

# Losing Leverage: Employee Replaceability and Labor Market Power

Cynthia Estlund<sup>†</sup>

*Workers' labor market power matters enormously to their lives at work and beyond. And most workers have too little of it. This Essay highlights one underappreciated set of factors in the decline of workers' labor market power and explores policy levers that might help to rebalance the bargaining field. This Essay begins with the fairly self-evident observation that workers' labor market power is a product in part of the ease with which employers can replace employees. That points to the importance of several trends in the organization and technology of work—including both fissuring and automation—that make it easier for private sector employers to replace employees either with other workers or with machines. The central argument here is that the proliferation of employee-replacement techniques helps to explain workers' shrinking labor market power. That leads to the question of what, if anything, to do about it. The idea of rebalancing bargaining power through regulation (as opposed to redistributing income through tax-and-transfer schemes) is controversial among economists; but it has long been central to the law of work. This Essay proceeds to describe how current U.S. labor and employment law does and doesn't constrain firms' employee-replacement options. Finally, it considers some alternative policy options for rebalancing bargaining power by constraining employee replacement—chiefly, job security protections and institutions of codetermination, including works councils—along with some empirical evidence of their likely economic effects.*

## INTRODUCTION

Workers' bargaining power matters enormously to their lives at work and beyond. At least above the legal floor on workers' rights and labor standards, employees with little bargaining power will have lower wages and benefits, less opportunity for advancement, less life-friendly schedules, less job security and physical safety, less privacy and freedom from intrusion both on

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<sup>†</sup> Catherine A. Rein Professor of Law, New York University School of Law. I would like to thank Daniel Hemel, Jonah Gelbach, and the participants in the Law and Labor Market Power Symposium held at the University of Chicago in March 2022 for their helpful comments on an earlier draft, and Krishnan Sethumadhavan for excellent research assistance.

and off the job, and greater vulnerability to abuse.<sup>1</sup> Even where those matters are legally regulated, employees with little bargaining power may feel compelled to tolerate violations of their rights—dangerous working conditions, discriminatory harassment, or demands for off-the-clock work. Many workers, especially those without higher education or advanced skills, find themselves in just that position most of the time.

At one level this is all rather obvious, even self-evident, to most non-economists. Indeed, the proposition that workers generally suffer from a lack of bargaining power is an official premise of the National Labor Relations Act<sup>2</sup> (NLRA), which aims to redress the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”<sup>3</sup>

After the 1970s, however, “inequality of bargaining power” largely ceased to be taken seriously as a premise for policymaking in the labor field.<sup>4</sup> In part, that was because the phrase was sometimes misunderstood or misused. It might seem to imply an ideal of *equal* bargaining power that is fictional—and certainly not what workers manage to achieve by organizing and bargaining under the NLRA. The phrase “inequality of bargaining power” might also seem to imply a naive conception of bargaining—individual give-and-take over specific terms—that is also fictional for most workers. Even workers who face a “take it or leave it” package of terms and conditions might be able to just leave it and look for better terms elsewhere. Workers with labor market power can

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<sup>1</sup> Jenn Hagedorn, Claudia Alexandra Paras, Howard Greenwich & Amy Hagopian, *The Role of Labor Unions in Creating Working Conditions That Promote Public Health*, 106 AM. J. PUB. HEALTH 989, 989, 992–94 (2016) (lower wages and benefits); Martin H. Malin, *Alt Labor? Why We Still Need Traditional Labor*, 95 CHI.-KENT L. REV. 157, 164 (2020) (less opportunity for advancement); Hagedorn et al., *supra*, at 989 (less life-friendly schedules); *id* (less job security, physical safety, privacy, and freedom from intrusion); *id*. at 993 (greater vulnerability to abuse).

<sup>2</sup> 29 U.S.C. §§ 151–169.

<sup>3</sup> 29 U.S.C. § 151. Professor Hiba Hafiz has recently centered this statutory goal in calling for major changes in the interpretation of the NLRA. See Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 670–72 (2021).

<sup>4</sup> See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 496 (2016) (“The notions of ‘unequal bargaining power’ and ‘economic dependence’ . . . do not explain when bargaining power is sufficiently unequal or dependence sufficiently grave to warrant employment duties.”); David Cabrelli & Rebecca Zahn, *Civic Republican Political Theory and Labour Law*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 104, 105 (Hugh Collins et al. eds., 2019) (arguing that unequal bargaining power “lacks clarity in its concept”).

use it by shopping around for a better job without ever engaging in actual bargaining. In the hope of avoiding some of those misunderstandings, I will use the term “labor market power.”<sup>5</sup>

The notion of unequal bargaining power also lost traction because it was sometimes stated in overly categorical terms, whether by proponents or critics who would discredit the idea. The proposition that all workers always lack bargaining power vis-à-vis employers—or for that matter that any workers have *zero* bargaining power—is a straw man, easily toppled by pointing to workers with scarce, in demand skills or to periods of relative labor scarcity. At some times and places, even less-skilled workers may have meaningful bargaining power, as in the recent late-COVID period.

In short, workers’ labor market power is variable, contingent, and not easily measured. Even so, it is a real thing, and workers can have more or less of it, as scholars from a variety of disciplines are recognizing.<sup>6</sup>

Incumbent employees’ market power on the job depends largely on how costly their departure, whether by quit or

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<sup>5</sup> Some economists use the term “labor market power” as shorthand for “a firm’s power to reduce the compensation it pays to its workers.” U.S. DEP’T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 3 (2022). See David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147, 1147 (2022); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537 (2018). Others use the term “workers’ power” to refer to workers’ ability to realize higher wages. See Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECON. ACTIVITY, no. 1, 2020, at 30. “Labor-market power” is also used, and I use it here, in a more neutral sense as something that can be possessed by either workers or employers. See, e.g., Josh Bivens, Lawrence Mishel & John Schmitt, *It’s Not Just Monopoly and Monopsony: How Market Power Has Affected American Wages*, ECON. POL’Y INST. (Apr. 25, 2018), <https://perma.cc/6PQT-AGCN>. “Labor-market power” is a labor market-specific term for “bargaining leverage.” See Aviv Nevo, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, *Mergers that Increase Bargaining Leverage 2* (Jan. 22, 2014), <https://perma.cc/R55P-PPNK> (noting that “bargaining leverage is a source of market power”); see also C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2082–84, 2093–94 (2018) (discussing “classical monopsony power,” when a buyer reduces purchases to push down costs, and “bargaining leverage,” when buyers and sellers each have market power and set prices through negotiation, as two forms of “buyer power”).

