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Administrative Law of Scarcity (and Surplus)

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CSAS Working Paper 21-24

Administration in Crisis: Pandemics, Financial Crises, and Other Emergencies

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INTRODUCTION

In March 2020, the United States first began to report confirmed positive coronavirus tests in various cities. News outlets quickly reported widespread panic buying in grocery stores, with runs on food, toilet paper, masks, and cleaning supplies. Images of empty shelves and long lines were common. The media reported shoppers experiencing general feelings of stress and anxiety; predictably, physical violence broke out between customers fighting to buy food.[1]

The dynamic of scarcity, particularly with respect to food, during times of emergency or crisis is a chronic problem. Special rules against price-gouging—charging excessive prices during short-term spikes in demand—are supposed to help manage the problem. But whether during natural disaster, war, or pandemic, the management of actual scarcity and, importantly, fear of scarcity, is central.

As runs on food emerged in the early days of COVID-19, trade associations argued that the shortages derived from outsized demand.[2] Indeed, the introduction of shutdowns in the United States marked a stark increase in the demand for a range of products – dry foods, hand sanitizer and cleaning wipes, toilet paper, etc. – leading to runs on these items in grocery stores.[3] Once runs began on products, the emptying shelves shoppers encountered contributed to a knock-on effect of what observers dubbed panic buying: consumers believed they needed to stock up on food because everybody else was stocking up. For example, demand spiked for household deep freezers so that

* Sidley Austin Professor of Law, Harvard Law School. I am grateful to Will Matheson, Samson Mostashari, Brett Richey, and Avery Wentworth for exceptional research assistance. Very useful comments and suggestions were provided by Sharona Hoffman, Tevi Troy, David Zaring and participants in the George Mason University Gray Center roundtable on "Administration in Crisis: Pandemics, Financial Crises, and Other Emergencies" (Oct. 1-2, 2020).

[1] *E.g.*, Fredrick Kunkle and Michael E. Ruane, *Coronavirus Triggers Run on Grocery Stores, with Panic-Buying, Hoarding and Some Fighting, Too*, WASHINGTON POST, (March 13, 2020), https://www.washingtonpost.com/dc-md-va/2020/03/13/coronavirus-triggers-run-grocery-stores-with-panic-buying-hoarding-some-fighting-too/; Vivian Manning-Schaffel, *Coronavirus Fears Have Emptied Supermarket Shelves. Are You Panic-Buying?*, NBC NEWS, (March 5, 2020), https://www.nbcnews.com/better/lifestyle/coronavirus-fears-have-emptied-supermarket-shelves-are-you-panic-buying-ncna1148536.

[2] Michael Corkery et al., *There Is Plenty of Food in the Country*, THE NEW YORK TIMES, (March 15, 2020), sec. Business, https://www.nytimes.com/2020/03/15/business/coronavirus-food-shortages.html.

[3] *Alexandra Zayas, Coronavirus Panic Buying Puts Grocery Workers and Shoppers at Risk of Infection, PROPUBLICA,* (*March 16, 2020*)*, https://www.propublica.org/article/coronavirus-grocery-shopping-risk-workers-shoppers-covid-19?token=2Afda3_4a5kZwuyUcu2dePYQjk2YB3DX; Victoria Bekiempis, 'Could You Buy a Little Less, Please?': Panic-Buying Disrupts Food Distribution*, THE GUARDIAN, (March 23, 2020), sec. World news, https://www.theguardian.com/world/2020/mar/23/us-coronavirus-panic-buying-food; CORKERY, *supra* note 2.

more frozen foods could be stored if subsequent food supplies proved inadequate.[4] An analysis of media reports worldwide found this problem widespread throughout the globe.[5]

However, concerns about the food supply were not altogether unfounded. Following COVID outbreaks at meat and poultry packing plants, it certainly seemed that food systems that required close-contact and high labor density would be infeasible to function during the pandemic. While the problem of food scarcity during emergency is part supply and part demand, there is no question that fear and uncertainty about future food availability also drives shortage.

This essay surveys some of the historical approaches to the problem of scarcity during emergency with a particular emphasis on the divergent approaches during World War I and World War II. The approach is part historical, part institutional, and part legal. My goal to sketch a bit of the institutional landscape and to survey the legal restrictions on the government's authority and ability to manage scarcity during emergency.

Because one of the standard approaches is for the government to act as a monopoly supplier of the good, stockpiling it and then selling or distributing it in carefully controlled quantities or at specific prices, the problem of scarcity is also closely related to the post-emergency problem of *surplus*. After emergency—most often after war time—the government must decide how to deal with the surplus of food and other goods it stockpiled during the emergency. Particularly when a war or crisis has lasted several years, the economics of surplus distribution are anything but straightforward. Dumping those goods onto the market will often result in plummeting prices and be deeply disruptive to producers or other sellers. By the same token, simply holding the foods will result in artificially high demand and prices. There is therefore a standard political economy story that results after many emergency-related scarcity problems. The goal of this paper is to offer some tentative and general observations about the political and legal landscape of scarcity and surplus.

Given the ongoing pandemic, rather than make strong forecasts about where we are going or draw inferences based on limited data in the very recent moment, I want to harken back to two of the moments in U.S. history, during which the federal government adopted somewhat divergent regulatory approaches to dealing with scarcity. I do not mean to suggest that either is a perfect analogue. Both, after all, involve War Time and the need to provide domestic goods to allies abroad. Nevertheless, the administrative structure provides two useful fixed points for thinking about managing scarcity (and surplus) in the current moment, or so I will suggest. Given obvious length limitations, I can offer only a thumbnail sketch of each historical time period, but hopefully the differences are square enough.

HISTORICAL ANALOGUES

[4] Aimee Ortiz, *Freezers Sell Out as Consumers Stock Up*, THE NEW YORK TIMES, (March 21, 2020), sec. Business, https://www.nytimes.com/2020/03/21/business/coronavirus-freezers-sold-out.html.
[5] S.M. Yasir Arafat et al., *Panic Buying: An Insight from the Content Analysis of Media Reports during COVID-19 Pandemic*, NEUROLOGY, PSYCHIATRY, AND BRAIN RESEARCH 37, 100–103 (September 2020), https://doi.org/10.1016/j.npbr.2020.07.002.

This part sketches two alternative approaches to the problem of scarcity during emergency, particularly with respect to the food supply. The essay discusses the role and activities of the Food Administration during World War I and the War Food Administration during World War II. Although the names of the two agencies are similar, their powers and approach to managing food scarcity were starkly divergent.

A. Food Control during World War I

The principal legal framework for WWI food control was the Food and Fuel Control Act (Lever Act), enacted on August 10, 1917.[6] The Lever Act was intended to "assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, [fuel, fertilizer, and related equipment]; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war."[7] The Act appropriated $150 million for these purposes.[8]

The Act empowered the President to "create and use any agency or agencies,"[9] enter into voluntary agreements,[10] establish a licensing system and regulations,[11] and requisition and sell foods.[12] The only price-fixing directly authorized in the Act was for wheat and coal/coke.[13] The Act also criminalized destroying, wasting, hoarding, monopolizing, or "mak[ing] any unjust or unreasonable rate or charge" for necessaries.[14] The Act was amended in 1919 after several lower courts found that Section 4's criminal prohibitions could not support an indictment because no penalty was prescribed therein.[15] It was repealed on March 3, 1921.[16]

1. Food Administration

The Food Administration was established by executive order on August 10, 1917 pursuant to the Lever Act.[17] This executive order did not meaningfully limit the broad authority granted to

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[6] Food and Fuel Control Act, Pub. L. No. 65-41, 40 Stat. 276 (1917), *amended by* The Food Control and the District of Columbia Rents Act, Pub. L. No. 66-63, §§ 1–3, 41 Stat. 297, 297–98 (1919).
[7] *Id.* at § 1.
[8] *Id.* at § 19.
[9] *Id.* at § 2.
[10] *Id.*
[11] *Id.* at §§ 5, 13.
[12] *Id.* at §§ 10–12.
[13] *See id.* at §§ 14, 25. The Lever Act specified that the price of wheat should be at least $2 per bushel for the 1918 crop. *Id.* at § 14.
[14] *Id.* at §§ 4, 6. Controversially, the Act also prohibited the use of foods and grains in liquor production. *See id.* at § 15.
[15] *See* Paul F. Hannah, *Some Aspects of Price Control in Wartime*, 27 CORNELL L. REV. 21, 28 (1941); *see also* The Food Control and the District of Columbia Rents Act, Pub. L. No. 66-63, §§ 1–3, 41 Stat. 297, 297–98 (1919).
[16] Joint Resolution of March 3, 1921, Pub. L. No. 64-66, 41 Stat. 1359, 1359 (1921) ("That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency . . . the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency . . . .").
[17] Exec. Order No. 2679-A (1917); *see also* Food and Fuel Control Act § 2.

