 45 LAB. STUD. J. 97, 98 (2020) (describing the origins and elements of "bargaining for the common good").

158. Andrias, *supra* note 131, at 33–34.

159. *Id.* at 9.

160. *Id.*

161. *Id.* at 78.

162. See COLLECTIVE BARGAINING DOL REPORT, *supra* note 139, at 5–6.

163. See Andrias, *supra* note 131 at 78.

164. David Weil defines the *fissured workplace* as companies: (1) "seeking to focus on their greatest competence from the perspective of customers and especially investors," (2) "shed[ding] as many as possible of the activities not core to delivering those competencies to other organizations," and (3) "maintain[ing] tight control of the outcomes of those subsidiary organizations in orbit around its competence through standards, monitoring, and mechanisms of enforcement." See David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 147, 148 (2019).

Andrias discussed, a 2015 NLRB decision,¹⁶⁵ would have an impact on fissured workplaces by allocating “employer responsibility for bargaining, as well as employer liability for violation of organizing rights” more broadly.¹⁶⁶

Finally, fear of retaliation is a deterrent to workers’ group participation in grievance procedures. Direct and immediate fear of retaliation is not misplaced, as data from the EEOC shows that retaliation claims are on the rise.¹⁶⁷ Included in David Weil’s conception of workers vulnerable to retaliation are workers whose employment relationship is precarious, workers whose wages are at or near statutory minimums, workers in industries frequently subject to wage theft, workers in industries where they are exposed to health and safety hazards—including occupational stress injuries—and workers who do not receive critical workplace benefits.¹⁶⁸ Many of these elements apply to workers in meatpacking facilities, and each highlights a broader systemic issue relative to workers’ ability to individually take on the work of combatting retaliatory activity. As greater than 50% of the meatpacking workforce are immigrant workers, immigration status also plays a large part in deterring workers from making complaints.¹⁶⁹ As demonstrated above, law-supported collective organizing entities are necessary to balance the scale between workers and industry.

165. Andrias, *supra* note 131, at 81 (discussing the impact of the NLRB’s decision in *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599 (2015)). The joint-employer standard at issue in *Browning-Ferris* has subsequently undergone multiple revisions in a tug-of-war between the NLRB and industry associations. Most recently, on March 8, 2024, a Federal Judge of the United States District Court for the Eastern District of Texas struck down the NLRB’s recently promulgated rule clarifying joint-employer liability extended to contractor and other third-party entities. Daniel Wiessner, *Judge blocks US labor board rule on contract and franchise workers*, REUTERS (Mar. 11, 2024), <https://www.reuters.com/legal/us-judge-blocks-us-labor-boards-rule-involving-contract-franchise-workers-2024-03-09/> [<https://perma.cc/JPA2-KWSU>].

166. *Id.* at 82 (impacting “labor contracts between companies and their subcontractors, for franchise agreements and other supply-chain employment relationships.”).

167. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-1997-through-fy-2022> [<https://perma.cc/LYE2-MK78>] (last visited Nov. 22, 2023).

168. David Weil, *Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach*, 51 J. INDUS. RELS. 411, 413–14 (2009).

169. “Fears of deportation, lack of knowledge about workplace rights, and the need to earn a living discourages many low-wage immigrant workers from complaining about working conditions.” Cruz, *supra* note 34, at 656 (citing STAFF OF H.R. COMM. ON EDUC. & LAB., 11TH CONG., HIDDEN TRAGEDY: UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESSES 12 (2008)); Brown, Fremstad, & Rho, *supra* note 35. (“[M]ore than one-half (51.5 percent) of frontline meatpacking workers are immigrants.”). See also AM FED’N LAB. & CONG. INDUS. ORGS., IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 9–11 (2005) (identifying a series of social, political, and economic factors placing foreign-born workers at increased risk for workplace injuries).

III. INTERVENTIONS

The issues discussed so far with regulating line speed are both simple and complex. On the one hand, granting OSHA the authority to regulate an issue clearly within the purview of its mission could, or should, be relatively simple. What's not clear is that a simple solution, such as permitting OSHA to regulate line speeds, would in practice operate as an "easy fix." That is because, as has been laid out above, the current system is the result of a long history of undervaluing worker health, and treating low-income workers, immigrant workers, and workers of color, as disposable. And the line speed problem is just one example of the ways that worker voice is discounted in the regulatory process. Labor unions could help strengthen worker power. Yet, as has been discussed, labor unions have been weakened over the past several decades.

This Part first introduces the obvious regulatory intervention: reorganizing authority over line speeds to allow for worker voice, using OSHA as an amplifier. The second set of recommendations offers a broader reimagining of a meatpacking industry that exists outside of capital structures and market incentives altogether. It provides a vision of work for low-income, rural, and immigrant workers—many of whom are workers of color—in areas dominated by meatpacking that does not require the continued sacrifice of their limbs, or lives, in order to provide for their family or community.

A. Mechanical and Regulatory Reforms

The interventions in this Section call for reforms that would amplify worker voice and agency in the regulatory process and would fix the mismatch of authority between FSIS and OSHA. First, the Section suggests two changes to the mechanics of the plant itself that could physically limit line speeds, as well as provide workers with additional tools to raise concerns about the pace of work. Then, it addresses the primary governance issue by analyzing recently proposed federal legislation and suggesting alternate courses of regulation that would better serve the goal of incorporating worker health and safety concerns into the line speed equation.

1. Inside the Plant

a. Speed-Locking Mechanism

One simple intervention that could be implemented to help control line speeds in meatpacking plants is a mechanism on the machinery itself that locks the line at a set speed or prevents it from going above a certain speed. As the overall speed of a plant's production is typically measured by how many animals are slaughtered per hour, this rate would need to be broken down by a per-minute rate and locked at that set speed for each piece of machinery along the line. As a result, from the chain at the beginning of the slaughter process to the packing and processing

department, speeds would be capped. As line speed can be variable depending on workers' pacing, the line could potentially slow down to accommodate staffing changes or rest breaks, but it could never go higher than an agreed-upon rate, ideally set through a redesigned regulatory process as introduced in the following Section.

