



# NEW FRONTIERS OF WORKER POWER

## Challenges and Opportunities in the Modern Economy

By Michelle Miller and Eric Harris Bernstein  
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# Executive Summary

American workers are facing a lack of power that has reached crisis levels. In addition to the decades long decline of unions, the expanded use of technology and outsourcing pose challenges from which contemporary labor law offers no shelter. This situation is poised to worsen in the near future, as Trump administration appointments to the Department of Labor, National Labor Relations Board, and Supreme Court stand ideologically opposed to even the most basic enforcement of worker protections and regulation. As all these factors combine to undermine workers, it's important for progressives to remember that the modern economy is not inherently inhospitable to worker interests. Rather, the silencing of the American worker is a choice; forward thinking reforms can bring about an era of renewed worker voice, both in the context of traditional unions and throughout the rest of the labor market.

Some have posited that the well-documented decline of unions since the late 1970s is the natural result of modernization that has shrink the manufacturing sector and increased reliance on flexible job descriptions, independent contractors, or outsourced service providers. This analysis implies that worker power is weakening primarily due to limitations of on-the-ground worker protections offered by the Wagner Act, which governs union representation. Although limitations in these protections must be addressed, we argue that union decline alone cannot explain the fall of worker standing. We take a broader definition of worker power, showing that the large and growing power disparity between workers and firms is rooted not just in the weakness of traditional labor law, but issues of market power and technology in the workplace as well.

We begin by describing the erosion of basic worker protections due to poor enforcement, and explain how this has set the stage for a broad array of hostile workplace practices. We then outline three topics – lacking pathways to organizing; data equity, algorithmic accountability, and information symmetry; and monopsony power – that must figure prominently into any discussion of worker power in the modern economy. We describe the challenges posed to labor and some potential policy treatments for each issue.

## Updated pathways to worker organization

In additional to challenges posed by hostility from the executive branch, facets of the modernizing economy present structural barriers to worker voice, which could greatly curtail unionization efforts as well as enforcement of basic workplace protections. This new reality only reinforces an existing need for experimentation with more broadly defined approaches to building worker power.

Our current systems for worker organizing were created with the assumption that workers would have reasonable access to a majority of their coworkers via shared physical workspace. In the digitally mediated and supply chain economy, there is no such centralizing mechanism, but Internet platforms offer an opportunity for workers to converge remotely; Facebook groups and Reddit threads provided early digital convening spaces for workers, while more recent platforms such as Coworker.org and Dynamo have experimented with new ways of organizing and supporting workers online (Epstein 2015 & Salehi et. al. 2015). These efforts have demonstrated the potential for decentralized, collective-building to effect real change and must be supported.



Firms that employ workforces through digital means should be expressly prohibited from preventing workers from contacting one another off-platform. Furthermore, free and safe internet access is not only a societal necessity, but essential for establishing meaningful worker voice in the modern economy. Policymakers concerned with worker well being must consider the protection of a free and open internet — net neutrality — to be a priority. Finally, workers must be assured that their digital organizing activities are not shared between firms; tech platforms sharing and selling data to one another is already a contentious issue in the privacy space, but government regulators must consider privacy a labor rights issue as well.

### **Data equity, algorithmic accountability, and information symmetry**

Beyond physical isolation, technology is altering and mediating labor in ways that have serious implications for worker voice in the 21<sup>st</sup> century. As algorithm-based software, machine learning, and automatic systems are increasingly being used to manage disaggregated workforces, new opportunities for worker exploitation have arisen. These workplace management systems are built on vast amounts of workplace surveillance, generating data that is fed into opaque algorithms, which partially or wholly manage wage-setting, allocation of hours, and evaluation metrics related to hiring, promotions, and firing. Despite massive implications for their livelihood, workers have essentially no influence over the way that these systems are designed, minimal information on how they are used, no access to or control over their own data, and no say over how firms use the data they possess. This asymmetry in information and control make it impossible to bargain over conditions in automated or semi-automated work environments.

Workers must be granted the right to know exactly what data is being collected by their employers or firms and how that data is being put to use. Disclosure requirements should be extended to work platforms to ensure compliance with basic labor standards. Workers should have access to individualized data packages that can be carried across platforms in order to certify past work and retain their ability to move to other firms. Finally, these platform workers should have the ability to contest consumer-based performance ratings, which are not subject to oversight, yet often determine a worker's fate on a given platform.

### **Monopsony power**

The systemic disadvantage of workers is based not just on the erosion of their organizing power but also on the concentration of power within the firms that oppose them. The power of a firm to unilaterally set the terms of employment is referred to as labor market monopsony. True market power regulation would address this by ensuring a reasonable balance of power in the economy, encouraging competition, and considering the needs of workers. Unfortunately, for too long regulators have focused solely on maximizing consumer welfare, turning a blind eye when firms accrue the power necessary to dictate terms in the labor market.

How to tackle labor market monopsony, and market power more broadly, is a complicated policy question. Ultimately a broad reimagining of antitrust policy — away from a focus on consumer savings and towards a focus on healthy markets — is needed, but several relatively straightforward possibilities for reform do exist. Efforts to cut down on noncompete clauses, which protect firms from having to compete with one another for



workers, and mandatory arbitration, which limit the legal rights of aggrieved workers, would encourage more competition and a more level playing field between firms and workers.

## **Introduction**

American workers are facing a lack of power that has reached crisis levels. For several decades beginning with the New Deal, the American system of employer-subsidized health care, retirement benefits, and unemployment insurance was sustained by a relatively equal balance of power between firms and the full-time workers they employed, stabilized by robust union membership and well-enforced worker protections. This balance of power allowed for productive bargaining and a generally stable environment for workers. But over the last several decades, as unionization has declined and labor law enforcement has waned, workers have found themselves without solid footing from which to negotiate and secure their livelihoods. In addition, the vulnerability of workers has increased along with their technological disadvantage in the workplace and the rising power of firms to shape the labor market to their own preferences. In this paper we explain how this confluence of trends has weakened worker standing and point to policy reforms that could protect and empower workers.