the President under the Act.[18] The Food Administration was active for a two-year period (until August 1919), with most price controls relaxed following the Armistice in November 1918.[19] At a high level, the goals of the Administration were to (1) stabilize prices and prevent speculation; (2) manage exports; and (3) reduce food waste and consumption.[20] These goals were generally achieved by encouraging voluntary compliance rather than through imposing legal sanctions.[21] Aside from encouraging such cooperation, the Administration's key powers were to enter into voluntary agreements, license and prescribe regulations, and buy and sell goods.[22]

The work of the Administration itself was fairly decentralized: each state had its own Federal Food Administrator, who in turn appointed county- and city-level administrators.[23] These administrators relied heavily on various local advisory committees.[24] Over the course of its activities, the Administration employed some 3,000 salaried employees and was supported by roughly 8,000 full-time volunteers and 750,000 part-time volunteers.[25] Because the Food Administration operated mainly on a voluntary basis, there were training sessions for orators who were tasked with publicly encouraging conservation and advocating for a swap from needed agricultural commodities to other substitutes.

In addition, two corporations were created under the umbrella of the Food Administration: the Grain Corporation and the Sugar Equalization Board.[26] The Food Administration Grain Corporation was established by executive order on August 14, 1917 under the authority granted by Sections 2 and 14 of the Lever Act.[27] Its initial capitalization was $50 million, paid for out of the $150 million provided by the Lever Act.[28] The principal activity of the Grain Corporation was buying grain at terminals at the established "fair price" and then exporting to the Allies or reselling domestically.[29] Thus, the Grain Corporation acted somewhat like a regular buyer, who then resold or redistributed domestically and internationally—controlling the supply level.

The Food Administration Grain Corporation was reorganized into the United States Grain Corporation on July 1, 1919 to "face the peace-time emergencies."[30] The U.S. Grain Corporation transitioned after the war into a vehicle for European food relief. It procured food for the American Relief Administration, including the Commission for Relief in Belgium and the Purchasing

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[18] *See* WILLIAM CLINTON MULLENDORE, HISTORY OF THE UNITED STATES FOOD ADMINISTRATION, 1917–1919, at 56 (1941) (quoting Exec. Order No. 2679-A) ("Said United States Food Administrator shall supervise, direct, and carry into effect the provisions of said act, and the powers and authority therein given to the President, so far as the same apply to foods, feeds, and their derivative products . . . .").
[19] HERBERT HOOVER, PREFACE TO A REPORT OF THE UNITED STATES FOOD ADMINISTRATION 3 (1920).
[20] *See* MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 59; HOOVER, *supra* note **Error! Bookmark not defined.**, at 3, 12–23.
[21] HOOVER, *supra* note **Error! Bookmark not defined.**, at 8–9.
[22] *See* MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 61.
[23] HOOVER, *supra* note **Error! Bookmark not defined.**, at 9.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Exec. Order No. 2681 (1917); *see also* Food and Fuel Control Act §§ 2, 14.
[28] Exec. Order No. 2681 (1917); *see also* Food and Fuel Control Act § 19.
[29] HOOVER, *supra* note **Error! Bookmark not defined.**, at 26–27.
[30] Chester L. Guthrie, *The United States Grain Corporation Records in the National Archives*, 12 AGRIC. HIST. 347, 349 (1938).

Commission for Russian Relief. The American Relief Administration was led by Herbert Hoover; it delivered four million tons of food supplies to 23 European countries after the war.[31] Notably, it launched a generous humanitarian campaign for famine relief in the Soviet Union.[32] The humanitarian efforts wound down beginning in 1922, and the Corporation was formally abolished by executive order on December 31, 1927.[33]

The Sugar Equalization Board was modeled on the Grain Corporation and was established on July 11, 1918.[34] However, because the Lever Act did not grant the Food Administration authority to actually buy sugar, the Sugar Equalization Board was instead established based on President Wilson's emergency war powers and its initial capitalization of $5 million came from his emergency war funds.[35] The Board's purpose was to "equalize the cost of various sugars and secure the better distribution."[36] The Sugar Equalization Board's primary contribution was the disposition of the 1919 sugar crop. (The 1918 crop was handled through voluntary agreements with producers and refiners.[37]) The Board set a nationwide price for refined sugar, negotiated an advance purchase of the 1919 Cuban sugar crop, reached agreements with producers and refiners, imposed a certificate system for sugar rationing, and prioritized distribution.[38]

2. Price Stabilization: Legal Powers and Constraints

The Lever Act represented an expansive, and relatively unconstrained, grant of power to the Executive. It permitted the President "essentially to regulate vast parts of the economy in furtherance of vast objectives."[39] The Act's language "was broad and somewhat elastic," and Section 1's framing of statutory purposes favored a generous construction of the subsequent provisions.[40] The Act drew authority from war powers and thus was not seen as implicating the ordinary limits of the Commerce Clause.[41] Not surprisingly, the executive order establishing the Food Administration did not narrow this broad authority.[42]

The Act's key limitation was that, with the exception of wheat and coal/coke, it did not authorize the President to directly fix prices.[43] Of course, the formation of the price-fixing Sugar

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[31] *The American Relief Administration in Soviet Russia*, HOOVER INSTITUTION, (2020), https://www.hoover.org/events/american-relief-administration-soviet-russia.
[32] Ibid.
[33] *Record Groups 4 – 49*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, (2020), https://www.archives.gov/chicago/holdings/rg-001-049.html.
[34] Joshua Bernhardt, *Government Control of Sugar During the War*, 33 Q. J. ECON. 672, 693–94 (1919).
[35] *See id.*; MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 178; *see also* Sundry Civil Act of July 1, 1918, Pub. L. No. 65-181, 40 Stat. 634, 635 (1918) (appropriating $50 million "[f]or the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President").
[36] BERNHARDT, *supra* note **Error! Bookmark not defined.**, at 673.
[37] *Id.* at 675.
[38] *See id.* at 696, 698, 702–08.
[39] Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 651 (2017).
[40] MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 60; *see also id.* at 66.
[41] *Id.* at 60.
[42] *See* Exec. Order No. 2679-A (1917).
[43] *See* HANNAH, *supra* note **Error! Bookmark not defined.**, at 25; Tom G. Hall, *Wilson and the Food Crisis: Agricultural Price Control during World War I*, 47 AGRIC. HIST. 25, 44–45 (1973); HOOVER, *supra* note **Error! Bookmark not defined.**, at 17 ("The economic policy of the administration was therefore to stabilize prices and

Equalization Board based on the President's emergency war powers in the absence of Lever Act authorization raises doubt about the efficacy of this limitation. Indeed, if the President could use his emergency war powers to fix prices, no specific authorization from another statute would have been necessary.

And, in practice, other provisions of the Act enabled the Food Administration to establish de facto price control for other goods. First, the Administration's power to enter into voluntary arrangements enabled it to set prices via agreement with industry.[44] Indeed, "[u]nder [the voluntary agreement power] it became possible, once the practically unanimous consent of a trade had been obtained, to reach results which the Food Control Act itself did not make possible.

Wherever a given step in distribution was not made up of too many elements, it was possible to obtain a unanimous agreement as to price to be paid or received for a given commodity, and substantially to fix the price of that commodity. . . . Practically, [these] agreements had the effect of conferring additional powers on the Food Administration . . . ."[45] The Attorney General took the position that such agreements did not violate the Sherman Act due to the government's involvement.[46] Second, the Food Administration's power to establish licensing schemes and associated regulations also served as a mechanism of price control.[47] The Administration required licensees not to exceed a "reasonable margin of profit," and the fixing of such margins by the Administration and publication of "fair price" schedules by local committees "resulted in fact in effective price control."[48]

Scholars of administrative law may recognize echoes of these arrangements in the new deal agencies, so many of which were subject to judicial challenge. The federal government had essentially brought together industry interests to facilitate industry agreement on price, supply, wages, and production. It is little wonder that in the decade that followed, efforts to promulgate "industry codes" become the foundation for so much administration and administrative law.