There is an appetite among the general public for regulating work-intensification practices, as evidenced by California's AB 701,¹⁷⁰ which restricts the implementation of strict work quotas by manufacturing employers.¹⁷¹ AB 701 was signed into law by Governor Newsom in September 2021, and seeks to provide workers with a more hospitable work environment.¹⁷² Despite not applying to the meatpacking sector, because it addresses worker-specific quotas rather than line speeds, the law recognizes the tendency of industry to intensify work at the expense of the basic needs of its workforce, such as by requiring production quotas high enough to prevent workers from being able to take bathroom breaks.¹⁷³ This new law is one example of an effort to directly regulate employers' policies concerning its own workforce. A speed-locking mechanism would be a similarly direct intervention in the day-to-day operation of meatpacking facilities, for which AB 701 provides a regulatory model.

States may also utilize a less direct alternative by creating a technology-forcing instrument through legislation. For example, if the technology to lock line speed in place does not currently exist, legislators could express a legislative goal for employers to reduce workplace injuries due to line speeds exceeding safe limits by a certain date in the future. This framework is borrowed from federal legislation such as the Clean Air Act of 1970, which required a 90% reduction of automobile emissions by 1975, an aggressive decline in emissions for which the technology did not exist in the market, at scale, at the time of the Act's passage.¹⁷⁴ This requirement would force the industry to innovate by creating or investing in technology designed to prevent line speeds from exceeding a safe, maximum limit.

b. Line Speed Transparency

Whether or not the lines are locked in at a certain speed using new technology, workers should be able to verify at any time that the lines are not running faster

170. Suhauna Hussain, *California Takes on Amazon, Advancing a Bill That Regulates Tough Warehouse Work Metrics*, L.A. TIMES (Sept. 8, 2021), <https://www.latimes.com/business/story/2021-09-08/california-bill-ab701-passes-senate-warehouse-work-metrics-algorithms-regulation> [<https://perma.cc/66JV-XTAZ>].

171. See CAL. LAB. CODE §§ 2101–12 (West 2021).

172. Alina Selyukh, *California Bill Passes, Giving Amazon Warehouse Workers Power To Fight Speed Quotas*, NAT'L PUB. RADIO (Sept. 8, 2021), <https://www.npr.org/2021/09/08/1034776936/amazon-warehouse-workers-speed-quotas-california-bill> [<https://perma.cc/YZA4-29FH>].

173. *Id.*

174. 42 U.S.C. § 7521(b)(1)(A); see Nicholas S. Bryner, *The One and Future Clean Air Act: Impact of the Inflation Reduction Act on EPA's Regulatory Authority*, 65 B.C. L. REV. 1, 11 (2023) (summarizing technology-forcing provisions of the Clean Air Act of 1970).

than speeds permitted by regulation. Work sites should be required to post signage in work areas defining maximum permitted speeds at each point in the line. Each piece of equipment should have a type of speedometer on it that is in plain view of workers on the line. Workers will then be able to self-assess whether the employer is running equipment on the lines at the regulated speeds.¹⁷⁵

Additionally, speedometers should collect and record data in a central plant location that shows equipment speeds at any given moment in time as compared to the permitted regulated speeds. Employers could be required to periodically report this data to OSHA to verify compliance, and/or could be required to furnish the data on demand in response to an OSHA- or worker-initiated request. Line speed data is already recorded by some workers, often stewards of departments working with a union to keep line speed records.¹⁷⁶

These interventions would allow workers to verify that employers are operating lines at appropriate speeds based on statutory maximums or collectively bargained reduced speeds. For example, in the collective bargaining agreement between Smithfield and UFCW Local 770 in effect from July 2018 through August 2022, a safety committee provision references “mutually agreed to line speed and crewing standards” between the plant and the union.¹⁷⁷ However, there is no provision concerning how workers can determine what the line speed is at any given moment during the work day.¹⁷⁸ Required transparency would aid workers in pushing to address line speed at the most local level.

2. Regulatory Governance

In addition to changes to the physical machinery in meatpacking plants as described above, regulatory reform can be enacted to correct for the mismatch in governance between the FSIS and OSHA concerning line speeds. The best way to accomplish this is by permitting OSHA to regulate line speeds directly—setting them at a rate optimal for the protection of worker health. Short of assigning OSHA direct regulatory authority over line speeds, the FSIS could alternatively engage in rulemaking to incorporate consideration of impacts on worker health into the FSIS line-speed determinations. In order to effectuate these changes, Congress could pass new legislation addressing meatpacking worker health directly, making additional changes to agency authority concerning line speeds. This Section briefly analyzes a recent legislative proposal, *Protecting America’s*

175. This idea grew out of conversations with worker-organizers and UFCW Local 770 representatives at the former Smithfield Vernon facility.

176. See D. Minn. Order on Summary Judgment, *supra* note 46, at 28.

177. Collective Bargaining Agreement Between Smithfield Packaged Meats Corporation and United Food and Commercial Workers Union Local 770, Article 24, Section 4 (June 27, 2018), <https://ufcw770.org/wp-content/uploads/2019/03/Farmer-John-7.16.18-to-8.1.2022.pdf> [<https://perma.cc/YJW5-5PCM>].

178. *See id.*

Meatpacking Workers Act, for sufficiency in addressing problems highlighted in this Article, and recommends changes for incorporation in future legislative proposals.