The decline in worker power is widely acknowledged to have begun around the time of Ronald Reagan's trickle-down revolution, with his symbolic breaking of the air traffic control strike in 1981. The share of the workforce represented by unions fell from more than 20 percent in 1983 to just over 11 percent at the close of 2015, with just 6.7 percent of private sector workers unionized at the close of 2016 (BLS 2016a). However, although deunionization and declining labor law enforcement have had a devastating effect on workers they are far from the only factors that explain the decline in worker voice, especially as it has accelerated in recent years. Jacob Hacker (2008) describes how, beginning in the late 1970s, corporations greatly stepped up lobbying efforts for a broad range of anti-worker, pro-firm policies. This was more than an assault on unions; it was a broad shift toward a trickle-down doctrine that disempowered workers. Lowering top tax rates, for example, increased the incentive for outsized compensation of managers and thus the incentive to cut labor costs at workers' expense (Piketty, Saez, and Stantcheva 2011). Antitrust policy, once dedicated to checking the outsized power of major firms, was reshaped to fit a narrower conception of "consumer welfare"; this involved turning a blind eye to dangerous imbalances of economic power throughout the supply chain, including unequal power in the labor market. Since the Reagan era, trickle-down ideology has only gained momentum across a breadth of policy areas, leading to the rollback of regulations and protections that were once key to maintaining a reasonable balance of power between workers and firms.

For workers, the impact of the resulting imbalance of power is clear: As the stock market reaches all-time highs and corporations report record profits, wages have broadly stagnated. While economic productivity has increased by 75 percent since the late 1970s, middle class incomes have risen just one-third in that time. Labor's share of national income follows a similar trend, declining from a high of 83 percent in 1980 to around 75 percent in 2015 (Bivens 2015). Of that growth, 70 percent is due to tax cuts rather than higher pre-tax wages (EPI 2016 & Mason 2015). The median male worker made more in 1973 than he did in 2014 (Wessel 2015).



Much of this wage stagnation and power erosion is aided and abetted by labor outsourcing, in which businesses push workers from full-time employment into franchised, part-time, temporary sub-contracting, or contracting arrangements, which are not protected under the current regulatory system or safety net. This group includes 2.9 million temporary workers, 5.7 million involuntary part time workers and 25 million independent contractors (BLS 2016c and Nicholson 2015). To the extent it has reached the mainstream, much of this discussion has been framed around the rise of the gig economy, and although we view this as a small facet of the broader challenges confronting the American workforce, the gig economy is illustrative of the basic deficiencies of today's labor protections. It has been widely noted, for example, that an Uber driver must purchase her own insurance, receives no retirement benefits, and goes without worker's compensation in the event of a crash. All workers in these independent arrangements suffer from a wide range of threats to economic stability, including a lack of basic workplace safety and wage protections, increased income volatility, and the increased administrative burden of self-employment, to say nothing of rampant wage theft and widespread client nonpayment (Dynan, Elmendorf, and Sichel 2012 & Freelancer's Union 2015 & NELP 2009).

By lessening their ties to these workers through disaggregation, firms have further strengthened their bargaining position and used this advantage to withdraw from their share of the public-private safety net. As a result, the number of Americans receiving health insurance coverage through their employers actually fell from 64.4 percent in 1997 to just 55.4 percent in 2014 (Smith and Medalia 2015 & Janicki 2013). Private pension coverage — a cornerstone of retirement stability — has also fallen by 50 percent since the 1990s. Without the promise of a stable source of income, the median American worker now has only \$5,000 in savings to fall back on, and the median worker approaching retirement has a mere \$17,000 (Morrissey 2013 & Morrissey 2016).

While many have posited that the decline of worker power is the natural result of a modernizing economy, we argue that it is a choice; a modern, technologically sophisticated economy is not inherently bad for workers. Rather, a combination of inadequate labor law enforcement, relentless private sector political pressure, and aggressive anti-worker tactics by firms have conspired to weaken worker standing. In addition to revisiting the foundational protections of the last century, rebuilding worker power for the 21st century will require expanding worker protections into new tactics and new facets of economic policy. The coming Trump era presents a grim picture for those hoping to maintain, let alone expand, worker power; however, we must continue to assess emerging assaults on worker power and counteract them wherever possible.

This paper argues that a systemic lack of worker power has given rise to a system that is fundamentally inequitable and in which the needs of workers are not being met. These circumstances have long required the attention of policymakers and activists, and do so now more than ever. We argue that building worker power must be the centerpiece of any policy agenda aimed at revitalizing a labor market that isn't working. Rebuilding worker power will eventually require revisiting employment classification criteria, the expansion of formal bargaining rights under the Wagner Act, and stiffer penalties for violations by employers as well as more consistent enforcement of those penalties. But achieving these goals under a conservative administration will be nearly impossible.

Much has been written on weakness in policy governing traditional unionization. Building from that work, we identify where new legal and technological barriers to power have arisen and seek to establish that, while old



laws must be enforced with renewed vigor, they will not suffice to strengthen the overall position of workers in a digital age. We identify three barriers to worker power — technological disadvantages, limited paths to organizing, and monopsony power — and point to opportunities for policy reforms that would rebuild worker power over the next several decades.

### **Limited Paths to Organizing**

We are realistic about the prospect of vigorous enforcement of our existing worker protection regime under President Trump; while we cannot predict precisely what a Trump administration National Labor Relations Board or Department of Labor will prioritize, the last Bush administration provides some hints. It is unlikely that rules expanding protections for vulnerable workers will be enacted, and we can expect enforcement to be minimal at best. A GAO report on the Wage and Hour Division’s investigative responses under Secretary Elaine Chao noted delayed response time, misinformation, and refusals to pursue complaints by workers (Meyers 2009). But hostility from the executive branch only reinforces an existing need for experimentation with more broadly defined approaches to building worker power, including organizing strategies that exert pressure on agencies to perform their basic duties of enforcing existing labor and employment protections, as well as a range of informal, social organizing.