The vast majority of violations were handled through administrative action (license suspension or revocation), rather than judicial enforcement. Only a small fraction were referred for criminal proceedings.[49] It appears that there were not legal challenges to Food Administration activities while the war lasted, due likely to both public sentiment and the Administration's focus on voluntary compliance.[50] In 1919, several cases involving license revocation were either settled

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reduce speculative profits by purely commercial pressures and business methods as distinguished from legal regulation. . . . The food law gave no power to control retail profit margins except so far as it could be accomplished by voluntary means.").

[44] *See* Food and Fuel Control Act, Pub. L. No. 65-41, § 2, 40 Stat. 276, 276 (1917).

[45] MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 61–62.

[46] *Id.* at 61.

[47] *See* Food and Fuel Control Act § 5.

[48] HANNAH, *supra* note **Error! Bookmark not defined.**, at 25–26; *see also* MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 63 ("The primary basis of commodity control, however, was that conferred by Section 5 . . . With reference to persons who were licensed, the President was authorized to issue regulations, prescribing just, reasonable, nondiscriminatory, and fair storage charges, commissions, profits, and practices.").

[49] HANNAH, *supra* note **Error! Bookmark not defined.**, at 26 (noting that "out of nearly 10,000 cases handled by the Enforcement Division between August 10, 1917, and December 31, 1918, only 65 resulted in requisition and 72 in criminal proceedings"); *see also* MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 333–35.

[50] MULLENDORE, *supra* note **Error! Bookmark not defined.**, at 340.

or decided in favor of the Food Administration.[51] However, in 1921 the Supreme Court found that Section 4 of the Lever Act's criminalization of "any unjust or unreasonable rate or charge" violated due process by failing to establish an "ascertainable standard of guilt"[52] and that its criminalization of conspiracy to exact "excessive prices" suffered from the same defect.[53] Of course, by this time "the war had been won, and the section had accomplished its purpose."[54]

B. Food Administration in World War II

By comparison, the management of food scarcity during World War II was far more extensive, centralized, and was part of an expansive regulatory program administered by the Office of Price Administration (OPA). OPA was the regulatory body responsible for stabilizing the economy and ensuring that the civilians cut back on resources necessary for the war effort. It had broad statutory authority to set price ceilings, impose rations, and punish violators, and it carried out these mandates through the extensive use of local field offices. Interest groups with strong and often-contradictory incentives pushed OPA's formation and eventual dissolution.

1. Administrative Response

President Roosevelt established the Office of Price Control and Civilian Supply (OPACS) by executive order on April 11, 1941.[55] OPACS existed to "[prevent] profiteering and unwarranted price rises, and [facilitate] an adequate supply and the equitable distribution of materials and commodities for civilian use."[56] OPACS, however, suffered from a lack of statutory authority. It was able to publish price schedules and rationing requirements, but not to enforce sanctions for any violations those schedules.[57] The executive order vaguely instructed OPACS to search for sanctions already available to the Executive branch by virtue of prior statutes, but there is no record of any other statutory authority even being identified,[58] certainly not enforced, and OPACS itself or its actions were never challenged in court.[59] OPACS operated in conjunction with several other agencies, each with overlapping and sometimes contradictory mandates. In particular, the authority to ration goods flipped frequently between OPA,[60] the Office of Production Management (OPM), and the War Production Board (WPB) during 1941 and 1942.[61]

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[51] *See id.*
[52] *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *see also id.* at 93.
[53] *Weeds, Inc. v. United States*, 255 U.S. 109, 110–11 (1921).
[54] HANNAH, *supra* note **Error! Bookmark not defined.**, at 29.
[55] William Jerome, et al, *The Beginnings of OPA: The Price Control Act of 1942, the Price Stabilization Division, Selective Price Control* (1947) at 28, https://hdl.handle.net/2027/coo.31924002440976; Exec. Order No. 8734 (1941), https://www.presidency.ucsb.edu/documents/executive-order-8734-establishing-the-office-price-administration-and-civilian-supply.
[56] JEROME, *supra* note 55, at 45.
[57] *Id.* at 44.
[58] *Id*. at 44.
[59] *Id.* at 45.
[60] Exec. Order No. 8734, (1941), https://www.presidency.ucsb.edu/documents/executive-order-8875-establishing-the-supply-priorities-and-allocations-board.
[61] JEROME, *supra* note 55, at 50.

On January 30, 1942, the Emergency Price Control Act consolidated this authority mainly within the OPA, empowering OPA to enforce its regulations and establishing procedural limitations on OPA decision making.[62] The Act allowed OPA to set ration orders and price ceilings on goods, services and rents as long as such ceilings were "generally fair and equitable."[63] It lacked the power to directly order the manufacture of civilian goods, but it was able to ration civilian goods with WPB permission.[64] The Act established an Emergency Court of Appeals, to which aggrieved parties could argue that OPA regulations had failed to meet the "generally fair and equitable" standard.[65] It empowered OPA to punish noncompliant businessowners by revoking business licenses, suing for damages, or pressing criminal charges.[66]

The Emergency Court of Appeals regularly heard challenges to OPA prices, and sometimes overruled OPA. For example, in *Peacock Canning Co. v. Turney*,[67] Peacock Canning Company sued OPA to raise the price ceiling on sardines, on the grounds that its prewar profit margins had been higher than OPA had reckoned and that the existing price ceiling was therefore too onerous. The Emergency Court of Appeals forced OPA to raise the price ceiling for Peacock Canning Co.[68] In *Davies Warehouse Co. v. Bowles*,[69] a public warehouse was storing goods owned by the State of California. Davies Warehouse Co. was subject to OPA price ceilings, but it argued that it was a public utility and therefore exempt. The Emergency Court of Appeals actually dismissed the complaint because Congress had failed to define "public utility." But the Supreme Court took the case, decided that public warehouses should qualify as a public utility, and granted the exemption.

The Stabilization Act, passed in October 1942, further strengthened the provisions of the Emergency Price Control Act. It empowered OPA to freeze wages and agriculture prices, which had been disallowed by the original Act.[70] At the end of the war, President Truman stripped OPA of its authority. It lost the ability to control prices on November 9, 1946, and it was dissolved in 1947.[71]

2. War, Food, Politics, Law

The lessons of the First World War paved the way for a more involved federal response during the Second. By the outbreak of World War II, there was already political energy in favor of government intervention in the wartime economy. In World War I, heavy government spending had enriched wealthy industrialists even as government debt exploded and inflation dried up Americans' savings.[72] Calls to "take the profits out of war" achieved bipartisan consensus during

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[62] *Id.* at 49–50.
[63] Emergency Price Control Act of 1940, 50a U.S.C. §§ 901-946 Suppl. 2 (1940), https://www.loc.gov/item/uscode1940-006050a010/; JEROME, *supra* note 55, at 104.
[64] *Id.* at 93.
[65] *Id.* at 101.
[66] *Id.* at 93.
[67] 185 F.2d 894 (D.C. Cir. 1950).
[68] *See R.J. Peacock Canning Co. v. Commodity Credit Corp*., 185 F.2d 894 (D.C. Cir. 1950).
[69] 321 U.S. 144 (1944).
[70] *Id*. at 92.
[71] Bartels, Andrew H, *The Office of Price Administration and the Legacy of the New Deal 1939-1946*, 3 THE PUBLIC HISTORIAN 5, 27 (1983) , https://www-jstor-org.ezp-prod1.hul.harvard.edu/stable/3377026?seq=19#metadata_info_tab_contents.
[72] JEROME, *supra* note 55, at 16.

the interwar period; Congress explored several plans to impose universal economic controls during national emergencies, but none of them actually passed.[73]