<sup>6</sup> See Lawrence Mishel, *The Goliath in the Room: How the False Assumption of Equal Worker-Employer Power Undercuts Workplace Protections*, 3 J.L. & POL. ECON. (SPECIAL ISSUE) (2022) 4. This entire special issue explores unequal bargaining power, its determinants, and its consequences. See also Hafiz, *supra* note 3, at 688–97 (2021) (surveying contemporary interdisciplinary scholarship on the determinants of workers’ versus employers’ bargaining power).

dismissal, would be both to their employer and to themselves. Employees have more market power when they can more readily find a comparable job and when their departure would be more costly to their employer, considering both replacement costs and any liabilities or dispute-resolution costs in case of dismissal. (Obviously both sides of the equation depend on the demand for and supply of those skills.) We might then say that workers lack market power relative to employers if most workers in most labor market conditions would find it harder or more costly to replace one job with another than employers would find it to replace one worker with another.<sup>7</sup> And if that's so, then changes in the economy and labor markets can degrade workers' labor market power over time by making it either harder for workers to switch or replace their jobs or easier for employers to replace workers.

The difficulties workers face in switching jobs or employers—especially workers with sector-specific skills—are related to problems of employer monopsony and growing concentration of product markets that are drawing greater scholarly attention lately.<sup>8</sup> Here I focus instead on the opposite side of the equation: the proliferation of employment-avoidance or employee-replacement options for employers, which I will argue is an underappreciated factor in depressing market power for many workers without scarce skills.

Part I describes trends in the organization and technology of work that are making it easier for private sector employers to replace employees either with other workers or with machines, and that are undermining workers' labor market power. Part II briefly takes up the question of whether it makes sense to recalibrate the balance of labor market power by constraining employee-replacement options. Part III describes how current U.S. labor and employment law does and doesn't constrain employee-replacement options. Finally, Part IV briefly takes up some alternative policy options in this space, along with some empirical evidence of their likely economic effects.

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<sup>7</sup> This approach broadly aligns with that of microeconomic game and bargaining theorists, who assess bargaining power through parties' ability to delay action without cost, make credible threats, and incur risk. *Id.* at 695. An expanding set of employee-replacement options permits employers to do all of those things.

<sup>8</sup> Along with several contributions to this symposium issue, see generally ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021); Eric A. Posner, *Antitrust's Labor Market Problem*, PROMARKET (Nov. 8, 2021), <https://perma.cc/B88Q-TDYL>.

## I. FISSURING, AUTOMATION, AND THE PROLIFERATION OF EMPLOYEE REPLACEMENT OPTIONS

Some of the most important labor market trends in recent decades effectively expand firms' ability to avoid employment relationships and to replace their own employees either with machines (through automation) or with other workers (through fissuring). The growing availability of employee-replacement and employment-avoidance strategies, taken together, almost certainly contributes to workers' shrinking market power, labor's declining share of income, and growing economic inequality.<sup>9</sup> I approach these issues not from the perspective or with the toolbox of a labor economist, but as a scholar of the law of work. Lacking the tools to test this proposition empirically, I'll state it as a hypothesis and hope to persuade readers of its plausibility.

### A. Fissuring as a Form of "Employee Replacement"

Let's start our story in the middle of the twentieth century, when the big branded corporations that reigned at the top of the economy—like AT&T, IBM, and the "Generals" (General Motors, General Mills, General Foods)—relied on their own employees to supply the great bulk of their labor needs, from manufacturing and maintenance on up to the C-suite.<sup>10</sup> Those firms maintained internal labor markets in which even the least skilled workers had relatively high wages, good benefits, promotion opportunities, and formal or informal job security. That was due to some combination of unions where they existed, efforts to avoid unions where they didn't, and the need to attract and keep good workers and maintain a modicum of internal equity and organizational cohesion.

Since the 1970s, those big firms and their successors have been systematically shedding workers and labor functions—especially manufacturing, maintenance, logistics, cleaning, and

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<sup>9</sup> See Gene M. Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*, 14 ANN. REV. ECON. 93, 101–09 (2022), for a useful survey of the vast economic literature attempting to explain the decline in labor's share of income.

<sup>10</sup> See Peter Cappelli, *Changing Career Paths and Their Implications*, in AMERICA AT WORK: CHOICES AND CHALLENGES 211, 212–14 (Edward E. Lawler III & James O'Toole eds., 2006). The next few paragraphs borrow from Chapter 3 of CYNTHIA ESTLUND, *AUTOMATION ANXIETY: WHY AND HOW TO SAVE WORK*, 45–47 (2021).

security—and contracting them out to other entities.<sup>11</sup> Outsourcing is not new, but it has metastasized in recent decades and has earned the new name of fissuring, bestowed by Professor David Weil.<sup>12</sup> Weil has shown that fissuring often leaves workers worse off—without the decent wages, generous benefits, and paths to advancement that their predecessors enjoyed inside lead firms.<sup>13</sup> That is partly because intense cost-based competition among supplier firms squeezes profit margins and sharpens the incentive to cut corners and costs, leading to lower wages and widespread labor violations. Many supplier firms also have little physical, financial, or reputational capital to lose in case they break the law or become insolvent. Fissuring allows lead firms to reduce costs and shed or avoid collective bargaining obligations while insulating themselves from the stench of the lawless practices that sometimes underlie those lower costs.

Fissuring includes not only domestic outsourcing but also offshoring of jobs to overseas suppliers (think China) and splintering of jobs into “gigs” that are or purport to be beyond the employment nexus (think Uber). The cost savings from offshoring stem partly from much lower wages and weak regulatory institutions and trade unions in these poorer countries, and partly from the same forces that operate among domestic suppliers: cost-based competition in a concentrated low-profit environment. As for the gig economy and the platform-based model that Uber exemplifies, those are high-profile aspects of the larger trend toward outsourcing work to putative independent contractors and eliminating both the legal burdens of employer status and the corresponding employee protections.

Fissuring in all its varieties replaces employees with other workers who are usually in a weaker market position—whether because of their relative isolation within a lower-profit sector of the economy, their location in a poorer or less regulated jurisdiction, or their legal status within the jurisdiction (as with independent contractors or undocumented immigrants). Fissuring contributes to economic inequality partly by increasing *interfirm*

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<sup>11</sup> See generally DAVID WEIL, *THE FISSURED WORKPLACE* (2014). For a concise summary, see Heather Boushey, *Equitable Growth in Conversation: In Conversation with David Weil*, WASH. CTR. FOR EQUITABLE GROWTH (June 22, 2017), <https://perma.cc/S5XT-CRCY>.