Disaggregated work arrangements also present structural barriers to worker voice. Previous generations of workplace organizing presumed the centralizing force of a shared workplace or geography. But workers at franchises or within a given supply chain may only ever see a small fraction of coworkers who work for the same employer, and an even smaller percentage of fellow employees working under identical circumstances. Meanwhile, digital contractors, temp workers, and freelancers perform tasks in near isolation. In this context, we must establish new pathways that enable workers to connect to one another in order to enable attempts at organizing.

In his paper “Libertarian Corporatism,” Brishen Rogers (2016) provides the theoretical legal groundwork on which these sorts of policies can be founded. Scholars have long noted, he points out, the need for governments not only to regulate powerful actors, but to support countervailing intermediate organizations like unions. Although we support the strengthening of traditional unions as well, this paper highlights several ways in which policy could support additional types of worker associations, especially as a means to stop the short-term erosion of worker power under a hostile government. We discuss both the long-term need for a wider variety of worker organizations as well as some existing barriers to these sorts of supplemental organizations and possible ways of navigating around them.

### **Data equity, algorithmic accountability, and information symmetry**

Technology is altering and mediating labor in ways that have serious implications for worker voice in the 21st century. The use of opaque algorithms in workforce management means that workers will struggle to identify the factors shaping their workplace experience; the proliferation of remote work arrangements means they will be isolated from each other as well as the people controlling their fate. In general, the trend of advanced technological intermediation means that most workers will be increasingly kept in the dark and disempowered if policymakers do not recognize that “algorithms” are not some apolitical technological advance, but are often



created and explicitly programmed by employers in order to exploit their workers in ways that violate labor law and workplace norms. However, if done thoughtfully, regulation of data and technology in the workplace could help expand, rather than merely maintain, worker power.

Achieving meaningful reform will require a keen understanding of the issues facing workers today. We aim to lay out a framework and guidelines for approaching digital intermediation as it relates to worker power in the digital age.

## **Monopsony Power**

The systemic disadvantage of workers is based not just on the erosion of their organizing power but also on the concentration of power within the firms that oppose them, which has arisen as a result of lax antitrust policy and other ideological choices to ignore unequal bargaining power. Increasingly, firms are able to set terms for workers without fear of worker exit or organization. This is known as labor market monopsony. True market power regulation would address this by taking a broad approach to regulating the distribution of power in the economy, encouraging competition, and considering the needs of workers. Unfortunately, for too long regulators have focused solely on maximizing consumer welfare, turning a blind eye when firms accrue the power necessary to dictate terms in the labor market. Workers have suffered the most under this regime. In this paper we illustrate how unbridled firm power has placed workers at a systemic disadvantage and decreased competition. We posit several policy reforms that would help curb monopsony power and increase labor market competition, ultimately leveling the playing field for the American workforce.

## **How Did We Get Here? The Erosion of Worker Power**

The trickle-down revolution that began under Reagan broadly moved public policy away from protecting workers and toward accepting and even encouraging inequalities of wealth and power on a broad range of issues. Although the well-documented attacks on — and the subsequent decline of — unions have indeed been disastrous for workers, this is but one aspect of hostile policies toward workers over the last several decades. At their peak, trade unions represented just one-third of the labor force, so it is obvious that workers exert and retain power through many pathways and policies outside of collective bargaining under the Wagner Act (DeSilver 2014). In this section we explain how poor enforcement of workplace safety protections began a slide toward a broadly anti-worker economy, which has only worsened with the rise of technology-driven asymmetries of information, lacking pathways to organizing, and the growth of firm monopsony power in the labor market.

### **The Eroding Floor: Poor Enforcement**

Poor enforcement of workplace protections has driven the secular decline in worker power over the last several decades. In this environment, workers have lost the ability to advocate for their own rights, let alone bargain for better conditions. Weil (2012) shows the enormous impact of inadequate enforcement on the reporting of workplace abuses. Analyzing employee complaints and incidents of workplace violations, he argues that, with violations remaining steady, the observed decline in complaints is a matter of widespread intimidation. This



theory is supported by worker survey data, which shows both widespread experience with and fear of employer retaliation against complaint filers. Although used in the context of workplace violations against employees, this hypothesis can logically be applied to many other worker populations: Whether being shifted from employee to contractor roles, saddled with unnecessary risk, or otherwise abused, working people are far less likely to complain or seek remediation if they observe that complaining would jeopardize or eliminate their source of income altogether. The experience of Uber drivers deactivated over complaints about working conditions is just one obvious example of this experience (The Rideshare Guy 2016 & Bhuiyan 2016).

Perhaps most importantly, lacking enforcement has emboldened firms to pursue increasingly aggressive anti-worker tactics. Bronfenbrenner (2009) finds robust evidence of increasingly aggressive anti-worker firm action during unionization campaigns, suggesting that the private sector has become emboldened to aggressively pursue its own interests at the expense of its workers. The rise in anti-union behavior included a doubling of plant closing threats as well as employer-mandated anti-union meetings from the early 1990s to 2003. Overall, the percentage of employers using 10 or more different union-blocking tactics during unionization campaigns rose from 38 percent in 1983 and 1984 to 82 percent from 1993 to 2003. But perhaps more telling is the fact that while these hostile tactics increased in frequency, appeasing strategies, such as offering raises or promotions to forestall unionization, fell precipitously over the same period. This shows that firms no longer feel compelled to address the concerns of their workers. To a modern employer, worker demands are irrelevant and there is little fear of repercussions for poor treatment of the labor force.

One example of the ramification of this behavior is exemplified by Freeman (2007), who found that worker interest in unionization had grown steadily since 1984, while the percentage of workers in unions had declined. This implies a widespread deterrence effect whereby intimidated workers now believe that the barriers to unionization are insurmountable and have begun to give up on organization efforts, despite their interest.