The economic orthodoxy within the academy argued that centralized government action could stabilize a wartime economy, while prioritizing military output. Wartime inflation is thought to be a product of rapid deficit spending and of reduced supply in the civilian economy. According to Galbraith, who headed OPA from about 1941 to 1943 before he resigned after intense clashes with industry—inflation could be stemmed with rapid and strict price controls that freeze prices at pre-inflation levels.[74] In view of shifting industrial output towards military purposes, Galbraith also wanted to disincentivize the manufacture of civilian products like cars and refrigerators.[75] Even many industrialists, wary of the unpredictable and destructive price fluctuations associated with war, supported price controls.[76]

Some members of Congress opposed the Emergency Price Control Act on political grounds. Isolationists disliked a permanent apparatus for managing the war economy—in 1941, they hoped that war would be a temporary affair.[77] Representative Dies categorically opposed heavy government intervention in the economy for anti-Communist reasons and he expressly accused the OPA administrator of Communist leanings.[78] Representative Gore believed the bill did not go far enough; he proposed an alternate plan that would replace *selective* price control, at the discretion of OPA, with a *general* price control that would universally freeze prices for almost all of the economy.[79]

The Food Administration of World War I had targeted price levels by calculating the cost of production and adding on "a reasonable profit."[80] Congress rejected this metric for the Emergency Price Control Act on the grounds that the cost of production was impossible to calculate. This is a familiar problem with the regulation of utilities and monopolies. Setting prices at "cost plus"—the costs of production plus a reasonable profit—means that firms have a systematic incentive to try to inflate costs or even allow them to drift upward away from efficiency.[81] Other proposals included "profit-and-loss" model, which used company-wide earnings data—readily available from the IRS—to extrapolate the average cost of production.[82] In the end, Congress opted for an "overall industry earnings" standard which was solely concerned with the survival of the industry.[83] Prices would be pegged to the overall cost of production, and

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[73] *Id.* at 17.
[74] Hamilton, Earl J, *The Role of War in Modern Inflation*, 1 THE JOURNAL OF ECONOMIC HISTORY 37, 18 (1977), http://www.jstor.org/stable/2119441; Galbraith, J. K., *The Selection and Timing of Inflation Controls*, 2 R. ECON. STAT. 23, 83 (May 1941), https://www-jstor.org.ezpprod1.hul.harvard.edu/stable/pdf/1927509.pdf?ab_segments=0%2Fbasic_search%2Fcontrol&refreqid=fastly-default%3A8263350c5298604bd198045fe7f88653
[75] *Id.* at 84.
[76] JEROME, *supra* note 55, at 18.
[77] Ibid. at 32, 59.
[78] JEROME, *supra* note 55, at 64.
[79] *Id.* at 70
[80] *Id.* at 96.
[81] *Id.* at 96.
[82] *Id.* at 97.
[83] *Id.* at 98.

inefficient firms with a higher cost of production could appeal the decision in cases of undue hardship.[84]

In inflationary times, there is generally a lag between price inflation and wage inflation. Freezing prices and wages at the same time would have calcified this temporary discrepancy, resulting in permanent harm for wage earners.[85] OPA officials asked Congress not to impose wage controls, saying that "if you expect to get the wholehearted cooperation of the people in a great effort which requires sacrifice, you cannot start out with a highly regimented control over wages."[86] Congress ultimately declined to impose wage controls through the Emergency Price Control Act but did so eight months later via the Stabilization Act of 1942.[87] This delay—whether intentional or not—reduced the discrepancy between prices and wages by allowing wages to catch up over the interim period.[88]

3. Exceptionalism

Public utilities were already under a high degree of government control; they were therefore excluded from regulation by OPA.[89] Subsequent litigation fought over whether other entities similar to public utilities were also exempted by implication. Newspaper advertising was also exempted due to the thin profit margins of the newspaper industry.[90]

As for our focus on food, the fishing industry sought an exemption from price controls on two grounds. First, they argued that the industry is highly volatile. The first harvest (at the time, at least) varied enormously from year to year, as did the marginal cost of production.[91] A permanent price ceiling, they argued, would bankrupt fishermen in a bad year and destroy their ability to plan for the future.[92] Second, they argued that the fishing industry is closely tied to agriculture and therefore price controls should be consistent between the two.[93]

Similarly, the agriculture lobby argued that farm prices should be exempted or offered a higher price ceiling. The diversity of American farms meant that the marginal production cost of farm goods varied widely from region to region. A low-price ceiling would be inappropriate, and should be raised above the average cost of production or abolished entirely.[94] The lobby also made an emotional appeal, invoking romantic notions of Jeffersonian agrarianism in defense against big-government efforts to deprive farmers of their property rights.[95] Rural Senators—fully one-third of the chamber—were sympathetic.[96] In the end Congress exempted agriculture and fisheries from OPA's authority to regulate prices.

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[84] *Id.* at 98.
[85] *Id.* at 72.
[86] *Id.* at 72.
[87] *Id.* at 72.
[88] *Id.* at 72.
[89] *Id.* at 127.
[90] *Id.* at 70.
[91] *Id.* at 66.
[92] *Id.* at 66.
[93] *Id.* at 66.
[94] *Id.* at 59.
[95] *Id.* at 66.
[96] *Id.* at 81.

However, it quickly changed course. Because of the centrality of food products to the consumer economy, OPA found it virtually impossible to curb inflation without touching food prices.[97] As rising food prices in cities increased the cost of living, city dwellers were increasingly hurt. [98] Congress granted OPA the authority to regulate farm prices in the Stabilization Act of 1942, but banned OPA from lowering the ceiling below 1942 price points.[99] The exemption for fisheries expired in 1943.[100]

4. Evaluating OPA

By most accounts, OPA worked reasonably well, accomplishing its twin goals of stabilizing the economy and rationing goods for military use.[101] But it is easy to gloss over the constant political and legal tensions that characterized OPA's entire existence. Initially, OPA's backers failed to persuade Americans of its benefit. OPA was understandably caught between two conflicting interests: the producers who wanted fewer regulations, and the consumers who wanted more.[102] By vacillating in response to the farm lobby and business interests in one direction and the labor groups and consumers in the other, OPA failed to satisfy either group. [103]

Unsurprisingly, big business had a mixed reaction to the wartime economic mobilization in 1941. Industrial manufacturers benefited from the government's wartime procurement investments. Lucrative weapons contracts, cheap interest rates, and tax breaks all supported the military-industrial complex.[104] But industry leaders opposed government efforts to manage the civilian economy, headed by John Kenneth Galbraith and Leon Henderson. [105]

As noted, some manufacturers flatly refused to obey price controls and rationing requirements. [106] Thus, the power to punish violators in the Emergency Price Control Act of 1942 was important.[107] Galbraith and Henderson regularly denied business leaders' requests for special exemptions and enforced against firms that violated OPA regulations.[108]

During the Congressional debate over the Emergency Price Control Act, Republicans had characterized price controls as a backdoor for New Deal-style control of the economy. Business lobbyists approached Republicans and Democrats to describe the dangers of the Act for local industries. Debate became dirty and personal; some Congressmen maligned Henderson with Communist and anti-Semitic accusations.

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[97] *Id.* at 92.
[98] *Id.* at 92.
[99] *Id.* at 92.
[100] *Id.* at 94.
[101] BARTELS, supra note 71, at 16.
[102] *Id.* at 16.
[103] *Id.* at 17.
[104] RICHARD PARKER, JOHN KENNETH GALBRAITH: HIS LIFE, HIS POLITICS, HIS ECONOMICS 140 (2005).
[105] Ibid. p. 140.
[106] Ibid. p. 147.
[107] JEROME, *supra* note 55, at 50.
[108] Ibid. p. 147.

Roosevelt introduced the General Maximum Price Regulation on April 27, 1942.[109] This was a general price freeze across the board, and it replaced OPA's previous item-by-item approach.[110] Overnight, OPA had to establish price controls for thousands of individual products in a consistent and fair manner.[111] OPA was unable to implement this regulation smoothly.[112] It received thousands of complaints by industry leaders who perceived the hasty price schedules as unfair.[113]

Democrats fared poorly in the midterm elections of 1942 for at least three reasons. First, Republicans were armed with large campaign donations from anti-OPA business interests.[114] Second, the GOP used OPA as a wedge issue; citing the General Maximum Price Regulation mishap, they characterized OPA administrators as corrupt and incompetent.[115] Aware that the war effort was very popular, Republicans tried to draw attention toward domestic economic policy and away from foreign policy.[116] Finally, voter turnout was low; the war had transplanted many in the working-class Roosevelt coalition away from their usual polling locations.