<sup>12</sup> WEIL, *supra* note 11, at 7.

<sup>13</sup> See David Weil, *Income Inequality, Wage Determination, and the Fissured Workplace*, in *AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY* 209, 224–27 (Heather Boushey et al. eds., 2017).

stratification. *Intrafirm* inequality is alive and well, as seen in the yawning ratio between CEO pay and median worker pay at the same firm—on average, over 350 to 1 among the 350 largest U.S. companies in 2020.<sup>14</sup> (That ratio would be even higher but for the outsourcing of lower-wage, labor-intensive functions.) But a growing element of overall economic inequality is *interfirm* disparities between profitable branded firms, with their relatively cosseted employees (think Google), and the lower-profit supplier firms that employ most low-wage workers.<sup>15</sup>

Alongside fissuring, other employee-replacement strategies also replace one group of employees with another at a lower economic tier. Replacing full-time employees with part-time or temporary workers—even if the latter are employed within the same firm—may similarly degrade labor conditions and undermine labor protections and labor market power, given lower labor standards for nonstandard employment.<sup>16</sup> So, too, with a single firm’s relocation of operations to a less worker- and union-friendly jurisdiction.<sup>17</sup> During the epic drama of deindustrialization in the 1970s and beyond, industrial jobs flowed from the industrial North and Midwest to Mexico and China as well as to the U.S. South—a lower-wage region and a bastion of so-called “right-to-work” laws.<sup>18</sup> Those moves undercut hard-won union gains, often very much by design. But for present purposes, the union avoidance motives behind these relocation decisions should not overshadow their employee-replacement effect.

Finally, we should not overlook the most blatant use of employee replacement to undercut unionized employees’ market

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<sup>14</sup> Lawrence Mishel & Jori Kandra, *CEO Pay Has Skyrocketed 1,322% Since 1978*, at 7 ECON. POL’Y INST. (Aug. 10, 2021), <https://perma.cc/H9Z9-BWDE>.

<sup>15</sup> See David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 656–57, 663–65, 675–81, 683–85 (2020); Erling Barth, Alex Bryson, James C. Davis & Richard Freeman, *It’s Where You Work: Increases in Earnings Dispersion Across Establishments and Individuals in the U.S.* 5, 7, 12–13, 15–17 (Nat’l Bureau of Econ. Rsch., Working Paper No. 20447, 2014); Jae Song, David J. Price, Faith Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1, 15–19 (2019).

<sup>16</sup> On part-time workers’ greater vulnerability to labor violations, see DAVID COOPER & TERESA KROEGER, ECON. POL’Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 24 (May 10, 2017), and ADEWALE MAYE, CTR. L. & SOC. POL’Y, WHY WE NEED THE PART-TIME WORKER BILL OF RIGHTS (Mar. 4, 2021).

<sup>17</sup> See Christopher Kollmeyer, *Trade Union Decline, Deindustrialization, and Rising Income Inequality in the United States, 1947 to 2015*, 57 RSCH. SOC. STRATIFICATION & MOBILITY 1, 3 (2018).

<sup>18</sup> See JAMES C. COBB, *THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT 1936–1990*, at 96–121, 209–28 (1993).

power: employers' permanent replacement of lawful economic strikers.<sup>19</sup> U.S. labor law's recognition of that employer prerogative, which dates from 1938, sets the United States apart from nearly all advanced industrial democracies.<sup>20</sup> Employers' growing propensity since the 1970s to use or threaten permanent replacements in case of a strike has contributed not only to the virtual demise of the strike in private sector collective bargaining disputes<sup>21</sup> but also to the difficulty of union organizing: during representation campaigns, employers often tout their willingness and ability to permanently replace strikers to raise employee fears of job loss and deflate beliefs about what can be achieved in collective bargaining.<sup>22</sup>

As with the ability to permanently replace strikers, a crucial feature of employee-replacement options generally—whether internal or external, domestic or transnational—is that they tend to undercut workers' market power even if they are not exercised. That is, a firm's realistic option to replace a given group of employees—whether by relocating, converting full-time jobs into part-time jobs, contracting out work to domestic or overseas suppliers or individual contractors, or replacing strikers—will tend to dampen the market power of incumbent employees even if it remains just an option. This “replacement-threat effect” roughly mirrors the “union-threat effect” by which nonunion firms may be induced to improve wages and working conditions by their workers' *potential* ability to organize a union. In both cases, the potency of the threat varies from sector to sector and across time and circumstances: the easier it is to exercise the option—for the firm to replace employees or for the workers to unionize—the

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<sup>19</sup> The permanent-replacement doctrine under the NLRA originated in dicta in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). It is among the most vehemently criticized aspects of U.S. labor law. See, e.g., JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 19–34 (1983); CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 29, 132–34, 143–46 (1993); JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14*, at 224–28 (1998); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 185–88, 202–03 (1993); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 264–69 (1990); Michael H. Gottesman, *Union Summer: A Reawakened Interest in the Law of Labor?*, 1996 SUP. CT. REV. 285, 293–96 (1996); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 69–70, 81–82 (1999) (reviewing GETMAN, *supra*).

<sup>20</sup> See Lance Compa, *Workers' Freedom of Association in the United States*, in *WORKERS' RIGHTS AS HUMAN RIGHTS* 23, 26–28, 44–46 (James A. Gross ed., 2003).

<sup>21</sup> See John Logan, *Permanent Replacements and the End of Labor's "Only True Weapon,"* 74 INT'L LAB. & WORKING-CLASS HIST. 171, 171–72 (2008).

<sup>22</sup> *Id.* at 179.

bigger the impact on the other side's ability to demand more favorable terms.<sup>23</sup>

The labor market impact of employee-replacement options parallels that of higher unemployment levels on the price of labor. Both expand the supply of labor with which workers compete. Workers with skills that are in ample supply on the external labor market, like most workers in times of high unemployment, have less market power—they are what economists call “price takers”—because they are relatively interchangeable with other available job candidates. Similarly, the easier and cheaper it is for a firm to replace employees through outsourcing or relocation to a cheaper location, the less market power those replaceable employees have. That is, both the wider availability of employee-replacement options and higher levels of unemployment depress workers' market power by enhancing employers' ability to replace current employees. The latter has a cyclical dimension (even if it also reflects deliberate policy choices<sup>24</sup>); the former is more of a secular trend. In both cases the impact is mediated by skill level: workers with scarce skills will be harder to replace at any given level of unemployment, whether by hiring a new employee or by contracting out or relocating work. Not surprisingly, the impact of employee-replacement strategies is greatest for workers who lack advanced education or training.