In February of 2023, Senator Cory Booker and Representative Ro Khanna reintroduced the *Protecting America's Meatpacking Workers Act*,¹⁷⁹ first filed in 2021.¹⁸⁰ The purpose of the legislation is to “provide protections for meatpacking workers along with systemic reforms such as creating a fair market that allows independent farmers, ranchers and robust local food systems to thrive.”¹⁸¹ The original legislation, which garnered support from UFCW National, was introduced following a congressional investigation that showed there were at least 59,000 meatpacking-worker COVID-19 infections and at least 269 meatpacking worker COVID-19 deaths nationwide as of October 2021.¹⁸² The bill, among other health and safety related changes, would prevent the USDA from issuing any line speed waivers to meatpacking plants, including under the newly authorized time-limited trial process, unless the plant can show that an increase in line speeds will not adversely impact worker safety.¹⁸³ For a facility to be issued a waiver, plants would agree to an inspection carried out by OSHA, which would include: (1) an ergonomic analysis of jobs potentially impacted by increased speed, (2) a review of the rate of current musculoskeletal disorders at the facility, (3) a review of the plant's efforts to mitigate musculoskeletal disorders, and (4) a review of working-pace increases likely to result from overall line speed increases.¹⁸⁴ Finally, the legislation prohibits the use of funds available to the Secretary of Agriculture for the development and implementation of policies related to increasing line speeds during the COVID-19 pandemic.¹⁸⁵

The bill, critically, brings consideration of worker-health in line speeds under the authority of OSHA.¹⁸⁶ Not only is this the appropriate site for this authority as worker health and safety is a primary purpose of OSHA, but also providing

179. Press Release, Cory Booker, Senator, United States Senate, Booker Introduces Package of Bills to Reform U.S. Food System (Feb. 2, 2023), <https://www.booker.senate.gov/news/press/booker-introduces-package-of-bills-to-reform-us-food-system> [https://perma.cc/2KKH-64JF]; H.R. 798, 118th Cong. (2023).

180. Press Release, Cory Booker, Senator, United States Senate, As Thanksgiving Approaches, Booker, Khanna Announce Legislation to Protect Meatpacking Workers (Nov. 23, 2021), <https://www.booker.senate.gov/news/press/as-thanksgiving-approaches-booker-khanna-announce-legislation-to-protect-meatpacking-workers> [https://perma.cc/22YK-9NKH].

181. Press Release, *supra* note 179.

182. Press Release, *supra* note 180; Press Release, United Food & Com. Workers, NEW REPORT: Meatpacking Worker COVID Cases Triple Previous Estimates with At Least 59,000 Workers Infected Nationwide, Major Safety Failures in Non-Union Plants (Oct. 27, 2021), <https://www.ufcw.org/press-releases/new-report-meatpacking-worker-covid-cases-triple-previous-estimates-with-at-least-59000-workers-infected-nationwide-major-safety-failures-in-non-union-plants/> [https://perma.cc/T79Z-GQR5].

183. S. 270, 118th Cong. § 101 (2023).

184. *Id.*

185. *Id.*

186. *Id.*

workers with a single entity at which to direct advocacy concerning line speed changes encourages greater inclusion of worker voice.¹⁸⁷ Further, the bill focuses on both acute injuries and repetitive motion injuries, acknowledging a core concern of workers in meatpacking facilities. While the waiver and inspection requirements would be ongoing, one limitation of the proposed legislation is that its prohibition on new policies relating to increasing line speeds would only be in effect for up to ninety days following the end of a declaration of emergency from the COVID-19 pandemic.¹⁸⁸ The federal government declared that the public health emergency for COVID-19 expired on May 11, 2023.¹⁸⁹ Therefore, the covered period contemplated by the bill ended on August 9, 2023, 90 days after the termination of the declaration on May 11.

In a later section of the bill, the sponsors propose a broader remedy by requiring OSHA to propose standards for ergonomic program management in meatpacking facilities.¹⁹⁰ The OSHA standard under this section is required to include identification and control of hazards contributing to musculoskeletal disorders, “which may include measures such as rest breaks, equipment and workstation redesign, *work pace reductions*, or job rotation to less forceful or repetitive jobs.”¹⁹¹ Importantly, the hazard identification process must include employee representative participation.¹⁹² If passed, provisions such as these, if implemented with fidelity, could greatly enhance worker voice in addressing workplace harms caused by line speed. However, the legislation does not allow for OSHA or unions to be involved in current line speed determination processes under the FSIS.

Finally, the bill does propose updates to an existing meat and poultry processing grant program.¹⁹³ However, Congress could make additional updates, discussed in this Part under Section B, to balance the scale between new businesses and large corporations in the meatpacking sector.

187. K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 343 (2017–2018) (discussing, in relation to the success of the Consumer Financial Protection Bureau, that it “centralizes authority in one agency, thus clarifying lines of accountability and responsibility, and providing a clear target against whom stakeholder groups can make claims.”).

188. S. 270 §§ 3(2), 101.

189. Press Release, U.S. Dep’t of Health & Hum. Servs., Fact Sheet: End of the COVID-19 Public Health Emergency (May 9, 2023), <https://www.hhs.gov/about/news/2023/05/09/fact-sheet-end-of-the-covid-19-public-health-emergency.html#:~:text=Based%20on%20current%20COVID%2D19,day%20on%20May%2011%2C%202023> [https://perma.cc/8VYY-VBVY].

190. S. 270 § 123.

191. *Id.* § 123(a)(1)(B) (emphasis added).

192. *Id.* § 123(a)(1)(A).

193. *Id.* § 201.

a. Direct OSHA Governance of Line Speeds

Authority to regulate line speeds should rightfully be delegated to OSHA, in light of OSHA's clear worker health and safety mandate.¹⁹⁴ As shown above, it is hard to imagine a colorable argument that line speed does not impact worker health. This Section proposes granting authority to regulate line speeds to OSHA without affecting the line-speed determination procedure under FSIS. OSHA and the USDA would, therefore, have concurrent authority to regulate line speed in meatpacking facilities.