If workers are to regain their footing in the 21st century American economy, they first need firm ground on which to plant their feet. Basic worker protections — enforcement of protections set out by the Occupational Safety and Health Administration, Fair Labor Standards Act, and National Labor Relations Act — guarantee that footing. It is no coincidence that, despite numerous and widely varying proposals for how to rebuild worker power and stimulate unionization in the 21st century, progressive voices are unanimous on the point that any move toward worker power must begin with proper enforcement of existing protections.

## **New Frontiers of Worker Abuse**

### **Lack of Pathways to Organizing**

Challenges to traditional labor — certain to increase under President Trump — necessitate the building of worker power through methods not tied to readily targeted institutions such as the National Labor Relations Board or the Department of Labor. While the survival and strengthening of these cornerstone institutions is essential to ensuring worker voice in the 21st century, there is little that progressives can do to accomplish this with a hostile president and Congress. In fact, even in friendlier political waters, traditional organizing models





might struggle in a modern economy; Harry Arthurs (2009) compares worker organizing in the United States and Canada and finds that, despite the latter's relatively supportive policies, traditional organizing is still on the decline there. This is not a reason to abandon traditional organizing but does suggest the importance of developing strategies outside of traditional organizing, which are more likely to flourish in a disaggregated environment that is not conducive to exclusive representation. In this section we discuss the importance of a broad approach to worker power and advocate for exploring and experimenting with alternative methods of organizing workers and building their power in the economy.

Katie Andrias of the University of Michigan describes a new paradigm through which informal sector-based action could be supported by the political activism of more tightly organized and better-funded trade unions (Andrias 2016). This approach builds on labor strategies employed during victorious campaigns dating back to the civil rights era. During World War II, after showing competence in leading broad demonstrations, including a highly successful march on Washington, A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters, successfully lobbied Eleanor and Franklin Roosevelt to desegregate the defense manufacturing industry in the early 1940s. This culminated in Executive Order 8802, which banned discriminatory employment practices within the defense industry, and led to a nearly threefold increase in minority-held positions within the sector.

A more recent example of Andrias's proposed marriage of social protest and union advocacy can be found within the Fight for \$15 movement. Beginning in 2015, with the support of the Service Employees International Union, fast food workers across the country protested and rallied for a higher minimum wage, earning widespread recognition of the plight of many service industry workers, and gaining legislative wins in New York, Los Angeles, San Francisco, Chicago, and Seattle (Fight for 15 Chicago 2016). It is worth noting that this movement coincided with the NLRB's consideration of *Browning-Ferris*, which rested on the question of whether franchised businesses like McDonald's could be labeled joint employers, accountable to the potential unionization of their separated workers. This perfectly illustrates how non-union activism could bolster, rather than detract from, the strength of unions (Miller and Meyerson 2016).

This kind of "social bargaining," as Andrias refers to it, is enabled by the current era of mass digital communication and social media, and so should be readily capitalized on, especially under a hostile administration. Operating off of a purely digital platform, for example, Coworker.org, a worker organizing platform, has registered 350,000 workers in its database in just a little under three years of existence. These workers have formed more than 500 campaigns, with recent victories including the expansion of paid family leave for hourly employees of Netflix and scheduling practice negotiations with Starbucks and REI (Coworker.org 2016). The Freelancer's Union has also used its online presence to bolster the voice of its workers. By sharing key findings, best practices, and other resources between millions of independent contractors, the Freelancer's Union has helped these workers confront the considerable asymmetry of power they face with respect to their clients.

It is essential that trade unions continue to consider social bargaining initiatives an augmentation of their own efforts and continue to grant these movements their full support. In fact, more than a parallel effort, non-traditional tactics should be seen as a means of introducing workers to the concept of organizing, ultimately improving their likelihood of forming a union.



## Data equity, algorithmic accountability, and information symmetry

Beyond disaggregation and classification issues, the growing role of technology in mediating work has placed a growing population of workers at a stark informational and technical disadvantage. For many, the entire work experience is managed by opaque algorithms that require workers to be available to work at certain times of day, determine pay rates, assign tasks, and evaluate their reliability or job performance (Rosenblat and Stark 2016). Others in service, retail, and logistics sectors are partially managed by software that schedules their work hours, tracks productivity, and even determines health insurance rates based on personal choices to exercise or eat properly (DePillis 2015 & Kaplan 2015 & McGee 2015). For white-collar workers, software even plays the role of supervisor and quasi-HR manager, collecting data on key strokes, email content, and peer contact in order to profile which workers may be worth promoting or, in some cases, watching more closely (Heath 2016).

These algorithms become arbiters and recorders of work, effectively holding the key to a worker's resume and access to future employment, with little transparency around how this process functions (Kessler 2015). Despite the enormous implications for workers' well-being, policymakers have little to no understanding of the way this software is designed or applied, and certainly no regulation on the amount of data private companies collect on their workers. At their worst, such opaque practices facilitate prohibited anti-worker and anti-unionization behavior, like surveillance, blacklisting, and wage theft.

All in all, these trends signal the repositioning of work beyond the protection of the traditional labor protections that guaranteed worker voice for much of the 20th century. As discussed at length by the Roosevelt Institute's Next American Economy project, the shift away from traditional supports necessitates a broadening of the policies and institutions that protect and organize workers (Miller 2015).

## Monopsony Power

While many proposals to address the asymmetries between firm and worker power focus on protecting workers and strengthening their ability to organize, the other side of this equation is the overwhelming preponderance of power in the hands of contemporary firms. In the labor market, monopsony power is the power of businesses to set the wages of their workers unilaterally, without fear of losing those workers to competing firms. Surveying recent literature, we find copious evidence that these are precisely the conditions that prevail today.