It is worth noting that technology has facilitated nearly every aspect of fissuring, from outsourcing to poorer countries to the growth of platform work, by lowering the transaction costs associated with firms' explicit contracting for goods and services—that is, the cost of “buying” versus “making” necessary inputs.<sup>25</sup> Technology enables lead firms to break down products and processes into component parts, to set precise standards and specifications by contract, and to monitor performance and outputs of

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<sup>23</sup> While I have focused thus far on the replaceability of incumbent employees, these strategies also affect the market power of prospective employees. To the extent that firms could get their labor inputs more cheaply by contracting out work instead of hiring new employees, that depresses the market power of would-be employees. So, I mean “employee-replacement options” to include the use of those same techniques to meet new labor needs.

<sup>24</sup> The Federal Reserve has also, it has been argued, deliberately maintained higher unemployment rates to suppress worker bargaining power after 1979. See LAWRENCE MISHEL & JOSH BIVENS, ECON. POL'Y INST., IDENTIFYING THE POLICY LEVERS GENERATING WAGE SUPPRESSION AND WAGE INEQUALITY 24 (May 13, 2021), <https://perma.cc/87DC-3976>.

<sup>25</sup> See WEIL, *supra* note 11, at 55, 60–63, 167–74.

outside suppliers.<sup>26</sup> Technology in the form of container ships and barcoding allows Walmart to reliably track goods from a factory in Shenzhen, China, to a store in Lexington, Kentucky.<sup>27</sup> Technology allows Apple to maintain scrupulous quality standards for its iPhones and iPads while tapping into the much cheaper Chinese labor market. And technology enables Uber to monitor drivers, connect them with customers, and capture a large share of the fares they generate, without directly supervising them.<sup>28</sup> Technology has greatly expanded firms' alternatives to direct employment through fissuring. Then, of course, there is automation.<sup>29</sup>

### B. The Automation Effect

Predictions of a jobless future have recurred in waves throughout the history of capitalism only to crest and retreat as new jobs—usually better jobs—have replaced those lost to machines. But the pace and distinctive nature of the latest wave of innovations in artificial intelligence, machine learning, and robotics led many contemporary observers—and led me in my own recent dive into debates over automation—to believe that this time may be different.<sup>30</sup> With advances in both hard and soft forms of technology—robots and algorithms, for example—machines are replicating a wider range of human capabilities and weaving together those distinct capabilities more seamlessly than ever before. The very terms “artificial intelligence” and “machine learning” hint at what is new: technology is acquiring and refining cognitive and sensory capabilities that had long been thought to be uniquely human. As machines replicate and surpass an ever-wider range of human capabilities, and as they outpace and outperform humans at increasingly complex tasks, they put a growing range of jobs at risk.<sup>31</sup>

That's only half the picture, of course. Machines not only destroy jobs but also create new jobs—especially skilled jobs

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<sup>26</sup> See generally Abraham Seidmann & Arun Sundararajan, *Sharing Logistics Information Across Organizations: Technology, Competition and Contracting*, in INFORMATION TECHNOLOGY AND INDUSTRIAL COMPETITIVENESS 107 (Chris F. Kemerer ed., 1998).

<sup>27</sup> See generally Witold Rybczynski, *Shipping News*, N.Y. REV. BOOKS (Aug. 10, 2006), <https://perma.cc/HA64-22ML>.

<sup>28</sup> Whether companies like Uber can do so without being the legal employer of those drivers is a hotly contested issue. See *infra* notes 82–85 and accompanying text.

<sup>29</sup> This Section also borrows liberally from my recent book on automation. See generally ESTLUND, *supra* note 10.

<sup>30</sup> See *id.* at 1–40.

<sup>31</sup> See DANIEL SUSSKIND, *A WORLD WITHOUT WORK* 119 (2020).

working with technology. The history of automation's impact on the labor market has been one of "creative destruction."<sup>32</sup> Of course, job losses may be devastating to workers and their families and communities even if the losses are numerically offset by new job opportunities elsewhere in the economy. Apart from geographic mismatches between jobs lost and jobs gained, those displaced by automation might have neither the skills needed in new jobs nor a realistic shot at acquiring those skills. More to the point here: workers whose jobs could be automated face another kind of employee-replacement option, the mere existence of which reduces their labor market power—again, even if the jobs are not yet automated or if other jobs are being created elsewhere.

So creative destruction is not an altogether reassuring prognosis for those whose jobs are at risk of destruction through automation. If the result is greater productivity and prosperity, as in the past, then the challenge would be to manage and mitigate the temporary dislocations and spread the gains. But some economists who study the impact of automation on labor markets are persuaded that this time is indeed different, and not in a good way. The current wave of automation is already producing a more polarized labor market with declining wages and job quality for many workers.<sup>33</sup> So concluded a star-studded MIT task force led by Professor David Autor in 2019:

Unlike the era of equitable growth that preceded it, the digital era has catalyzed labor-market polarization—that is the simultaneous growth of high-education, high-wage and low-education, low-wage jobs at the expense of middle-skill jobs . . . This lopsided growth has concentrated labor market

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<sup>32</sup> See David H. Autor, *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, 29 J. ECON. PERSPS. 3, 10 (2015). Capitalism's dynamics of creative destruction were named and elucidated by political economist Joseph Schumpeter. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81–86 (George Allen & Unwin ed. 1976) (1943). A 2017 survey found that 78% of economists agreed that growing automation was "likely to create benefits large enough that they could be used to compensate those workers who are substantially negatively affected for their lost wages." *Robots and Artificial Intelligence*, THE INITIATIVE ON GLOB. MKT. F., CHI. BOOTH (Sept. 12, 2017), <https://perma.cc/K9BN-5NFQ>. Of course, that begs the question whether compensation will take place, and in any case, whether it can make up for the loss of decent work.