Under the new scheme, one line speed limit would be promulgated by the FSIS, as it is now. Even the most recently proposed rule, allowing for no upper limit so long as product is uncontaminated, would suffice, so long as it met FSIS's consumer safety goals. The USDA would continue to have the jurisdiction to ensure that food is safe for consumption. The scope of USDA's power would be unchanged; it could still implement and enforce its product-inspection programs.

However, there would be an additional layer of oversight by OSHA, which would have the substantive jurisdiction¹⁹⁵ to express worker safety and ergonomic standard requirements, including implementation of a (presumably) sub-maximum line speed. Under the new delegation of authority, the scope of OSHA's power would include enforcement of its mandate through existing citation procedures.¹⁹⁶ Through this process, individual plants may be required to lower line speeds below maximums identified by the USDA in order to comply with worker safety standards. Importantly, those worker safety standards would be set at the national level, rather than being left to individual unions to negotiate through workplace bargaining.¹⁹⁷

Not only does the OSHA mandate clearly fit the project of regulating line speeds, but consolidating authority for work-regulation under OSHA will assist workers in locating where to seek guidance on workplace concerns. Creating a clear sight line between a governing agency and workers seeking to organize

194. "Congress created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions for workers by *setting and enforcing standards* and by providing training, outreach, education and assistance." *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB. (emphasis added), <https://www.osha.gov/aboutosha> [<https://perma.cc/EEP9-ZGFF>] (last visited: Oct. 31, 2023).

195. Defined as the specific "subject matter [an agency] is authorized to regulate or manage." ALEJANDRO E. CAMACHO & ROBERT L. GLICKMAN, *REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK* 21 (2019).

196. Critically, the ability of OSHA to investigate and implement an additional mandate on employers in the sector will depend entirely on additional investment for investigatory capacity at the agency. As Professor Cruz has noted, "[I]ack of funding and political standing has led to an agency that continues to be severely underfunded, understaffed, and incapable of investigating and enforcing complaints." Cruz, *supra* note 34, at 673–74.

197. See Andrias, *supra* note 131, at 8–9.

around a specific set of problems greatly increases the likelihood that workers will exercise their organizing power.¹⁹⁸

b. Worker Health Considerations Incorporated into FSIS Process

If OSHA cannot regulate line speed directly, the potential health impacts on workers at the very least need to be incorporated into the considerations made by the FSIS. A version of this proposal already has supporters in the federal government and among labor unions.¹⁹⁹ As discussed above, the Biden Administration authorized a time-limited trial, in partnership with OSHA, allowing pork-processing plants in the United States to operate at faster line speeds in order to collect data on worker safety.²⁰⁰ This proposal differs from the time-limited trial in at least one important respect, which is that the mandate to incorporate worker-safety measures in future rulemaking following the trial is not explicit.²⁰¹ Accordingly, existing proposals can still be strengthened to ensure that worker voice is not undervalued.

Distinct from the strategy outlined in the previous Section, under this recommendation, the FSIS would retain sole jurisdiction to regulate line speed—forcing OSHA and worker advocates to push for strong worker-safety measures in response to increased lines speeds set by the FSIS, rather than permitting it to regulate independently. One significant drawback of this proposal is the likelihood that worker-safety measures will be undervalued in the regulatory process, particularly in evaluating costs and benefits. If each agency addressed the problem individually, it need only contemplate the relative costs and benefits of that particular agency’s interventions in relation to the underlying problem. However, if the FSIS attempts to incorporate worker voice into its line-speed setting process, the agency will need to weigh the relative costs and benefits of worker safety against those of consumer safety. Even if the food and consumer side of the equation was not heavily influenced by industry production goals,²⁰² pitting constituency safety goals against one another in this way is counterproductive.

Complicating this recommendation is the fact that the FSIS, in its final rulemaking concerning NSIS, repeatedly asserted that it did not have the jurisdiction or authority to regulate with regard to worker health, a power the FSIS interprets as solely within the purview of OSHA.²⁰³ However, FSIS can collaborate with OSHA on initiatives, or seek comment from OSHA when regulating in areas it

198. See Rahman, *supra* note 187, at 362–63.

199. See Polansek, *supra* note 75.

200. *Id.*

201. See *id.*

202. See, e.g., Marks, *supra* note 122, at 74 (describing the impact of export contracts on pork production during the COVID-19 pandemic); see also Cruz, *supra* note 34, at 647, n. 41.

203. See Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 53305 (Oct. 1, 2019) (amending 9 C.F.R. §§ 301, 309, 310).

believes may overlap with a worker safety concern.²⁰⁴ Despite this, FSIS asserts that it is not required to seek collaboration with OSHA when its initiatives may impact worker health, and that it did not do so during the rulemaking process for the NSIS because it believed the Office of Management and Budget (OMB) review process would be sufficient to take into account potential worker harms.²⁰⁵

Relying on the OMB review process to appropriately weigh the costs and benefits of proposals involving non-monetizable costs (e.g., the value of maintaining worker health compared to the effectiveness of a policy in producing sanitary food products) is extremely fraught. In 2011, the Obama Administration emphasized its support for the OMB's cost-benefit analysis (CBA) requirement, and "encouraged agencies to choose regulatory alternatives that 'maximize net benefits' and . . . 'impose the least burden on society, consistent with obtaining regulatory objectives.'"²⁰⁶ One of the principal concerns and outstanding questions with regard to CBAs is how agencies can or should weigh "variables that are difficult or perhaps impossible to quantify."²⁰⁷

As has been discussed, the harms associated with line speed in meatpacking facilities are significant.²⁰⁸ Chronic or severe injuries may also lead to permanent disability and the ensuing cost of medical care and lost wages.²⁰⁹ For this reason, quantifying the value associated with a regulation aimed at reducing workplace-related amputations and injuries is an extremely difficult task, and weighing these values against the profit goals of the meat-packing industry seems inappropriate if not impossible.²¹⁰ A cost-benefit analysis that pits these two interests against one another runs the risk of undervaluing the impact of increasing worker safety. It would serve each goal more fully to separate the issues and allow each agency to tackle costs and benefits relative to its stated mission.