Since the trickle-down revolution of the 1980s, regulators have broadly failed to police imbalances of economic power. Because power is difficult to measure, and because its very acknowledgment runs contrary to free market dogma of mainstream economics, regulators have allowed for firms to corner markets and engage in anti-competitive behavior so long as they abstain from blatant price-fixing or gouging. But mounting evidence shows that this approach has systematically failed to create healthy, competitive markets, and — importantly — that workers suffer the greatest detriments of this policy failure.



In their recent report on the subject, the Council of Economic Advisors described how our anti-competitive environment has allowed firms to pursue many monopsonistic practices that drive down compensation and worsen working conditions. In broad strokes, this trend is evidenced by stagnating wages, rising inequality, and the decoupling of compensation and productivity. Put more simply, workers are no longer able to parlay their productivity into better pay and terms of employment. The rise of market concentration — that is, fewer firms dominating a given sector — as well as the decline of worker mobility — the inability of workers to readily move between firms — have created a system in which workers are unable to bid up their own wages. Fewer competitors and startups means fewer places for workers to market their skills (Molloy et. al. 2016). Furthermore, studies show that those workers who do move are increasingly unsuccessful in securing better pay — further proof of a monopsonistic labor market (Cobb, Lin, and Gabriel 2016).

The CEA and others have suggested that the lack of dynamism and competition reveals a skill gap or the existence of barriers to entry; however, Konczal and Steinbaum (2016) argue that it is instead the result of low demand and a permissive regulatory environment. In the subsequent sections we discuss policy solutions to address discrete components of this anti-competitive regime, such as the proliferation of non-compete agreements and collusion between employers. But first, it is important to discuss the large-scale trend of disaggregation that has been instrumental in the rise of monopsony power.

One major avenue for the exercise of power over workers has been the disaggregation of employers into distinct high- and low-wage firms. By pushing low-wage and other ancillary workers out of the firm, powerful employers are able to ensure that fewer workers can stake a claim on their profits. We posit that the rise of so-called “inter-firm inequality” described by Song et. al (2016) is a telling indicator of the power held by wealthy firms and the impact of large-scale disaggregation. The classic example is that of a janitor previously employed by Goldman Sachs; as a direct employee the janitor may have reasonable expectations of sharing in the profitability of that firm, but as a sub-contractor, the viability of that claim is greatly diminished. This is made possible only by a large imbalance of power in labor markets: In a less monopsonistic and more dynamic labor market, workers would not accept the low wages and poor conditions that result from this kind of outsourcing (Dube and Kaplan 2010) because new firms would form to harness their productivity.

In his book *The Fissured Workplace*, David Weil (2014) argues that this disaggregation is largely due to an increased obsession with shareholder value and short-term profit maximization. Weil points out that disaggregation is often carried out on questionable legal grounds, resulting in misclassification of employees as contractors. Beyond creating legal and transactional boundaries between profits and workers, studies show that outsourcing events associated with disaggregation lead to wage reductions. Lower wages, fewer benefits, and — as pointed out in the Uber example — increased risk placed on workers are not benefits to efficiency but transfers of wealth and stability from workers to firms. The fact that workers are not compensated for their shift into unprotected classifications and alienated firms, but are in fact often issued pay and benefits reductions, undercuts any argument that these shifts are not predicated on the abuse of monopsony power. In a relatively equal environment, workers may agree to sub-contract, but only if compensated for the increased risk assumed. In this context, it is clear that such maneuvers are in no way predicated on a mutually beneficial boost to efficiency or preference for greater autonomy.

Short of stopping the process of disaggregation altogether, some proposals suggest a way in which its worst



ramifications could be nullified. In a paper for *Harvard Law & Policy*, Brishen Rogers (2016) argues that key protections could be extended to disaggregated workers through a reconsideration of legal employment tests. By using the “anti-domination principle” and taking into account a more qualitative analysis of the power dynamics within a given worker-firm relationship, Rogers argues, many current contractors would be deemed employees under the Fair Labor Standards Act. These workers would not qualify as employees under all legal definitions, but their subordinate position in the labor market would afford them legal guarantees of a safe working place, minimum wage, and bargaining rights.

It is worth noting that this expansion of employment protections stands in stark contrast to the narrowing of these classifications, as suggested by Alan Krueger and Seth Harris in their 2015 paper for the Hamilton Project. In it, Krueger argues for a third classification called an independent worker, who would receive some but not all of the protections of an employee. Unfortunately for workers, the third classification would likely end up as a ceiling instead of a floor; employees could more easily be moved into the independent worker status than into the existing independent contractor status, and independent contractors lobbying for employee status would be effectively capped at the new classification. The regulation of this new category would also be problematic; The IRS, DOL, and NLRB would all have to devote staff and resources to defining this category, resulting in even more bureaucratic confusion and red tape. In short: This solution would be enormously problematic for workers and would likely complicate rather than simplify questions of worker classification. The goal should be to expand universal protections to all workers, not restrict them to increasingly specific and highly gameable groups.

Combatting the trend of rising monopsony in the labor market will require a large-scale rethinking of competition policy in the United States with the goal of rebalancing asymmetries of power in key areas. Without this guiding principle, the negative impact on the labor market is clear; skill, education, and experience matter less, while the power possessed by employing firms matters more (Rothstein 2014). Unfortunately, broad changes like these are unlikely in the current political environment. Again, though, this should not preclude a steady drumbeat of support for policies that American workers need.

Ultimately, the best check on firm power in the labor market, is a well-protected and organized workforce. With a short-term union rebound unlikely, progressives have begun to respond with proposals for new avenues of collective bargaining. This includes the work of David Madland (2016) of the Center for American Progress, who rightly pointed to the need for bargaining based on industry, sector, and geography, as well as the need to encourage new and existing worker organizations and strengthen existing labor protections. We agree that these reforms are important, but posit that even with them, workers will still face a stark disparity of power if monopsonistic labor practices are not addressed. We discuss some possible policy solutions at the end of the following section.