<sup>33</sup> See RICHARD B. FREEMAN, IZA WORLD LAB., WHO OWNS THE ROBOTS RULES THE WORLD 9 (2015) [hereinafter FREEMAN, WHO OWNS THE ROBOTS]; Laura Tyson & Michael Spence, *Exploring the Effects of Technology on Income and Wealth Inequality*, in AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY, 170 (Heather Boushey et al. eds., 2017); see also TYLER COWEN, AVERAGE IS OVER: POWERING AMERICA BEYOND THE AGE OF THE GREAT STAGNATION 3–18 (2013).

rewards among the most skilled and highly-educated workers while devaluing much of the non-specialized work that remains. This imbalance contributes to the vast divergence of earnings between college- and noncollege-educated workers in recent decades.<sup>34</sup>

The MIT task force found, in short, that automation was already destroying more decent middle-skill jobs than it was creating—that it was hollowing out the labor market.<sup>35</sup> Harvard economist Richard Freeman similarly noted that, as robots become better and cheaper substitutes for human labor, “the net impact . . . will be to shift work from humans to the robots, reducing employment and pressuring wages downward in jobs where machines can do the work of humans at lower costs.”<sup>36</sup>

Technology is thus contributing to inequality within the labor market and to the shift of income from labor toward capital.<sup>37</sup> Professor Daron Acemoglu and his colleagues suggested that “automation may have been the most important factor boosting inequality in the U.S. labor market” in recent decades.<sup>38</sup> They estimated that 50–70% of changes in the U.S. wage structure over the last four decades are due to the “relative wage declines of worker[s] . . . specialized in routine tasks in industries experiencing rapid automation.”<sup>39</sup>

These diagnoses of the impact of automation are troubling even if job shortages and falling wages for ordinary workers coexist with high demand and rising wages for some skilled workers. They portend a growing chasm over time between most workers and those at the top who own or produce the new technology, or whose high-end skills are complemented by that technology. Most workers may be stuck competing for the shrinking range of low- or middle-skill jobs that humans can still do better or more cheaply than machines but that many humans can also do

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<sup>34</sup> MIT TASK FORCE ON THE WORK OF THE FUTURE, THE WORK OF THE FUTURE: SHAPING TECHNOLOGY AND INSTITUTIONS 22 (Nov. 1, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> Richard B. Freeman, *Ownership When AI Robots Do More of the Work and Earn More of the Income*, 1 J. PARTICIPATION & EMP. OWNERSHIP 74, 79–80 (2018).

<sup>37</sup> See FREEMAN, WHO OWNS THE ROBOTS, *supra* note 33, at 4.

<sup>38</sup> DARON ACEMOGLU, ANDREA MANERA & PASCUAL RESTREPO, MIT WORK OF THE FUTURE, TAXES, AUTOMATION, AND THE FUTURE OF LABOR 7 (2020) (citing DARON ACEMOGLU & PASCUAL RESTREPO, THE LABOR SHARE, DISPLACEMENT AND WAGE INEQUALITY (2020)).

<sup>39</sup> Daron Acemoglu & Pascual Restrepo, *Tasks, Automation, and the Rise in US Wage Inequality* 37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28920, 2021).

without advanced training or higher education. In short, the proliferation and growing cost-effectiveness of technological substitutes for labor translates into another powerful employee-replacement strategy that undermines workers' market power even before they are actually displaced.

Automation is thus part of a larger menu of options by which owners and managers of capital can secure needed inputs without directly employing people. If robots or algorithms can supply those inputs more reliably or more cheaply than employees or outside contractors, then firms will turn to robots and algorithms instead of human labor. As investment banker Steven Berkenfeld put it, CEOs these days ask, "Can I automate it? If not, can I outsource it? If not, can I give it to an independent contractor?"<sup>40</sup> Indeed, "some [CEOs] . . . will do anything possible, they'll explore all other alternatives so as not to hire another full-time employee."<sup>41</sup> The alternatives are ever more abundant. And that depresses the labor market power of the workers for whom fissuring or automation provides a ready substitute.

## II. SHOULD THE LAW CONSTRAIN EMPLOYEE-REPLACEMENT OPTIONS TO REBALANCE BARGAINING POWER? A FIRST CUT AT THE QUESTION

So we can reframe many of the trends that are depressing workers' market power as a proliferation of employee-replacement or employment-avoidance options. That brings us to the question of what, if anything, the law should do about that. After all, the various tools in the employee-replacement toolbox are at one level unexceptionable techniques for lowering costs and improving performance, productivity, and efficiency. They are part of the mechanics of creative destruction by which less productive or higher-cost firms and business models give way to more innovative and productive ones. To be sure, techniques of fissuring or automation may reflect regulatory arbitrage or other less salutary aims, or they may be "so-so technologies" that replace

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<sup>40</sup> Olivier Garret & Stephen McBride, *How the Coming Wave of Job Automation Will Affect You and the U.S.*, FORBES (Feb. 23, 2017), <https://perma.cc/7QN2-MBMM> (quoting Steven Berkenfeld, Managing Dir., Barclays Capital).

<sup>41</sup> Steven Berkenfeld, Managing Dir., Barclays Capital, Opportunities and Challenges, Presentation at the U.S. Department of Labor Conference on the Future of Work (Dec. 10, 2015).

workers with little productivity gain.<sup>42</sup> But these techniques often do produce gains—mostly by reducing costs of production—that accrue to the economy as a whole. Curbing these employee-replacement techniques might curtail not only their destructive impact but also their creative impact as well.

Policy makers have wrestled with this dilemma openly in the context of trade policies and have largely settled on coupling freer trade with more or less (and usually less) robust commitments to cushioning the impact on displaced workers through “trade adjustment assistance” or the like.<sup>43</sup> That is the kind of compromise typically favored by economists—at least when they acknowledge that there are indeed losers from freer trade.<sup>44</sup> Free trade policies have been crucial in the transnational dimension of fissuring by enabling firms to offshore production and to develop extended transnational supply chains. There, too, policy makers have taken a hands-off posture, letting lead firms reap the gains from offshoring on the assumption that the economy as a whole will benefit and that some of the gains might eventually accrue to those who are, at least in the short run, on the losing end. As for who’s been on the losing end of globalization, it’s been mostly the once-prosperous industrial workers of the rich world and their would-be successors.<sup>45</sup> (One complication is that some of the *winner*s from globalization have been among the poorest humans on the planet.<sup>46</sup>)

Policies that facilitate transnational trade and fissured production reflect many economists’ general predisposition toward unfettering managers and market mechanisms in pursuit of aggregate gains, and either ignoring the distributional impact or mitigating it through tax-and-transfer mechanisms.<sup>47</sup> Though

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<sup>42</sup> Daron Acemoglu & Pascual Restrepo, *Automation and New Tasks: How Technology Displaces and Reinstates Labor*, 33 J. ECON. PERSPS. 3, 10 (2019).

<sup>43</sup> *Trade Adjustment Assistance for Workers*, U.S. DEP’T OF LAB., <https://perma.cc/4B5G-8L7W>.

<sup>44</sup> See DANI RODRIK, A PRIMER ON TRADE AND INEQUALITY 3 (2021) [hereinafter RODRIK, PRIMER]; see also DANI RODRIK, THE GLOBALIZATION PARADOX 44–45 (2010).

<sup>45</sup> See Christoph Lakner & Branko Milanovic, *Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession* 49 (The World Bank, Working Paper No. 6719, 2013).