204. See, e.g., D. Minn. Order on Summary Judgment, *supra* note 46, at 6 (describing FSIS's commitment in the Final Rule to "work with OSHA to improve worker safety").

205. *Id.* at 12. As the result of a 1993 EO, agencies are required to assess potential costs and benefits of significant rules and submit those assessments to the OMB prior to the rulemaking process. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

206. MAEVE P. CAREY, CONG. RSCH. SERV., COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING (2022) (quoting Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011)).

207. See Cass R. Sunstein, *Some Costs & Benefits of Cost-Benefit Analysis*, 150 DAEDALUS 208, 212 (2021).

208. See *supra* Part I.B.

209. Wasley, Cook, & Jones, *supra* note 57.

210. *Comment on Cost-Benefit Analysis of Regulations*, PUB. CITIZEN (June 20, 2023), <https://www.citizen.org/article/comment-on-cost-benefit-analysis-of-regulations/> [<https://perma.cc/357N-XJ56>] ("Comparing quantified regulatory costs to non-quantified regulatory benefits in order to determine whether a regulatory action 'maximizes net benefits' is tantamount to comparing 'apples to oranges.'"); James Goodwin, *A Post-Neoliberal Regulatory Analysis for a Post-Neoliberal World*, CTR. FOR PROGRESSIVE REFORM (Oct. 14, 2021), <https://progressivereform.org/cpr-blog/post-neoliberal-regulatory-analysis-post-neoliberal-world/> [<https://perma.cc/9FVK-4ZZC>] ("Agency economists are supposed to quantify and monetize all impacts—pro and con—of an infinite number of potential solutions. This aim is, unsurprisingly, impossible to achieve in practice.").

The FSIS could seek input from labor unions and OSHA, creating a procedural worker-power mechanism that would enhance worker voice in the regulatory process. As Professor K. Sabeel Rahman argues, “creating more points of leverage through which stakeholders can influence policymaking in . . . institutions” can “shift the terrain of power and influence in a more equitable and balanced direction.”²¹¹ Therefore, in order for worker consultation in the FSIS process to be effective, the agency should be required to consult with OSHA and workers’ unions in setting the substantive line speed threshold. FSIS should promulgate a rule proposing potential consultation process designs, rather than relying on ad hoc intervention instigated by labor unions to attempt to intervene in entrenched FSIS procedures.

B. Increasing Worker Power and Self-Governance

While the above set of recommendations may well accomplish the task of incorporating worker voice in the regulatory process of setting line speed, these reforms do not address the underlying conditions discussed at the outset of this Article. The preceding recommendations could be termed, in the framework of Andre Gorz, “reformist reforms,”²¹² or reforms that “legitimize existing power structures, accumulation dynamics, and political processes.”²¹³ The following Sections propose reforms intended to challenge existing power structures; what Gorz terms “non-reformist reforms.”²¹⁴ Each of these recommendations “require[s] a ‘modification of the relations of power,’ in particular ‘the creation of new centers of democratic power.’”²¹⁵ Professor Amna A. Akbar describes the primary concern with reformist reforms as their orientation “toward entrenching, rather than overthrowing or substituting, a fundamentally corrupt system, institution, or set of relations.”²¹⁶ Alternatively, non-reformist reforms seek “to

211. Rahman, *supra* note 187, at 358.

212. ANDRE GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 7 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press 1967).

213. Patrick Bond, *Reformist Reforms, Non-Reformist Reforms and Global Justice: Activist, NGO and Intellectual Challenges in the World Social Forum*, 3 *SOC’YS WITHOUT BORDERS* 4, 15 (2008).

214. GORZ, *supra* note 212.

215. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 *HARV. L. REV. F.* 90, 101 (2020) (quoting GORZ, *supra* note 212, at 8 n. 3 (Martin A. Nicolaus & Victoria Ortiz trans., 1967)).

216. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2518–19 (2023) (citing Meagan Day, *Single-Payer Is a “Non-Reformist Reform,”* MEDIUM (Nov. 20, 2017), <https://medium.com/@meaganday/single-payer-is-a-non-reformist-reform-fe3751aa7f27> [<https://perma.cc/77H9-KGD3>] (“Reformism is when your mission is to tinker with the system to make people’s lives better, but not really alter the basic structure at the end of the day. And reformists prefer changes that give people a much-needed helping hand, but don’t really undermine capitalism.”)).

undermine the prevailing political, economic, social order” and to “redistribute power and reconstitute who governs and how.”²¹⁷

This Section begins to answer the question: What *should* meatpacking look like? The following sections propose to transform the meatpacking sector by creating new centers of power and enabling worker-advocates to challenge the underlying conditions that give rise to worker exploitation altogether.

1. Breaking Up Big Meat-Production Companies

This Section introduces recent proposals in the antitrust space, and ultimately recommends breaking up meatpacking companies dominating the labor and consumer markets. While this intervention makes use of an existing legal structure, the aim to break up large entities in the meatpacking industry is non-reformist in that the end goal is to reorder who holds power in the industry and how that power is held.²¹⁸ To the extent that reordering the organization of power within the meatpacking industry is a suppression of capitalism (which otherwise relies on market forces and private ordering to structure power within the sector), breaking up large corporations is more than just a “suppression of the abuses of capitalism” targeted by reformist-reforms.²¹⁹ An intervention such as this has the potential to rebalance the scale between workers and employers concerning collective bargaining leverage and overall wage trends.²²⁰

From 1990-2020, individual hog farming enterprises grew larger, while the overall number of farms with hogs declined by more than seventy percent.²²¹

217. *Id.* at 2507.