## **Policy Responses: Three New Pillars of Worker Power in the 21st Century**

### **Building More Pathways to Organizing**

While expanding the protections and coverage of existing labor and employment law to all workers is an



important first step, changes in the structure of work require additional considerations to ensure workers are able to make use of these protections to effectively counter firm power. Our current systems for building worker organization were created with the assumption that workers would have reasonable access to a majority of their coworkers via shared physical workspace or geography. The waves of worker organizing that built the modern labor movement in the mid-20th century relied on a combination of worksite-based organizing and clandestine meetings in union halls, bars, restaurants, and homes, as well as the federal government’s active protection against anti-union activism by employers. It is difficult to imagine key moments in the prior century’s labor history without the images of the Flint sit-down strike or farmworkers gathering together in the fields they worked on. Workers were able to find one another at their worksites and, as organizing and representation grew, were able to convene in person at local and regional halls to engage one another on key issues as a group.

In the digitally mediated and supply chain economy, there is no such centralizing mechanism, other than the employers themselves. This hub–spoke structure enables employers to thwart worker activism by both legal and illegal means. Franchise and supply chain workers at multinational corporations only ever see an infinitesimal fraction of their coworkers — certainly never enough to achieve the kind of density necessary to contest the power of their employer. And digital platform workers have no in-person access to their coworkers at all, except in rare cases. This amounts to a de facto divide-and-conquer strategy for decentralized firms, whereby workers lack even the most basic ability to share information or discuss grievances, let alone organize themselves. For workers to achieve the density that would enable them to effectively negotiate their working conditions with firms, new avenues for collaboration must be provided and attempts by firms to prevent this convening must be considered a violation of those workers’ rights to freedom of association.

Internet platforms offer the infrastructure for these kinds of workers to converge in digital space on a scale that matches the reach of multinational firms. Facebook groups and Reddit threads provided early convening spaces for workers, while more recent platforms such as Coworker.org and Dynamo have provided longer-term solutions by experimenting with ways to sustain networks of people contesting power in their workplaces, and by supplementing those efforts with expert support, data analysis, and media outreach (Epstein 2015 & Salehi et. al. 2015). These efforts have demonstrated the potential for decentralized, digital collective-building to effect real change. Meanwhile, the National Labor Relations Board has repeatedly ruled in favor of non-union workers who faced retaliation for organizing in digital spaces, citing concerted activity protections outlined in Section 7 of the NLRA and asserting the right of workers to use firm-provided email accounts to communicate about union issues (Wattles 2016 & NLRB 2012 & Kaltenbach 2015).

There are additional policy considerations that will be necessary to ensure that these digital pathways continue to be open and can effectively be put to use. Firms that employ workforces through digital means should be expressly prohibited from preventing workers from contacting one another off-platform. This would require a review of Terms of Service agreements such as TaskRabbit’s, which states that “You may only use [...] community areas to send and receive messages and material that are relevant and proper to the applicable forum. For the safety and integrity of the TaskRabbit Platform, you may not share your personal contact information with other Users” (TaskRabbit 2016). Preventing users from establishing alternative means to contact one another forestalls any ability for independent discussion of working conditions, a fundamental pillar of workers’ ability to organize. One could even go a step further, requiring that, because the structure of



these work arrangements upends the presumption of shared physical space to facilitate peer organizing, firms should be expected to provide alternatives for reasonable access to a majority of a worker’s peers. This access could be provided on secure and independent platforms that mimic the same kind of space once offered by break rooms or offsite meeting locations. Such platforms could be run by worker organizations, trade unions, or other trusted third parties who provide the kind of research, legal, organizational, and representational support outlined in “The Union of the Future” (Miller 2015).

As the internet and independent worker-led digital platforms will provide the most natural gathering place for distributed workforces, corporate control of internet access must continue to be held at bay. To that end, policymakers concerned with ensuring freedom of association for workers must consider the protection of a free and open internet — net neutrality — to be a priority. A lack of equal access to independently run, worker-led online platforms would essentially undo any advancements made to provide a means for disaggregated workforces to build effective collectives.

This also means that workers should be assured their digital organizing activities will not be exposed by one employer to another, or to government entities with an interest in the suppression of more general protest activity. Tech platforms sharing and selling data to one another is already a contentious issue in the privacy space, but government regulators should also protect workers’ privacy when it comes to preserving labor rights. This may include levying penalties on companies that infiltrate protected online spaces through the use of agitators or employee espionage.

### **Correcting Information Asymmetry and Algorithmic Accountability**

As algorithm-based software, machine learning, and automatic systems are increasingly being used to surmount the physical barriers presented by disaggregated and distributed workforces, a new set of complications and obstacles for worker agency arises. These systems are built on vast amounts of workforce data collection that feed opaque algorithms, which partially or wholly manage wage-setting, allocation of hours, and evaluation metrics related to hiring, promotions, and firing. Meanwhile, workers have essentially no influence over the way that these systems are designed, minimal information on how the systems use data inputs to make decisions, no access to or control over the data they generate in the systems, and no control over the way firms use this data. This asymmetry in information and control makes it impossible to imagine bargaining over conditions in automated or semi-automated work environments: If workers do not have access to the work rules as established by these algorithms, they cannot determine when they are being abused, let alone adequately negotiate for changes to the rules that govern their work.

While the fraction of workers today accessing work through fully automated platforms is minimal, it is widely projected that these platforms will be introduced into other sectors like law, service, and logistics. Just last year, the Institute for the Future tested iCEO, a “virtual management system” that “points to a not-too-distant future in which these [software programs] will not only manage simple processes, but also help conceptualize and oversee an endless variety of projects — functions traditionally performed by management” (Fidler 2015). And many more workers are already partially managed by software-based systems: Scheduling, labor allocation, performance ratings, and time management are some areas where software is being introduced into more traditional work environments.