<sup>46</sup> *Id.* at 33–34.

<sup>47</sup> See, e.g., *Free Trade*, CHI. BOOTH: THE INITIATIVE ON GLOB. MKTS. (Mar. 13, 2012), <https://perma.cc/86ET-9SLA> (finding that 85% of polled economists agree that the gains to producers and consumers from freer trade greatly exceed any employment costs); Spencer G. Lyon & Michael E. Waugh, *Redistributing the Gains from Trade through*

dissenting views may be gaining ground,<sup>48</sup> economists who do worry about distributional outcomes have tended to favor *redistributive* over *predistributive* policy interventions, and to oppose regulating in the interest of fairer distributional outcomes.<sup>49</sup> Yet the latter is what I want to defend here.

Much of the law of work—and especially much of collective labor law—aims to achieve fairer distributional outcomes through regulatory interventions into labor and employment relations. That is an explicit aim of the NLRA’s regime of collective labor relations, as I’ve noted,<sup>50</sup> and it is equally evident in laws establishing minimum wages and other terms and conditions of employment. Beginning in the 1980s, a barrage of economically inspired critiques of labor and employment law argued that it was socially counterproductive (because it distorted otherwise-efficient markets for labor and commodities) and self-defeating (because employers would deploy their residual market freedom in ways that hurt workers—for example, by cutting jobs or wages).<sup>51</sup> Part of that body of criticism set out to debunk the assumption of inequality of bargaining power that ran through the defense of much of the law of work. (Professor Richard Epstein, for example, attacked that assumption in part by arguing that

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*Progressive Taxation*, 115 J. INT’L ECON. 185, 185 (2018) (“The standard response to [globalization] concerns is . . . that there exists a Pareto improving transfer scheme that can compensate the losers from trade, yet still preserve the gains for the winners.”).

<sup>48</sup> See, e.g., Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 534–35 (2022) (arguing that redistribution through regulation can sometimes be more efficient than redistribution solely through taxation). More broadly, Professor Zachary Liscow has criticized the prevalent assumption in law and economics that efficiency is the main goal of policymaking. See Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1693–1700 (2018).

<sup>49</sup> The crux of this argument is the idea of double distortion: that using legal rules to affect the distribution of income not only distorts income like a tax but also distorts the behavior regulated by the legal rule and is thus less efficient than taxation. See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–25 (2000); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 31–37 (2002). In the labor law context, see Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1077 (1984), for the related argument that redistribution through taxation, unlike laws that strengthen unions, would aid nonunionized employees as well.

<sup>50</sup> See *supra* Part I.

<sup>51</sup> See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1403–08 (1983); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 962–79 (1984); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1011 (1984).

employers as well as employees bore costs in case of termination, given the costs associated with replacing workers.<sup>52</sup> Of course, that implies that market power shifts toward employers insofar as changing labor market conditions make it cheaper to replace workers.)

I agree with those who see a vital role for predistribution regulatory interventions (as well as redistributive taxes and transfers). For one thing, the polarized politics of redistribution often thwart the tax-and-transfer alternative.<sup>53</sup> Moreover, not all that is lost by the losers can be compensated by redistributive transfers.<sup>54</sup> Recall the manifold ways that depressed market power can disable workers from claiming legal rights and resisting abuse. Redistributing market power at the front end can benefit workers in ways that redistributing income at the back end cannot.

We'll need to return to these questions once we take a closer look at what the law might do to constrain firms' ability to replace employees and thereby bolster employees' relative bargaining power. In particular, we'll have to take into account the hydraulics of regulating labor markets and employment relations. Closing off or impeding one cost-saving strategy might lead firms to seek out others that are worse for workers or harder to regulate.<sup>55</sup> Similarly, strongly protecting incumbent job holders from replacement can depress the labor market prospects of job aspirants, especially new entrants on the market. Those unintended consequences are not as inexorable as they are often portrayed to be and shouldn't necessarily rule out distributionally conscious

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<sup>52</sup> See Epstein, *In Defense of the Contract at Will*, *supra* note 51, at 973–74.

<sup>53</sup> There is evidence that most people oppose redistributionist taxation based on a sense that pre-tax earnings are “theirs.” See Liscow, *Redistribution for Realists*, *supra* note 48, at 511–29; Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518–25 (2018) (noting that congressional gridlock and political polarization make it more difficult to achieve redistribution through tax policy).

<sup>54</sup> Cf. Revesz, *supra* note 53, at 1512–18 (observing that redistribution through taxation struggles to deal with harms that are probabilistic, latent, or otherwise hard to monetize); RODRIK, PRIMER, *supra* note 44, at 3–4 (noting that compensation through the tax system will necessarily be incomplete given information problems and income effects). Practically, these concerns are reflected in redistributive programs—including trade adjustment assistance—that are underfunded, poorly administered, and ultimately ineffective. See generally *Improvements Necessary, but Programs Cannot Solve Communities' Long-Term Problems: Testimony on Trade Adjustment Assistance Before the Subcomm. on Int'l Trade of the Sen. Comm. on Fin.*, 107th Cong. (2001) (statement of Loren Yager, Dir. of Int'l Affs. & Trade, Gen. Acct. Off.).

<sup>55</sup> See Cynthia Estlund, *What Should We Do After Work?: Automation and Employment*, 128 YALE L.J. 254, 295–300 (2018).

regulatory solutions. But neither should they be ignored by those focused on improving outcomes for workers.

### III. HOW CURRENT U.S. LAW REGULATES EMPLOYEE-REPLACEMENT OPTIONS

Before turning to possible reforms, let us look briefly at how the U.S. law of work currently regulates employee-replacement options. We can readily imagine several regulatory strategies for constraining employee-replacement techniques (without outright banning any of them): the law could interpose *procedural* duties of notice, consultation, or bargaining with affected employees or their representatives before replacing them; it could condemn certain *motives* for replacing or displacing employees; or it could require some level of *justification* for such decisions, with procedures for judicial or administrative review. Each of those three types of constraints could be imposed on decisions displacing either individuals or groups of employees. The law could also defeat the employment-avoidance aims of some fissuring options by looking through formalities and treating putative independent contractors as employees or treating a contractor's workers as the lead firms' employees for some legal purposes. As it turns out, the U.S. law of work already does several of these things to some degree.