218. *Id.* at 2507; see also Azmimah Jhetam, *Hopes for an Anti-Monopoly Agenda in the AFCFTA Competition Protocol*, AFRONOMICS L. (Nov. 11, 2022), <https://www.afronomicslaw.org/category/analysis/hopes-anti-monopoly-agenda-afcfta-competition-protocol> [<https://perma.cc/VE7S-P246>] (“Competition law can function as a ‘non-reformist reform’ when it is deployed as part of an antimonopoly agenda concerned with protecting and deepening democracy through ‘control[ling] private concentrations of economic power’”) (internal citations omitted); Azza Altiraifi & Sasha Hammad, *Reclaiming Antimonopoly for Racial and Economic Justice*, INEQUALITY.ORG, <https://inequality.org/research/amazon-antimonopoly/> [<https://perma.cc/7JHC-PKRK>] (“Antimonopoly activism must foster democratic and collaborative practice that keep law and policy in dialogue and in solidarity with emancipatory social movements. By pursuing non-reformist reforms that modify power relations, we move beyond the narrow question of what is possible in a current political moment and pursue solutions to build ‘new centers of democratic power.’”).

219. Akbar, *supra* note 216, at 2519 (quoting ROSA LUXEMBURG, REFORM OR REVOLUTION AND OTHER WRITINGS 3 (2006) 58).

220. See U.S. DEP’T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf> [<https://perma.cc/7FTL-QNSE>]; JOSH BIVENS, LAWRENCE MISHEL, & JOHN SCHMITT, ECON. POL’Y INST., IT’S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES (2018), <https://files.epi.org/pdf/145564.pdf> [<https://perma.cc/6B6N-WM6A>].

221. *Animal Product, Hogs & Pork, Sector at a Glance*, U.S. DEP’T OF AGRIC. (Jan. 4, 2022), <https://www.ers.usda.gov/topics/animal-products/hogs-pork/sector-at-a-glance/> [<https://perma.cc/MV8U-JWDT>].

“[T]he rapid shift to fewer and larger operations” characterizes the most important of significant structural changes undergone by the hog industry in the United States in the last forty years.²²² The production share for producers who marketed more than 50,000 hogs per year grew from 7% of the market in 1988 to 51% of the market in 2000.²²³ In the same time frame, the production share of producers who marketed under 1,000 hogs per year dramatically declined from 32% to just 2%.²²⁴ Further, a 2005 report showed that just four pork-packing companies controlled sixty-four percent of the market.²²⁵

A growing body of research has documented that when market concentration increases, wages and worker power decrease.²²⁶ Highly concentrated job markets also prevent worker mobility, limiting individuals’ ability to express dissatisfaction with an employer by seeking employment elsewhere.²²⁷ Combined with issues discussed above concerning regional dependence on meatpacking plants for employment, workers in the sector are in a weakened bargaining position as compared to deeply entrenched monopsony and monopoly interests.

In a 2021 Executive Order (EO), President Biden acknowledged that “excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.”²²⁸ For workers specifically, the EO aspires to create a competitive marketplace where workers have access to “more high-quality jobs” and are provided the “freedom to switch jobs or negotiate a higher wage.”²²⁹ To combat the marked increase in market concentration in the agricultural sector, the Biden EO encourages the USDA to issue new rules under the Packers and Stockyards Act, originally passed to “assure fair competition and fair trade practices . . . and to protect members of the livestock, meat, and poultry industries from unfair,

222. *Id.*

223. CORIOLIS RESEARCH, LESSONS FROM SMITHFIELD FOODS 13 (2006), https://coriolisresearch.com/pdfs/coriolis_smithfield_case_study.pdf [<https://perma.cc/S3UT-2DAZ>].

224. *Id.*

225. Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets*, DEP’T OF RURAL SOCIO., UNIV. OF MO. (2005), https://www.iatp.org/sites/default/files/258_2_60439.pdf [<https://perma.cc/MH2A-L68R>]. The “big four” pork packers identified in this report are Smithfield Foods, Tyson Foods, Swift & Co., and Hormel Foods. Notably, adding just two additional large producers brings the large-producer market share to seventy-seven percent. *See id.* *See also* Kelsea Kenzy Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America’s Heartland*, 58 S.D. L. REV. 611, 612 (2013) (highlighting the degree of concentration in the meatpacking industry from the 1920s to today).

226. *See* U.S. DEP’T OF THE TREASURY, *supra* note 220, at 23; Bivens, Mishel, & Schmitt, *supra* note 220; José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. 167, 180–81 (2022).

227. U.S. DEP’T OF THE TREASURY, *supra* note 220, at 1–2, 51.

228. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

229. *Id.*

deceptive, unjustly discriminatory and monopolistic practices,”²³⁰ but suffering from weak enforcement mechanisms put in place by the Trump Administration.²³¹

In contrast, rather than relying on an extended rulemaking procedure, Senators Elizabeth Warren and Mike Rounds filed a joint resolution in May 2022 “[d]irecting the Federal Trade Commission [FTC] to investigate and report on anticompetitive practices and violations of antitrust law in the beef packing industry.”²³² The resolution calls for an investigation into the beef packing industry concerning: “(A) price fixing; (B) anticompetitive acquisitions; (C) anticompetitive vertical integration; (D) dominance of supply chains; and (E) monopolization.”²³³

While both options have merit, each is limited. First, the Warren/Rounds resolution is drafted narrowly to only review the beef packing industry. While Senators Warren and Rounds respond, rightly, to consumer concern over the price of beef while profits at large beef packing companies skyrocket,²³⁴ the issue extends to pork and poultry packing as well. All of the meatpacking industries should be included in this review. Second, concerning the Biden EO, new rulemaking is an invariably slow intervention.²³⁵ Rulemaking procedures can often last years, potentially outlasting the current presidential administration. Finally, as with all regulatory interventions, the method of regulation will ultimately depend on a balancing of comments submitted to the agency, which itself is at risk of being captured by industry.²³⁶

The meatpacking industry as a whole needs immediate intervention. Data on market concentration detailed above highlights significant concerning trends that

230. H.R. Rep. No. 85-1048, at 1 (1957).

231. Catherine Boudreau, *The Trump Administration Chose Meatpacking Giants Over Farmers in USDA Proposal, Critics say*, POLITICO (Jan. 14, 2020), <https://www.politico.com/news/2020/01/14/trump-usda-meatpacking-proposal-098352> [<https://perma.cc/KKK6-VVPC>] (reporting on USDA proposed rules under Trump Administration which “omit[] an Obama-era effort that would have made it easier for livestock farmers to win lawsuits against meat processors like JBS or Tyson Foods”).