At the most basic level, workers should have a right to know how decisions related to their pay, mobility, and performance tracking are made. In traditional corporate hierarchies, access to this information has been mediated through direct relationships with supervisors and/or direct contact with coworkers. The basic expectations for employees were communicated at hire and decisions related to an employee's ability to meet these expectations were transparent. As these decisions are buried under software, firms should be expected to go a step further in terms of communicating basic functionality of the software as it relates to managing work and changes to the software that impact workers' earning power or performance. After all, software does not function autonomously; firms program their software intentionally, and hence it cannot become a means to circumvent labor law.

The current lack of information in this area undermines the promise of a more flexible and agile work environment in which workers can make informed choices about how and when they work, which has been the basis of support for these new modes of work in the first place. These systems also make it nearly impossible to effectively negotiate for improvements to these systems. Firms argue that data related to the algorithmic management of their workforces must remain private for the sake of market competitiveness. But this argument must be balanced against workers' basic rights to understand the terms of agreements they are entering.

Currently, workers mitigate this information asymmetry by forming online groups and sharing anecdotal data to form a patchwork theory about how algorithms make decisions that prefer certain workers or increase rates at certain times. While this approach is clever and certainly admirable among workers who are already overburdened, it does not provide a reliable aggregate picture of working conditions as affected by mediating software. Furthermore, it does not provide a sufficient check on potential firm abuses. Workers cannot effectively negotiate the conditions of their relationships to platforms on a set of hunches and individual anecdotes. The lack of transparency effectively renders workers helpless to the whims of markets in a way that is destabilizing in aggregate. Some states have passed laws requiring temporary staffing agencies to provide basic information on pay rates and start/end times, among other critical pieces of information about the work day (State of Massachusetts). Former NLRB Chair Wilma Liebman proposes that these same disclosure requirements could be extended to work platforms to ensure that the platforms are in compliance with basic labor standards and "mitigate the asymmetry of information that exists on platforms that lack transparency about remuneration and client reputation."

Though platforms manage and rate workers based on performance, the data related to that performance rating is not accessible to them. As digital platforms increase, workers' abilities to move from one platform to another will be reduced if they cannot prove or certify the prior work performed on another platform. For task-based and service-based workers, this seems particularly fraught. On current task platforms, workers have an overall rating that helps consumers choose them to perform tasks. Without the ability to easily transfer that rating and related performance metrics over to a new platform, the likelihood that a worker can weather the financial risk of switching is diminished. In these cases, the workers' ability to exit the workplace is stunted, undermining this longstanding cornerstone of labor power. The right to exit rests upon the reasonable ability for an individual worker to protest a decline in conditions by leaving one firm for another, holding employers to a minimum set of conditions. If workers cannot seamlessly move from one platform to another, they cannot



exercise this right.

Further, workers should have the ability to contest consumer-based performance ratings. Simplistic star ratings systems effectively transfer management responsibility to consumers on peer-to-peer platforms. Yet consumers are not held to standards that protect workers from racial or gender-based discrimination, and it is unknown if the algorithms that collect that data take such biases into account in assessing performance. As Alex Rosenblat points out, “Through the rating system, consumers can directly assert their preferences and their biases in ways that companies are prohibited from doing. In effect, companies may be able to perpetuate bias without being liable for it.” In fact, Uber points to systemic racial bias in favor of white workers as their reason for not allowing in-app tipping. Attorney Shannon Liss-Riordan has filed a complaint with the Equal Employment Opportunity Commission asserting that Uber’s statements indicate that consumer ratings hold the same potential for racial bias. While there have been some effective strategies for contesting deactivations on these platforms, workers will only be able to address root causes by understanding (and potentially contesting) the ways in which their performance ratings are weighted. Workers should have access to individualized data packages that can be carried across platforms and some insight into what information is contained in the packages.

Beyond ownership of performance-based data, workers should also have the right to know exactly what data is being collected by their employers or firms and how that data is being put to use. For workers in fully digital environments, the pay they receive is generally based to the good or service they are providing to a paying customer. But if, in the process of providing that service, they are generating additional data that is of economic value to the platform, they should be aware of and potentially compensated for the value of that data. For example, Uber has never hidden its ambitions to move far beyond providing rides. All the way back in 2013, investor Shervin Pishevar described the company’s ambitions to build a “digital mesh — a grid that goes over cities,” establishing Uber as a global logistics empire (Vaccaro 2013). The grid for this potential empire, currently valued at \$66 billion, is built on data provided by the hundreds of thousands of rides by drivers earning less than \$13 an hour after expenses (O’Donovan and Singer-Vine 2016).

For service sector and white-collar workers, data collection systems related to productivity and performance are also frequently used (Rosenblat, Kneese, and Boyd 2014). The post-Snowden era has unleashed a torrent of “insider threat” tracking software that collects interpersonal communications content, time management data, and physical location data to track employees (Goldhill 2016). This data is collected by employers to determine the threat potential of specific individuals, resulting in massive personal data files owned by private companies with economic power over their employees (Waddell 2016). Further, systems optimized to track “threatening” employees can also be used to profile potential internal agitators or organizers within a firm and target them for dismissal. Nathan Newman (2016) argues that this presents a “collective harm to the workforce” as the “benefits gained by internal agitators are extended to the general workforce” when these employers speak up for wage increases or improved safety protocols. Meanwhile, such software can simultaneously be used to identify workers who are unlikely to protest wage stagnation or a decline in conditions, due to a combination of personal circumstances, economic liabilities or emotional disposition that may surface in a firm’s analysis of behavioral data. In place of collective workplace improvements that raise standards for workers as a class, we find a sophisticated, data-driven targeting operation that winds up benefiting only the individual employees with pre-existing structural advantages and further entrenching





vulnerable employees in lower-paying roles.