After the election, Congressional Republicans followed through on their anti-OPA campaign promises. They conditioned OPA funding on Henderson's resignation; Henderson accepted this ultimatum and resigned as OPA Administrator in December 1942.[117] Republicans also pressured Galbraith to resign. They arranged for business leaders to attack him in Congressional hearings—often in offensive and personal terms. Opinion columnists regularly criticized him in conservative-leaning papers. Congressman Everett Dirksen (R-Illinois) called for defunding OPA.[118] Galbraith still refused to resign, but the new OPA Administrator, Prentiss Brown, acquiesced to Republican demands to fire him.[119] Although Galbraith had a solid track record at OPA, he was a lightning rod for critiques of OPA. Galbraith was a good bureaucrat but a poor politician.

After Galbraith was forced out as head of OPA, Chester Bowless served as OPA Administrator from 1943-1946. He accomplished a remarkable turnaround in public opinion while leaving most of the substantive policies of OPA unchanged. In response to businesspeople who felt unheard, Bowless invited business executives to advise OPA bureaucrats on policy matters.[120] While this was a purely advisory role, it did seem to lower tensions with industry.[121] Bowless created a system of local advisory committees through which farmers, labor interests and consumers could all express grievances and listen to their local OPA officials.[122] Finally, Bowless

[109] Ibid. p. 149.
[110] Ibid. p. 149.
[111] Parker, supra note 104, at 149.
[112] Ibid. p. 149.
[113] Ibid. p. 149.
[114] Ibid. p. 150.
[115] Ibid. p. 150.
[116] Ibid. p. 150.
[117] Ibid. p. 150.
[118] Ibid. p. 152.
[119] Ibid. p. 152.
[120] *Id.* at 20.
[121] *Id.* at 20.
[122] *Id.* at 21.

strengthened the field offices, responsible for collecting data and enforcing OPA policies on a local level. [123] He believed that localization would humanize OPA and encourage bureaucrats to be more responsive. Through these efforts, OPA increased compliance, appeased interest groups and boosted OPA's standing in DC.[124]

5. After the War

OPA believed that high levels of savings, unsatisfied consumer demand, and reduced supply in consumer markets would lead to inflationary pressure for many months after the war. On this view, price controls and rations should only be relaxed once military manufacturers had completed the conversion back to civilian production.[125] But Truman hastily dismantled OPA's wage controls, rationing restrictions, and agriculture subsidies, while leaving the (now-popular) price controls intact.[126] Inflation materialized quickly, and with it, the predictable labor unrest.

Truman responded by reinstituting wage controls at a higher level and raising price ceilings to compensate. [127] OPA, now seen as anachronistic and somewhat incapable, faced a tough reauthorization fight in 1946.[128] Over Truman's objections Congress weakened OPA's price-setting abilities, deregulated agriculture prices, and removed subsidies.[129] As OPA weakened, it became less effective. [130] But the worsening inflation did not reinforce Americans' belief in price controls; it was further proof of OPA's incompetence. [131] Facing pressure to drop the toxic asset, Truman ended all price controls on November 9, 1946.[132] The United States entered an inflationary period lasting until 1948.[133]

C. Surplus

Food is "the necessity of all necessities, the prime essential of war, greater in importance than bombs and shrapnel. It is as sharp as steel, the driest—the deadliest of all weapons."[134] For much of the 1900s, the United States stockpiled agricultural commodities as part of an effort to keep consumer prices from drifting too high and avoid year-to-year volatility. Starting in the 1930s, the government also commenced a series of domestic and foreign programs to dispose of the surplus. Sometimes surplus was sold to foreign governments, sometimes donated for emergency relief, sometimes direct distribution within the United States. The Agricultural Adjustment Administration (AAA) was created in 1933 to implement a system of price supports and production control programs.[135] The Commodity Credit Corporation (CCC) was created in

[123] *Id.* at 21.
[124] *Id.* at 22.
[125] *Id.* at 24.
[126] *Id.* at 25.
[127] *Id.* at 25.
[128] *Id.* at 26.
[129] *Id.* at 27.
[130] *Id.* at 27.
[131] *Id.* at 27.
[132] *Id.* at 27.
[133] *Id.* at 28.
[134] LAURENCE A. NIXON, ED., WHEN WAR COMES 142 (1939).
[135] NORWOOD ALLEN KERR, UNDERSTANDING FEDERAL COMMODITY PROGRAMS (1988).

1933 to purchase, store, and dispose of price-supported commodity stocks. And contemporaneously, the Federal Surplus Relief Corporation was created to purchase farm products that fell outside the price support programs.[136] Later in the decade, these entities were moved under control of the USDA. In the first half of the 1930s, these entities purchased wheat, hogs, cattle, sheep, butter, and cheese. Apparently,

> [o]n the assumption that farmers accounted for just under one-third of the general population, Congress set aside 30 percent of the country's customs receipts for the secretary of Agriculture to help maintain farmer incomes. Since then, Section 32 has funded a variety of price support and surplus disposal activities, including the purchase of perishable commodities—usually dairy and beef products and fats and oils—and their distribution at home and abroad.[137]

Section 32 dollars that financed surplus purchases that were then donated to states ultimately became the federal food stamps program, as well as the school lunch program beginning in 1936.

During World War I, the Food Administration Grain Corporation and the Sugar Equalization Board were the principal surplus programs. During World War II, the Surplus Marketing Administration assumed the responsibility for purchasing and distributing a wide variety of farm commodities. New industrial farming techniques, a lack of consumer buying power, and war-related disruptions of foreign trade all exacerbated the surplus that farmers were experiencing.[138] The Surplus Marketing Administration supported the industry in three ways. It directly bought commodities in bulk, then resold them cheaply to needy citizens; it developed new uses for existing commodities; and it exported surpluses to Allied countries.[139] Products included cotton, wheat, pork, oats, rice, eggs, peanuts, dairy, fruits, vegetables, nuts, coffee, and fish.[140] The Surplus Marketing Administration was reorganized as the Agricultural Marketing Administration (AMA) in 1942; AMA had a streamlined organizational structure but conducted the same activities.[141]

By the 1950s, agricultural surplus and foreign aid were critically tied. The Agricultural Trade Development and Assistance Act of 1954

> unified existing surplus-disposal techniques and foreign policy goals. The Act recognized the chronic excess capacity of American agriculture and the dollar-shortage situation of many food-poor nations."[142]

Throughout the 1950s and 1960s, CCC-owned commodities continued to mount. Concessional sales were valued at almost $8 billion from 1954-64. Over the next several decades, as the world

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[136] *Id.*
[137] *Id.*
[138] USDA, *Report of the Administrative Official in Charge of Surplus Removal and Marketing Agreement Programs* (1940), at 2.
[139] *Id.* at 5.
[140] Ibid. at 2.
[141] Agricultural Marketing Administration, *Report of the Administrator of the Agricultural Marketing Administration* (1940) at 4.
[142] *Id.* at 26.

economy alternated between boom and bust, the CCC and related government programs managed a set of surplus agricultural commodities—although sometimes not terming them "surplus" to respond to waxing and waning demand for U.S. agricultural products, domestically and abroad.

COVID-19

A. Preliminaries

As a general matter, there are two major kinds of shortages during emergency. The first is caused by an actual lack of sufficient supply. The second is caused (as an initial matter) by a fear of inadequate supply, which then drives a spike in demand for which there is a lack of supply. Initial accounts of the pandemic suggested that much like previous crises, coronavirus generated a herd mentality that led to panic buying of items when such purchasing was not necessary – i.e., supplies of these consumer goods were generally sufficient to keep up with people's everyday needs.[143] However, with the marked increase in demand, consumers created a shortage. Supply levels remained constant or struggled to adapt rapidly enough to the new spike in demand. Thus, the perception of shortage generated an actual shortage. [144]

Relatedly, prices on products ranging from toilet paper and soap to dry pasta and milk to medical supplies all increased markedly. Whether the price increases resulted from ordinary market economics, price-gouging, or some combination of the two, depends on one's point of view.

Interestingly, however, when the government of Australia implemented price controls on products deemed "essential," the public perceived that there must be shortages of those goods and demand spiked even more severely.[145] Without price fixing, however, price increases could have been anticipatory, which could have prompted consumers to buy more due to perception of a shortage.