232. S.J. Res. 47, 117th Cong. (2022).

233. *Id.*

234. Press Release, Elizabeth Warren, Senator, United States Senate, Warren, Rounds Introduce Bipartisan Resolution Directing FTC to Investigate Anticompetitive Practices and Violations of Antitrust Laws in Beef-packing Industry (May 19, 2022), <https://www.warren.senate.gov/newsroom/press-releases/warren-rounds-introduce-bipartisan-resolution-directing-ftc-to-investigate-anticompetitive-practices-and-violations-of-antitrust-laws-in-beef-packing-industry> [<https://perma.cc/UY7P-4S9Q>].

235. See Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841, 842-44 (2017) (detailing the lengthy rulemaking process and political aspects of rulemaking which can slow it even further).

236. See Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business?: Assessing Interest Group Influence in U.S. Bureaucracy*, 68 J. POL. 128, 129 (2006) (“[B]usiness interests enjoy disproportionate influence over rulemaking outputs despite the supposedly equalizing effects of notice and comment procedures.”)

could give rise to antitrust action.²³⁷ In a 2022 hearing before the House Agricultural Committee, representatives of the largest four beef packing companies were questioned about rapidly increasing profits.²³⁸ Referencing a 400% increase in profit margins in the packing industry since 2015, Representative David Scott stated plainly: “Let me tell you, this can’t possibly happen in a competitive market.”²³⁹

2. Cooperative Ownership of Packing Plants

Worker-owned cooperatives, “democratically managed business[es] . . . owned and controlled by the workers,”²⁴⁰ provide an alternative to corporate forms of government and can act as an essential tool in combating income inequality.²⁴¹ Unlike in traditional corporations, profits are shared among worker-owners.²⁴²

Worker cooperatives are designed to “support inclusive governance and equitable sharing of responsibilities and profits.”²⁴³ Benefits can also extend to the community. Worker-owners tend to live in areas where their businesses are located, thereby anchoring cooperatives and furthering the opportunity for wealth-building locally.²⁴⁴ Some cooperatives also have a unionized workforce, further institutionalizing the power of worker voice.²⁴⁵ Unionization in the cooperative setting allows the entity to formalize certain procedures, such as the handling of workplace disputes.²⁴⁶ This inclusive governance structure can amplify worker

237. *Supra* notes 221–225.

238. Present were the CEOs of Cargill, JBS USA, Tyson Foods, and National Beef Packing. Karl Evers-Hillstrom & Tobia Burns, *Big Four Meatpackers Deny Price Fixing Amid Record Profits*, THE HILL (Apr. 27, 2022), <https://thehill.com/policy/finance/3469128-big-four-meatpackers-deny-price-fixing-amid-record-profits/> [<https://perma.cc/4UWR-VDKJ>].

239. *Id.*

240. *Worker Co-ops*, CAL. CTR. FOR COOP. DEV., <https://cccd.coop/co-op-info/co-op-types/worker-co-ops> [<https://perma.cc/G43D-CRZN>] (last visited Oct. 29, 2023).

241. See generally Carmen Huertas-Noble, *Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools to Address Income Inequality*, 22 CLINICAL L. REV. 325 (2016).

242. *Worker Cooperatives*, CITY OF SANTA ANA, <https://www.santa-ana.org/worker-cooperatives/> [<https://perma.cc/QU7L-FX3A>] (last visited Oct. 29, 2023).

243. Huertas-Noble, *supra* note 241, at 340.

244. *Id.* (citing Carmen Huertas-Noble, Jessica Rose, & Brian Glick, *The Greening of Community and Economic Development: Dispatches from New York City*, 31 W. NEW ENG. L. REV. 645 (2009)).

245. *Overview*, UNITED STEELWORKERS, <https://www.usw.org/union/featured-projects/union-co-op-overview> [<https://perma.cc/69L5-YFMF>] (last visited Oct. 29, 2023) (“By integrating collective bargaining, the workers gain an additional avenue to exercise their ‘ownership’ and to help keep management accountable to the worker-owners as workers.”).

246. Ariana R. Levinson, *Union Co-Ops and the Revival of Labor Law*, 19 CARDOZO J. CONFLICT RESOL. 453, 460 (2018) (“A union provides an avenue for individual workers to file grievances and resolve them, rather than have those workers who are unhappy or outvoted left without a stable process for dispute resolution.”).

concerns over health and safety in the workplace, and would provide a sustainable alternative to traditional profit-maximizing corporations.

As discussed in Part I, corporations are nearly always incentivized to increase productivity, regardless of the potential cost to human health and worker job security.²⁴⁷ However, when the workers own the company, they are not only incentivized to increase productivity²⁴⁸ to maximize workers' own profits, but they are also incentivized to improve working conditions.²⁴⁹ Indeed, one report found that workers who belong to cooperatives in the thirteen states with the most worker cooperatives can expect to earn on average \$7 more than the minimum wage for an entry-level position.²⁵⁰

Worker cooperatives are primarily a creature of state statutory construction.²⁵¹ Some states have authorized specific forms of governance that allow for various degrees of worker-ownership. For example, worker cooperatives are authorized under corporation law in California.²⁵² To form a cooperative corporation, individuals need only execute and file articles of incorporation and comply with naming formalities directed by statute.²⁵³ Despite the simple procedures associated with registering a cooperative corporation with the state, forming a worker cooperative can be extremely challenging. As a threshold issue, securing funding is one of the most difficult parts of starting a new business.²⁵⁴ While worker cooperatives do already receive financial incentives in the form of tax benefits,²⁵⁵ the promise of future tax benefits is little comfort to individuals unable to raise capital to cover the upstart costs of a business.