More generally, in a Panopticon-like work environment in which one's every move is monitored, the peer solidarity that traditionally precedes and enables organizing is inhibited because workers lack space to casually air grievances or question authority. While there has been extensive research and policy advocacy around data collection as it relates to government surveillance, there are minimal limits on what firms can collect and keep as it relates to employees. As many people use personal technology in their work (from checking emails to performing work on platforms), lines between on-the-clock behavior and off-the-clock behavior can become blurred. In a 2013 article on PRISM, privacy activists David Segal and Sam Adler-Bell note that the cozy private–public partnerships between corporations and government could result in collusion to target and track perceived threats to security as they move through private and public spheres (Adler-Bell and Segal 2013). All of this limits workers' ability to discuss and research issues related to their own working conditions and form the bonds necessary to advocate on their own collective behalf.

Workers should have a clear right to know what kinds of personal data are being collected by their employers and the ways in which it is being used to assess their performance. These policies and practices should not be embedded in arcane Terms of Service policies or individual contracts workers sign with specific firms. Policymakers and journalists also have a right to know this collective information, as it relates to a general sense of working conditions for citizenry.

Workers' ability to effectively negotiate on their own behalf — either through third party organizations and agencies or via individual right to contract — requires equal access to information upon which these workers are judged. A requirement for this basic level of communication and transparency on the part of firms does not need to impact competitiveness.

### **Reforming Antitrust to Balance Labor Markets**

The impact of market power and antitrust policy on workers and the labor market has become hard to ignore. By using their influence to structure markets, firms have effectively cut workers out of the bargaining process, leaving them with little or no say in determining the fair cost and conditions of their own labor. The topic was the focus of a late-2016 report by the Council of Economic Advisors, which outlined the various pathways through which firms exert market power to the detriment of workers (CEA 2016). Remediating this will require re-envisioning antitrust policy to take into account a broader set of public interest considerations, including worker power and the health of the labor market. There are a number of policy approaches that could limit monopsony power and thus balance the voice of workers and firms in the economy.

The CEA has already called for a broad inter-agency competition review, but that will be less specific to growing monopsony power, which is the primary area of concern for antitrust policy as it applies to the labor market. On the more extreme end, in response to the paper, Adam Ozimek (2016) suggested that unionization be made a condition for merger approval as a means of balancing employer and worker power. And while this is radical and would represent a major departure from current competition policy, mitigating the threat of monopsony should absolutely be incorporated into merger review. Short of mandated unionization, several specific ideas related to bringing competition policy to bear in a monopsonistic labor market follow.



## ***Noncompete Clauses***

Noncompete clauses should be viewed by competition authorities as vertical restraints that prevent workers from exercising the essential choice to exit. A dense enough concentration of noncompete clauses among workers in a given sector, market, or job description could amount to an attempt among employers to close off hiring opportunities to their workers, so as to avoid competing for their labor. Federal authorities have thus far left policy on noncompete clauses to the states, but with mounting evidence of their aggregate impact on workers, and with strong remedies available under federal statute, there's no reason to continue with that hands-off approach.

## ***Mandatory Arbitration***

Mandatory arbitration agreements and class action waivers may themselves be evidence of a monopsonistic labor market because, like noncompete clauses, they remove legal rights and market options from workers without compensation for potential future losses. By removing litigation and discovery as bargaining tools, they also serve to directly transfer wealth up the wealth distribution (Khan 2014). Most importantly, mandatory arbitration closes off the possibility of private antitrust enforcement through civil litigation — a critical component of U.S. competition policy. Unfortunately, the Supreme Court has increasingly read the Federal Arbitration Act, a relatively minor piece of 1920s legislation, as a super-statute that overrides rights guaranteed by other laws, like labor organizing, non-discrimination, or, in this case, competition (SCOTUS Blog).

The policy proposal here is, first of all, to roll back those judicial opinions in coordination with other relevant agencies with statutory authority to regulate bilateral contracts, like the National Labor Relations Board and the Consumer Financial Protection Bureau (Vaheesan 2016). The competition authorities could participate in a regulatory procedure to challenge the use of such agreements throughout the economy, on the understanding that they are both anti-competitive themselves and preclude the important private litigation channel for the enforcement of competition policy.

## ***Antitrust in the Fissured Workplace***

Competition law could also play a role in regulating the aforementioned fissuring workplace, as indicated by the private antitrust lawsuit against Uber and its CEO (Steinbaum 2016). The idea is that classifying workers as independent contractors, which are technically businesses themselves, changes the firm–worker relationship into a firm–firm relationship, which is under the purview of antitrust and the law of vertical restraints. Under these conditions, restrictions like requiring contractors to accept orders, fixing the prices they can charge, and mediating the terms on which they are paid by customers become legally anti-competitive. The core issue here is that fissuring is a strategy for avoiding labor law, but that should not create a regulatory black hole. Instead, the competition authorities should enforce the guarantee of market access on fair terms contained in the antitrust laws as they were first conceived (Vaheesan 2014).

Bringing the powerful weapons of federal competition policy to bear on the problem of monopsony would be a substantial departure from recent practice. Insofar as the competition authorities have regarded the labor



market at all, they have tended to focus on restrictions on supply rather than demand, and at a recent FTC microeconomics conference, panelists were far more comfortable with the idea of reviewing state-level occupational licensing rules than they were confronting the other, more empirically grounded issues in the CEA's monopsony brief (FTC 2016). But as Renata Hesse, acting Assistant Attorney General of the DOJ's Antitrust division, pointed out in a recent speech, the antitrust laws were meant to oppose market power wherever it may reside. For the most part, we have the legal structures in place to make the labor market more competitive—the only question is whether we have the political will to do so (Hesse 2016).

## Conclusion

These suggestions provide a snapshot of the additional considerations required of policymakers to provide a more robust worker protection regime in the 21st century economy. They indicate that the task at hand goes beyond simply expanding the reach of labor and employment law to cover workers unitarily. As the very structure and culture of work is experiencing a radical shift, we must be prepared to consider reforms that recognize the overall context in which work is taking place and emerging mechanisms through which firms have power over their workers.

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