B. Shortages and Surpluses in the Food Supply

With respect to the food supply in particular, pandemic-related shutdowns also produced a widespread and radical shift in consumption habits—perhaps the most severe change in the past fifty years. In the main, demand for food goods from sectors like the restaurant industry, hotels, travel industry, and university cafeterias essentially dropped off a cliff as those industries were nearly completely shut down. Consumers started eating more at home because they had little choice.

Suppliers to industries that were suddenly shuttered apparently let products go to waste, dumping milk, letting vegetables rot, and culling herds. [146] While demand for household

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[143] Mary Loxton et al., *Consumer Behaviour during Crises: Preliminary Research on How Coronavirus Has Manifested Consumer Panic Buying, Herd Mentality, Changing Discretionary Spending and the Role of the Media in Influencing Behaviour*, 166 JOURNAL OF RISK AND FINANCIAL MANAGEMENT 13, 21 (July 30, 2020).
[144] *Id.* at 14–16.
[145] *Id.* at 10.
[146] Perez, Marvin, Michael Hirtzer, and Deena Shanker, *Smashing Eggs, Dumping Milk: Farmers Waste More Food Than Ever*, BLOOMBERG, (May 18, 2020), https://www.bloomberg.com/news/articles/2020-05-18/smashing-eggs-dumping-milk-farmers-waste-more-food-than-ever; CNBC, *Why Farmers Are Destroying Millions Of Pounds Of Food*, (2020), https://www.youtube.com/watch?v=UO5N5nPPwGA&ab_channel=CNBC; Yaffe-Bellany, David,

consumption of food increased, producers could not meet this demand with the same food they provided to bulk purchasers. This was true for many reasons, but in part they lacked the proper packaging and labels required for sales to grocery stores or home consumers.[147] In this way, producers experienced a glut of product at the same time food prices in grocery stores were increasing and food shortages became more common.

In response to this issue, on at least 5 occasions since March 26, 2020, the FDA has rolled back regulations to provide "temporary flexibility" related to selling and labeling during the pandemic.[148] The purpose for these rollbacks was to "provide flexibility with packaging and labeling requirements in an effort to reduce food waste in these difficult times."[149] For example, the first rollback issued on March 26 expressed the FDA's intent not to bring enforcement actions against restaurants that sell directly to consumers food that is not labeled for retail sale and thus lacks a nutrition facts label.[150] Manufacturers can continue to produce food with restaurant labeling for sale to consumers if normal direct-to-consumer retail packaging is unavailable. Another rollback issued on April 1 temporarily exempts restaurants from complying with menu labeling requirements to allow restaurants flexibility in quickly changing their menus (e.g. to create paper menus or a large billboard menu instead of standard reusable menus).[151] Finally, a third rollback from May 22 allows food manufacturers to make minor ingredient substitutions without updating the ingredient list on food packaging as long as the changes are relatively minor and do not pose a risk of causing adverse health effects.[152] The overall effectiveness of these regulatory changes in preventing restaurants from dumping products or manufacturers from selling products due to shortages of particular ingredients is still to be determined.

C. Supply Chain Problems

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and Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES, (April 11, 2020), https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html.

[147] Jacob Bunge and Jesse Newman, *Farmers Dump Milk, Break Eggs as Coronavirus Restaurant Closings Destroy Demand*, WALL STREET JOURNAL, (April 9, 2020), https://www.wsj.com/articles/farmers-deal-with-glut-of-food-as-coronavirus-closes-restaurants-11586439722; Annie Gasparro, Jaewon Kang, and Stephanie Stamm, *Two Months That Tore Apart the Food Chain*, WALL STREET JOURNAL, (April 29, 2020), https://www.wsj.com/articles/two-months-that-tore-apart-the-food-chain-11588174236.

[148] *FDA's Perspective on Food Safety and Availability During and Beyond COVID-19*, Food and Drug Administration (April 16, 2020), https://www.fda.gov/food/conversations-experts-food-topics/fdas-perspective-food-safety-and-availability-during-and-beyond-covid-19.

[149] *Id.*

[150] *FDA Provides Temporary Flexibility Regarding Nutrition Labeling of Certain Packaged Food in Response to the COVID-19 Pandemic*, Food and Drug Administration (March 26, 2020) https://www.fda.gov/food/cfsan-constituent-updates/fda-provides-temporary-flexibility-regarding-nutrition-labeling-certain-packaged-food-response-covid.

[151] *Temporary Policy Regarding Nutrition Labeling of Standard Menu Items in Chain Restaurants and Similar Retail Food Establishments During the COVID-19 Public Health Emergency*, Food and Drug Administration (April 1, 2020) https://www.fda.gov/media/136597/download. This guidance document temporarily exempts restaurants from complying with menu labeling requirements in 21 CFR 101.11, which generally requires that menus include caloric information and a general statement about daily caloric needs, and that restaurants have detailed nutritional information available to provide upon request.

[152] *Temporary Policy Regarding Certain Food Labeling Requirements During the COVID-19 Public Health Emergency: Minor Formulation Changes and Vending Machines*, Food and Drug Administration (May 22, 2020) https://www.fda.gov/media/138315/download.

In addition to shortages and surpluses, the pandemic also created a variety of supply chain problems that may have contributed to shortages. This was most widely reported in the meat industry, which faced acute supply chain difficulties due to closures of meatpacking plants following viral outbreaks. For example, Hormel Foods projected an inability to meet demand for many of its meat products after meat packing plants were shut down because of COVID-19 infections.[153] The series of outbreaks restricted supply, contributing to substantial price increases for grocery store shoppers and even prompted increases in production of plant-based meat alternatives.[154]

Bottlenecks

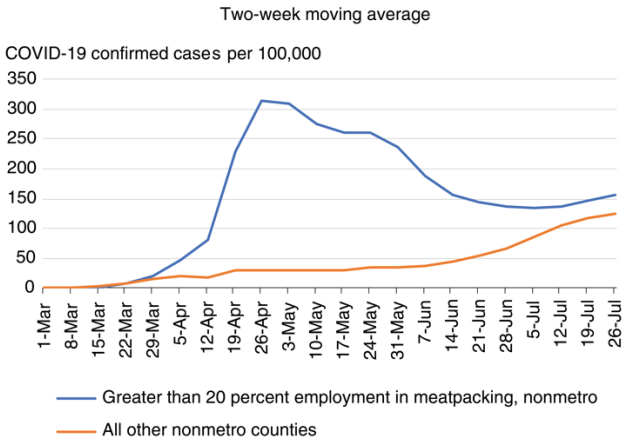
The meat-industry in particularly has long been susceptible to problems and manipulation at a few bottlenecks in the supply chain. Meatpacking and processing plants are the main purchaser of live cattle and poultry and also the main suppliers of frozen and processed meat to grocery stores and consumers. Thus, when those packing plants are inoperational for any period of time, prices paid to cattle or poultry raisers can plummet even as prices at the supermarket spike. The past hundred years are riddled with accusations of price-fixing and market manipulation of these bottlenecks. Indeed, the Beef Trust of the early 1900s was a staggeringly successful endeavor, at least from the Trust's perspective. Today, around 500,000 people work in American meatpacking plants.[155] Workers in meat packing plants tend work in close quarters when processing meat and poultry,[156] which directly facilitates COVID-19 spread due to a lack of social distancing.

The below chart demonstrates the disparity between counties with significant meatpacking operations and those without, from March 1 through July 26, 2020:[157]

[153] *Hormel Foods Warns of Supply Shortages on COVID-19 Hit*, REUTERS, (August 25, 2020), https://www.reuters.com/article/us-hormel-foods-results-idUSKBN25L1W4.
[154] Jacob Bunge and Heather Haddon, *Coronavirus Meat Shortages Have Plant-Based Food Makers' Mouths Watering*, WALL STREET JOURNAL, (May 13, 2020), https://www.wsj.com/articles/coronavirus-meat-shortages-have-plant-based-food-makers-mouths-watering-11589371206; Michael Grabell and Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (August 20, 2020), https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19?token=8x14roDzBQ5p8Y0hCArCtdwGWCNrGooB; Kelly Tyko, *Pepperoni Is the Latest Coronavirus Shortage. Will the Scarcity Affect Your Pizza Habit?*, *USA TODAY*, (August 16, 2020), https://www.usatoday.com/story/money/food/2020/08/16/pepperoni-shortage-covid-19-shortage-higher-prices/5595762002/.
[155] Economic Research Service, *USDA ERS - The Meatpacking Industry in Rural America During the COVID-19 Pandemic*, (2020), https://www.ers.usda.gov/Covid-19/rural-america/meatpacking-industry/.
[156] [Cite to every six seconds.]
[157] Economic Research Service, *supra* note **Error! Bookmark not defined.**. Note that these counties also have higher poverty rates than the national average, with 34.7% classified as high poverty (20% or more poverty rates) compared to 26.2% of all other rural counties.