247. See *infra* Part I. An investigative piece in *The New York Times* found Amazon encouraged employee turnover in response to longer-term workers' expectations for continued raises over time. Amazon affected this by eliminating automatic raises for hourly workers after three years and limiting upward mobility by hiring managers from outside the company. David Leonhardt, *The Amazon Customers Don't See*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/briefing/amazon-warehouse-investigation.html> [<https://perma.cc/PPT8-MMTL>].

248. NORTHCOUNTRY COOPERATIVE FOUNDATION, WORKER COOPERATIVE TOOLBOX—IN GOOD COMPANY: A GUIDE TO COOPERATIVE EMPLOYEE OWNERSHIP 47 (2006), https://resources.uwcc.wisc.edu/Business%20Conversion/Coop_Employee_Ownership.pdf [<https://perma.cc/4UGZ-J7EJ>].

249. See Sydney Pereira, *How Worker Cooperatives Shift Power to Workers*, PRISM (Apr. 11, 2022), <https://prismreports.org/2022/04/11/how-worker-cooperatives-shift-power/> [<https://perma.cc/Y947-KUW8>].

250. DEMOCRACY AT WORK INST., WORKER COOPERATIVES IN THE UNITED STATES (2019), https://cameonetwork.org/wp-content/uploads/2020/02/2019-Worker-Cooperative-Economic-Census-EN-FINAL_020220.pdf [<https://perma.cc/PUX4-ZUW6>].

251. *Co-operative (co-op)*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/co-operative_\(co-op\)](https://www.law.cornell.edu/wex/co-operative_(co-op)) [<https://perma.cc/RH8Y-688C>] (last visited Nov. 6, 2023).

252. CAL. CORP. CODE §§ 12200–12340.

253. CAL. CORP. CODE §§ 12300–12302.1.

254. *We Ask: What's Your Biggest Challenge? Entrepreneurs Say: It's Financing*, U.S. CHAMBER OF COMMERCE (Feb. 25, 2019), <https://www.uschamber.com/co/run/business-financing/business-financing-challenges> [<https://perma.cc/8FEG-L93R>] (asserting financing is the most challenging part of starting a new business).

255. 26 U.S.C. §§ 1381–1388.

In order to allow worker cooperatives to deliver on their promise of providing a just alternative to oppressive working environments, states should experiment with direct funding mechanisms designed to facilitate cooperative growth. One example of a funding mechanism permits the state to direct public and private funding to individuals seeking to form new business in a particular industry.²⁵⁶ For example, Massachusetts recently passed legislation supporting the startup of minority-owned cannabis establishments which provides forgivable loans to entities unable to raise necessary startup capital.²⁵⁷ On the federal level, the U.S. Department of Agriculture manages a grant program called the Meat and Poultry Processing Expansion Program.²⁵⁸ These grants are given to meat and poultry processors in order to “expand their processing capacity . . . creat[ing] new, better and more processing options for meat and poultry producers.”²⁵⁹ Eligible processors include cooperatives, as well as private, non-profit, tribal, and state or local governmental entities.²⁶⁰ The *Protecting America’s Meatpacking Workers Act* (S. 270) would make an important change to the structure of this grant program by limiting the ability of a grant recipient to sell its operations to another meat or poultry processor within 10 years after receipt of a grant.²⁶¹ The proposed change in S. 270 is in line with the underlying purpose of the grant program in that it prevents the consolidation of meatpacking entities the grant program seeks to diversify. In furthering the aim of expanding cooperative ownership of processing facilities, the grant program could also be changed to include prioritization of cooperatives as grant recipients, which are less likely to agree to future corporate consolidation because it would be a misalignment with cooperative values and the goals of worker-ownership.

CONCLUSION

For over a century, workers in meatpacking facilities have implored industry to slow down the pace of work in order to protect their safety and their lives. Despite the safety and health risks, packing plants instead continue to push for increased output in order to increase profits. The COVID-19 pandemic highlighted just how far the industry was willing to go to make money by sacrificing the lives of its workers. This Article has described the conditions that contribute to worker

256. See, e.g., MASS. GEN. LAWS ch. 94G, § 14A (2022) (implementing a cannabis social equity trust fund to provide grants and loans to applicants from communities disproportionately impacted by the war on drugs to assist with cannabis establishment startup costs).

257. *Id.*

258. *Meat and Poultry Processing Expansion Program*, U.S. DEP’T OF AGRIC., <https://www.rd.usda.gov/programs-services/business-programs/meat-and-poultry-processing-expansion-program#:~:text=What%20is%20the%20maximum%20grant,from%20%24250%2C000%20to%20%2410%20million> [https://perma.cc/KL3V-B68X] (last visited Nov. 6, 2023).

259. *Id.*

260. *Id.*

261. S. 270, 118th Cong. § 201 (2023).

exploitation in the sector, including the undervaluing of worker health and safety in the regulatory process, the weakening of collective bargaining, and exploitation of immigrant communities and communities of color. By granting OSHA direct authority to regulate line speeds, the federal government would be righting a century-old wrong in prioritizing food and consumer safety over the health and safety of workers. Further, the government could take even stronger steps to reconfigure the meatpacking industry altogether to allow for a greater accumulation of worker power and non-reliance on current industry conglomerates through antitrust law and new cooperative corporations law.