#### A. Motive-Based Restraints on Dismissal, Managerial Discretion, and Employment at Will

We must first recognize that everything in the U.S. law of work operates against the background of a presumption of deference to managerial prerogatives.<sup>56</sup> To some degree those prerogatives are hardwired into an economy based on private ownership of productive organizations. Yet the degree of deference to managerial prerogatives in the United States is virtually unique in the developed world. That is seen most clearly in the prevailing presumption of employment at will: absent an agreement granting job security (like a union contract with a "just cause" requirement), employees can lawfully be fired, laid off, or replaced at any

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<sup>56</sup> See Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. LAB. & EMP. L. 79, 82–85 (2022) (cataloguing the ways in which the managerial prerogative permeates all labor and employment law).

time without any reason.<sup>57</sup> The United States stands virtually alone in the developed world in failing to require any justification for dismissals or layoffs from employment. Back in the day—before the New Deal advent of modern employment law—the law tolerated dismissals for any reason good, bad, or ugly; and the federal Constitution of the *Lochner* Era rejected any legislative limits on employment at will.<sup>58</sup>

Modern U.S. employment law still allows dismissal without a demonstrably good reason, but it condemns many bad motives for dismissal—discrimination because of race, sex, age or other status or identity traits, or because of union activity, whistleblowing, or other socially valued and protected activity. Still, all of the motive-based exceptions to employment at will require fired employees (or the government on their behalf) to bear the burden of proving the employer’s unlawful motive—which the employer has means, motive, and opportunity to conceal—through the rigors of litigation.<sup>59</sup> And that is where litigation has not been foreclosed by a mandatory arbitration “agreement,” the prevalence of which has exploded in recent years.<sup>60</sup> Given the obstacles to successful litigation and the unfavorable terrain of employment arbitration, most employees who believe they have been wrongfully discharged are unable to get an attorney to represent them.<sup>61</sup> That is what wrongful discharge law amounts to in an at-will world.

Employment at will, even with its modern exceptions, makes it easier and cheaper to dismiss most workers,<sup>62</sup> and thus

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<sup>57</sup> Critiques of employment at will abound. For a recent overview, see KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., *ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM* 8–12 (2021).

<sup>58</sup> See *Adair v. United States*, 208 U.S. 161, 179–80 (1908); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

<sup>59</sup> I explore these issues in Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670–74 (1996).

<sup>60</sup> See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE ARBITRATION EPIDEMIC* 3, 6–10 (2015).

<sup>61</sup> Survey data indicate that plaintiff-side attorneys agree to pursue, on average, 19% of potential claims that are not covered by an arbitration clause and just 11% of those that are covered. Mark D. Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?*, in 22 *MANAGING & RESOLVING WORKPLACE CONFLICT* 105, 119 (David B. Lipsky et al. eds., 2016). Median rates of acceptance are lower, at 10% and 5%, respectively. *Id.*

<sup>62</sup> In theory, the costs associated with U.S. wrongful discharge laws could be comparable to or even greater than the costs of dismissal under a moderately protective unjust-dismissal regime. There was some evidence for that possibility in the years before the steep rise of mandatory arbitration, at least for better-paid white-collar workers in larger

depresses the market power of employees who are replaceable—whether by a new hire, by outsourcing, or by machines—and who would have difficulty replacing their jobs. More concretely, employment at will renders workers less able to push back against abusive treatment, to seek better conditions than the law requires, or even to demand compliance with the law. The U.S. baseline of employment at will also reflects a more general posture of deference to managerial prerogatives that shapes other constraints on employee-replacement decisions.

#### B. The NLRA’s Duty to Bargain and Prohibition of Antiunion Discrimination

Consider, for example, the NLRA, which regulates many decisions that displace workers—from individual dismissals and layoffs to subcontracting, relocation, or closure of operations. Collective bargaining agreements reached within that legal framework also regulate those decisions by requiring just cause for dismissal and regulating the order of layoffs (usually by seniority).<sup>63</sup> They can, but usually don’t, regulate subcontracting, outsourcing, or the like. Those are just some of the ways that collective bargaining can enhance workers’ labor market power. But I’ll focus here less on the “law of the shop” than on the law of the land: the NLRA’s framework for union organizing and collective bargaining.

Employer decisions that displace workers—from a total or partial closing to subcontracting or relocation of work—might be challenged under the NLRA on two grounds: (1) as discriminatory, or unlawfully motivated by antiunion sentiment or, (2) if undertaken unilaterally by management vis-à-vis union-represented workers, as a refusal to bargain in good faith with that union. Antiunion discrimination and refusal to bargain in good faith are both “unfair labor practices” that the National Labor Relations Board (NLRB) is charged with adjudicating and remedying—including by restoring the status quo ante where that is not “unduly burdensome.”<sup>64</sup>

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companies, for whom litigation was relatively feasible and foreseeable. See Cynthia Estlund, *Wrongful Discharge Law in the Land of Employment-At-Will: A US Perspective on Unjust Dismissal*, 33 KING’S L.J. 298, 300–01 (2022).

<sup>63</sup> See Andrias & Hertel-Fernandez, *supra* note 57, at 6.

<sup>64</sup> The presumptive remedy in such cases is restoration of status quo ante, except where that would be “unduly burdensome.” See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 n.10 (1964); *Lear Siegler, Inc.*, 295 N.L.R.B. 857, 861–62 (1989).

The Supreme Court has injected into these doctrines a large dose of deference to managerial prerogatives (though less of it than employers crave). Roughly speaking, the bigger the impact of a decision on the scope or nature of the employer's enterprise, the harder it is to prove antiunion discrimination, and the less likely the employer will be required to bargain over the decision. (A unionized employer must bargain in any case over the effects of all these decisions—potential transfer rights or severance payments, for example.<sup>65</sup>) At one extreme, the existential decision to cease being an employer by closing one's entire business is legally unchallengeable under the NLRA on either ground.<sup>66</sup> Partial closing decisions are also categorically exempt from the duty to bargain<sup>67</sup> and are very hard to challenge as discriminatory. Such decisions—even if they are plainly triggered by union organizing at the closed facility—are unlawfully discriminatory under the NLRA only if they aim to, and foreseeably could, chill union activity by other employees in the employer's remaining operations.<sup>68</sup>

By contrast, subcontracting and relocation decisions that do not alter the basic scope of the enterprise are more likely to be subject to the duty to bargain under case-specific balancing tests, and are somewhat easier to challenge as discriminatory based on proof of antiunion animus or a union-avoidance motive.<sup>69</sup> Similarly, decisions to automate work, like subcontracting decisions, are “to be considered on their particular facts,”<sup>70</sup> and can be subject to the duty to bargain if they don't alter “the scope and direction of the enterprise.”<sup>71</sup> That means that the greater the capital investment, and often the more jobs that are eliminated, the more likely it is that such decisions will be exempt from the duty to

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<sup>65</sup> See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981).