Figure 3

Confirmed COVID-19 cases per 100,000 population (two-week moving average) since March 1, 2020: Comparing rural counties with 20 percent or more employment in meatpacking to all other rural counties in the United States



Sources: USDA, Economic Research Service using data from Johns Hopkins University U.S. County Level COVID-19 Tracking Map (downloaded August 2, 2020); U.S. Department of Commerce, Bureau of the Census population estimates for 2019; and *Imputing Missing Values in the U.S. Census Bureau's County Business Patterns*, F. Eckert, T.C. Fort, P.K. Schott, and N.J Yang, National Bureau of Economic Research Working Paper #26632-2020.

Additionally, an analysis in May 2020 found that rural counties containing a meatpacking plant that had experienced a coronavirus outbreak experienced infection rates five times that of other rural counties.[158] These data are merely suggestive, but they illustrate the seemingly significant risk posed by the meatpacking plants.

According to the Congressional Research Service, the coronavirus pandemic forced at least 15 plant closures by late April 2020 and had pressed plants to operate at roughly 60% capacity.[159] The Midwest Center for Investigative Reporting found that, as of September 2020, there had been at least 39,000 positive reported cases and 184 reported deaths in the meatpacking industry. Although around 400 plants experienced outbreaks, roughly 45% of these plants were not publicly identified; among plants that have experienced worker deaths due to the coronavirus, around a third have not been publicly identified.[160] As of September 15, 2020, the Food and Environment Reporting Network reported that at least 203 meatpacking workers have died, and 42,000 have tested positive for the coronavirus.[161]

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[158] Leah Douglas and Tim Marema, *When Covid-19 Hits a Rural Meatpacking Plant, County Infection Rates Soar to Five Times the Average*, FOOD AND ENVIRONMENT REPORTING NETWORK, (May 28, 2020), https://thefern.org/2020/05/when-Covid-19-hits-a-rural-meatpacking-plant-county-infection-rates-soar-to-five-times-the-average/.

[159] Joel L. Greene, *COVID-19 Disrupts U.S. Meat Supply; Producer Prices Tumble*, CONGRESSIONAL RESEARCH SERVICE, (April 29, 2020), at 5.

[160] Sky Chadde, *Tracking Covid-19's Impact on Meatpacking Workers and Industry*, THE MIDWEST CENTER FOR INVESTIGATIVE REPORTING, (April 16, 2020), https://investigatemidwest.org/2020/04/16/tracking-Covid-19s-impact-on-meatpacking-workers-and-industry/.

[161] This source updates every weekday and contains insights into Covid's impact on various sections of the food system by cases, deaths, state, and company. Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD AND ENVIRONMENT REPORTING NETWORK, (April 22, 2020), https://thefern.org/2020/04/mapping-Covid-19-in-meat-and-food-processing-plants/.

Because each meatpacking plant accounts for such a large volume of total slaughters in the US, each single closure produces a significant influence on the market. For example, Smithfield Foods' Sioux Falls, SD plant accounts for around 4% of national daily hog slaughter.[162] Because meat and poultry must be fresh, the industry operates on a 'just-in-time' delivery model, meaning even short-term disruptions reverberate both up and down the supply chain.

With regard to the upstream market, meatpacking facility shutdowns led to a reduction in meatpacking demand for livestock and poultry. Correspondingly, livestock prices declined precipitously. For example, from March to April 2020, broiler prices declined 29%, hog prices 18%, and cattle prices 10%.[163] While predictions for the total monetary impact vary, in April 2020 the University of Missouri's Food & Agricultural Policy Research Institute forecast a loss of $10.8 billion from baseline income predictions for the cattle industry 2020-2021, $2.5 billion for the hog industry, and $4.7 billion for the poultry industry.[164] These losses have already forced cattlemen and ranchers to euthanize at a loss hogs and cattle aging beyond their marketability.[165] At the same time, small independent slaughterhouses have seen a surge in business due to the large meatpacking facilities shutting down and/or reducing capacity.[166]

Downstream, restaurant closures largely drove down demand for meat, but the combination of closures of meatpacking facilities and the difficulty of reappropriating meat for portioning and labeling in grocery stores meant the supply to grocery store consumers was still restricted. According to seasonally adjusted US Bureau of Economic Analysis data, prices for meats and poultry substantially increased from February 2020 to June 2020; the most recent data, for July, shows a modest decline in prices from the June peak. Observing the price change from February to the peaks in June, meat and poultry prices increased 10.85%; this included roughly 8.5% increases for pork and poultry and a 20.22% increase for beef and veal.[167] Correspondingly, experts believe US per capita meat consumption will drop for the first time since 2014.[168] More broadly, this decline in consumption may accelerate the trend away from per capita meat

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[162] GREENE, *supra* note **Error! Bookmark not defined.**.
[163] *Id.*
[164] *Early Estimates of the Impacts of COVID-19 on U.S. Agricultural Commodity Markets, Farm Income and Government Outlays*, FOOD AND AGRICULTURAL POLICY RESEARCH INSTITUTE AT THE UNIVERSITY OF MISSOURI, (April 2020), https://www.fapri.missouri.edu/wp-content/uploads/2020/04/FAPRI-Report-02-20.pdf.
[165] Aimee Keane, *When Coronavirus Hit America's Meat Industry*, FINANCIAL TIMES, (2020), https://www.ft.com/content/dc27a691-1da5-4d13-b0fc-a22a8deeacfd; Gregory Meyer, *Largest US Meat Company Warns Food Supply Chain Is Breaking*, FINANCIAL TIMES, (April 27, 2020), https://www.ft.com/content/ff892660-6a9d-4cea-b041-79177ed9076d.
[166] Reilly Mahon, *Special Report: Butchering Back-Up*, SIOUXLAND PROUD (NEXSTAR MEDIA GROUP), (August 11, 2020), https://www.siouxlandproud.com/news/special-report/special-report-butchering-back-up/.
[167] Bureau of Economic Analysis, *National Data: Price Indexes for Personal Consumption Expenditures by Type of Product*, (2020), https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&select_all_years=0&nipa_table_list=2016&series=m&first_year=2018&last_year=2020&scale=-99&categories=underlying&thetable=.
[168] Elizabeth Rembert, *Virus to Cut American Meat Consumption for First Time in 6 Years*, BLOOMBERG, (June 9, 2020), https://www.bloomberg.com/news/articles/2020-06-09/virus-to-cut-american-meat-consumption-for-first-time-in-6-years.

consumption, which was already predicted to peak in the US in 2020 before the pandemic occurred.[169]

Reports also indicated many employees avoided calling in sick once they had fallen ill. Many workers did not receive sick leave and apparently feared their ability to sustain themselves economically should they report COVID symptoms and be dismissed from the job. Moreover, many of these workers were immigrants, including some undocumented, meaning they lack health insurance and may avoid seeking healthcare based on concerns about having their citizenship statuses flagged.[170] The industry has a reputation of penalizing workers who call in sick, which further led some workers to avoid reporting illness.[171] On top of these issues, the industry faced an extremely tight labor market before the virus struck, complicating its ability to respond to labor shortage disruptions.[172]

An analysis of communications between the companies running these plants and state and county governments/health agencies reveals that in February and March 2020, when the threat of the virus was known but large outbreaks had not yet occurred, these companies were largely encouraging authorities to leave the plants operational instead of instituting infrastructure and processes to address the virus such as barriers between workers, masks, temperature screenings, and organizational schema to enable social distancing.[173]

The Occupational Safety and Health Administration (OSHA) had no explicit standard committing it to regulation of exposure to airborne diseases in the workplace. However, its General Duty Clause requires employers to foster a workplace without "recognized hazards" that are "causing or are likely to cause death or serious physical harm."[174] About two months into the spread of the virus in the US, OSHA and the CDC issued nonbinding guidelines for the meatpacking industry; it has not issued any binding rules to date.[175] Additionally, OSHA has the authority to issue an Emergency Temporary Standard (ETS), which takes effect immediately rather than after a period of review and comment. However, it has not issued an ETS since 1983. Some

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[169] Tom Hancock, Emiko Terazono, and Leslie Hook, *Have We Reached 'Peak Meat'?*, FINANCIAL TIMES, (December 27, 2019), https://www.ft.com/content/815c9d62-14f4-11ea-9ee4-11f260415385.
[170] Michael Grabell, *What Happens If Workers Cutting Up the Nation's Meat Get Sick?*, PROPUBLICA, (March 28, 2020), https://www.propublica.org/article/what-happens-if-workers-cutting-up-the-nations-meat-get-sick?token=6LHoUCqhSP02JHSsAi7mlAd73V6zJtgb; *The Children of Smithfield*, NPR: LATINO USA, (August 11, 2020), https://www.npr.org/2020/08/11/901217452/the-children-of-smithfield.
[171] GRABELL, *supra* note **Error! Bookmark not defined.**.
[172] Gregory Meyer, *Abattoir Economics: Trump's Immigration Policy Tests Iowa*, FINANCIAL TIMES (March 24, 2019), https://www.ft.com/content/0c1db8f6-44e8-11e9-a965-23d669740bfb; *Agriculture Labor Issues*, NATIONAL PORK PRODUCERS COUNCIL, (2020), https://nppc.org/issues/issue/agriculture-labor-issues/.
[173] Michael Grabell, et al, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA, (June 12, 2020), https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-Covid-19-outbreaks-in-their-plants?token=N4k88uB8H681Ql3s7NXVvflOxrkBWSTf.
[174] Scott D. Szymendera, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, Congressional Research Service No. 46288 (2020), at 27.
[175] *Meat and Poultry Processing Workers and Employers,"* CENTERS FOR DISEASE CONTROL AND PREVENTION, (April 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html.

state agencies with authority over workplace safety, such as those in California and Virginia, have issued ETSs in reaction to COVID.[176]

Since March 2020, OSHA has received almost 10,000 pandemic-related complaints, but has only issued three citations.[177] In September 2020, OSHA issued two fines using its powers under the General Duty Clause. Both fines total in the low five-figures range ($13,494 for Smithfield Foods and $15,615 for JBS), which critics ranging from The United Food and Commercial Workers Union to the former director of OSHA argued were mere slaps on the wrist.

On April 28, 2020, the Trump administration issued an Executive Order invoking the Defense Production Act to deem meatpacking facilities vital to the critical infrastructure of the nation such that they be required to remain open during outbreaks of the virus.[178] This order prohibited state and local governments and public health agencies from shutting down plants experiencing outbreaks. The Defense Production Act is Cold-War era statute. It had contained extremely broad authorities, including fixing prices and nationalizing industries, but in 2009, most of those powers were repealed.

Interestingly, the George W. Bush administration had performed substantial work on pandemic preparation, including the development of guidance for the meatpacking industry given the particular risk of outbreak in the densely packed plants and the plants' importance to the national food supply. Unfortunately, this guidance issued in 2006, along with other recommendations from the government and private health officials, went largely unadopted by the industry. In the weeks before the onset of the pandemic in the United States, the Trump administration did not provide these companies with updated guidance on responding to COVID-19.[179] Discerning the extent to which infections have disrupted harvesting is more difficult. While the risk of a labor shortage was forecast in the spring,[180] it seems farm laborers instead largely worked under risk of exposure.[181] Reports have detailed clusters of cases among farm laborers, though it is unclear the extent to which these outbreaks have diminished supply of various foods, if at all.[182]

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[176] SZYMENDERA, *supra* note **Error! Bookmark not defined.**.
[177] Kimberly Kindy, *More than 200 Meat Plant Workers in the U.S. Have Died of Covid-19. Federal Regulators Just Issued Two Modest Fines*, WASHINGTON POST, (September 13, 2020), https://www.washingtonpost.com/national/osha-Covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html; Sam Bloch, S*mithfield Foods, California Companies Fined for 'Failing to Protect' Employees from Coronavirus in a New Wave of Accountability Actions by OSHA*, THE COUNTER, (September 10, 2020), https://thecounter.org/smithfield-foods-meatpackers-coronavirus-worker-safety-osha-fines/; Sam Bloch, *Giant Meatpacker JBS Hit with Five-Figure Fine for Covid-19 Violations*, THE COUNTER, (September 14, 2020), https://thecounter.org/jbs-meatpacker-fined-Covid-19-violations-osha/; Ximena Bustillo, *U.S. Issues First Covid-19 Fine to Meatpacking Plant Totaling $13,500*, POLITICO, (September 10, 2020), https://www.politico.com/news/2020/09/10/osha-smithfield-coronavirus-fine-411925.
[178] Exec. Order No. 13917, 85 Fed. Reg. 26313 (April 28, 2020).
[179] GRABELL, *supra* note **Error! Bookmark not defined.**.
[180] GASPARRO, *supra* note **Error! Bookmark not defined.**.
[181] Victoria Knight, *Without Federal Protections, Farm Workers Risk Coronavirus Infection to Harvest Crops*, KAISER HEALTH NEWS, (August 10, 2020), https://khn.org/news/as-crisis-grows-farms-try-to-balance-health-of-field-workers-and-food-supply/.
[182] Patricia Mazzei, *Florida's Coronavirus Spike Is Ravaging Migrant Farmworkers*, THE NEW YORK TIMES, (June 18, 2020), https://www.nytimes.com/2020/06/18/us/florida-coronavirus-immokalee-farmworkers.html.

CONCLUSION

Tino Cuellar has already usefully shown how the war-time administrative structure during World War II transformed the practice of administration and administrative law.[183] By establishing a set of administrative structures and practices, the war-time administration created both familiarization with and tolerance of broad-scale federal administrative authority. The World War I agencies established to deal with war-time shortages, I would argue, create a foundation for the industry codes enacted as part of the National Industrial Recovery Act. Despite the lack of legal authority, or perhaps because of it, the negotiated voluntary agreements with industry seem to have established a working structure for agreements with respect to wages, prices, and practices during the new deal. It also established the federal government as a purchaser of last (or sometimes first) resort for agricultural commodities. During World War II, OPA and the War Food Administration embarked on an extensive program of price regulation. The price schedules regulated virtually the entire economy.

Perhaps in spite of, or perhaps because of the experience during World War II, support for such extensive administrative management of prices, supply, and distribution during emergency seems to have waned. The repeal of significant portions of the Defense Production Act during 2009 suggests the taste for federal rations and prices has diminished. Nevertheless, the experience during the World Wars with respect to food rationing is far from irrelevant to the current pandemic. Indeed, although the need to export commodities to allies "to win the war" may be different, the need to manage the food supply is not.

What the food administration experiences reveal is threefold. First, the two models illustrate the potential efficacy of both relatively decentralized voluntary measures and more centralized mandatory price schedules. Second, they make clear that the problems of scarcity and surplus are general. To be sure, they are most visible during war time, but they equally important during short-term emergencies or catastrophes like the current pandemic. Third, they emphasize the importance of administrative laws as an enabling and constraining force during temporary economic disruptions. Although the courts were largely absent during World War I on this front, both the Emergency Court of Appeals and the federal courts (to whom orders of the Emergency Courts were appealed) were active enforcers of statutory and Constitutional restrictions of OPA and the War Food Administration.

As we turn back to the current pandemic, two points are worth noting. First, the possibility of rationing and price controls is far from fantasy. A second round of shutdowns could easily put the food system in a spot close to that of war time. Second, actual implementation of rations (never mind the subsequent surpluses) is part legal and part political. The gains from a legal exception may be enormous to a given industry. Thus, ordinary politics, unsurprisingly, play a key role in the extraordinary context of administering scarcity and surplus.

[183] Cuellar, *Administrative War*, 82 GEO. WASH. L. REV 1343 (2014).