<sup>66</sup> *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69, 272–74 (1965).

<sup>67</sup> See *First Nat'l Maint. Corp.*, 452 U.S. at 686.

<sup>68</sup> See *Textile Workers Union*, 380 U.S. at 268.

<sup>69</sup> See *Fibreboard Paper Products Corp.*, 379 U.S. at 213–14 (finding duty to bargain over subcontracting of maintenance work that does not alter a firm's basic operations); *Dubuque Packing Co.*, 303 N.L.R.B. 386, 396–97 (1991) (finding duty to bargain over partial relocation of operations).

<sup>70</sup> *First Nat'l Maint. Corp.*, 452 U.S. at 686 n.22.

<sup>71</sup> Compare, e.g., *Winchell Co.*, 315 N.L.R.B. 526, 526 n.2 (1994) (finding duty to bargain over introduction of desktop computers, given minor impact on the enterprise), and *Richland, Inc.*, 180 N.L.R.B. 91, 91 (1969) (duty to bargain over installation of automated equipment), with *Noblit Bros., Inc.*, 305 N.L.R.B. 329, 330 (1992) (finding no duty to bargain over technological streamlining of operations, given impact on “the scope and direction of the enterprise”).

bargain.<sup>72</sup> (Bargaining over effects will still be required.) Decisions to automate work can also be challenged as discriminatory under the NLRA if motivated by the displaced employees' union activity.<sup>73</sup>

The prohibition on antiunion discrimination and the duty to bargain are nontrivial constraints on firms' efforts to replace incumbent employees with subcontractors, workers at another location, or machines. But those legal constraints are confined to the relatively few workplaces in which workers are either represented by a union or engaged in union organizing. Even within that domain, a firm can avoid discrimination by acting on demonstrable business- and cost-based grounds (putting aside the enduring puzzle of how to untangle antiunion animus from the higher expected labor costs that partly underlie that animus). As for the duty to bargain, it entails no duty to give in. If a firm meets and confers with the union over such a decision and is not moved—that is, if negotiations reach an impasse—it can implement the decision without liability. There are obviously risks and uncertainties in adjudication, all complicated by delay.<sup>74</sup> But neither unions nor employees can pursue litigation over such decisions. They can only file charges with the NLRB; the General Counsel's decision whether and how aggressively to pursue those charges is not subject to appeal or review.<sup>75</sup> From the perspective of a well-advised firm, the NLRA's legal constraints are likely at worst to slow the implementation of an economically rational decision to replace or displace employees. At best, a union might be able to alter the firm's calculus by offering concessions or creative solutions to the firm's problems (a possibility that does little to curb management opposition to unionization).

The point of the NLRA's prohibition of antiunion discrimination and its duty to bargain is to enable workers to claim a

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<sup>72</sup> On some older decisions on this issue, see Debra J. Zidich, Comment, *Robotics in the Workplace: The Employer's Duty to Bargain over Its Implementation and Effect on the Worker*, 24 SANTA CLARA L. REV. 917, 923–37 (1984).

<sup>73</sup> The Board has found automation of individual workers' jobs to be discriminatory, as in *Richland, Inc.*, 180 N.L.R.B. 91, 91 (1969), and *Weston & Brooker Co.*, 154 N.L.R.B. 747, 748–49 (1965), *enforced per curiam*, *NLRB v. Weston & Brooker Co.*, 373 F.2d 741 (4th Cir. 1967).

<sup>74</sup> Delay in adjudication at the NLRB can favor the employer at the remedial stage, for it may lead the Board or a reviewing court to conclude that an order to restore work that had been unlawfully subcontracted or relocated years before was unduly burdensome to the employer.

<sup>75</sup> See *NLRB v. United Food & Com. Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 114 (1987); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

collective voice in workplace governance, including some decisions that threaten their jobs, through union organizing and collective bargaining. (And one point of that is to redress the endemic inequality of bargaining power between employers and unorganized employees.) The NLRA has largely failed in these aims. Gaining union representation under the NLRA requires workers to run a gauntlet of intense employer resistance on the way to proving majority support. Few workers manage to do that, and even fewer manage to secure a collective bargaining agreement, with its characteristic formal and informal mechanisms for resolving problems. Yet the NLRA is the only game in town when it comes to collective voice in the private sector workplace, for federal labor law forecloses employers' voluntary construction of alternative structures of collective voice and preempts any state or local efforts either to authorize such alternative structures or to facilitate union organizing.<sup>76</sup> The upshot is that most private-sector workers—well over 90%—have no formal collective voice at work.<sup>77</sup> They are subject to a regime of largely unfettered managerial discretion to fire them or replace them with subcontractors, machines, or otherwise.

The NLRA's limited reach in this domain led Congress in 1988 to enact the Worker Adjustment and Retraining Notification Act<sup>78</sup> (WARN). The WARN Act “protects workers, their families, and communities by requiring employers with 100 or more employees . . . to provide at least 60 calendar days *advance written notice* of a plant closing and mass layoff affecting 50 or more employees at a single site of employment,”<sup>79</sup> with exceptions for “unforeseeable business circumstances,” failing companies, and natural disasters.<sup>80</sup> Beyond requiring notice, the WARN Act does not constrain even large-scale employee-replacement (or displacement) decisions. The main point of the Act is simply to give “workers and their families some transition time to adjust to the . . . loss of employment, to seek and obtain other jobs, and if

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<sup>76</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1571–73 (2002).

<sup>77</sup> That is apart from less formal structures of worker representation that fly under the regulatory radar and that appear to be quite common. See John Godard & Carola M. Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in the American Workplace*, 66 INDUS. & LAB. REL. REV. 142 (2013).

<sup>78</sup> Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2101–2109).

<sup>79</sup> *Plant Closings and Layoffs*, U.S. DEP'T OF LAB., <https://perma.cc/5ETE-R3LS> (emphasis added).

<sup>80</sup> *Id.*

necessary, to enter skill training or retraining.”<sup>81</sup> The WARN Act does not require bargaining over mass layoffs (much less a justification), though it might incidentally afford a practical opportunity to bargain, where there is a union on the scene, over decisions that are *not* subject to the NLRA’s duty to bargain.

### C. Looking Through Formalities: Misclassification and Joint-Employer Doctrines

Finally, the law of work may disregard some fissuring decisions for some purposes and treat a firm as the legal employer of some workers who are nominally either independent contractors or employees of contractors. That prospect should blunt the incentive to replace employees through fissuring to whatever extent those decisions are driven by avoidance of employer responsibilities.

Firms that purport to contract out work to “independent contractors” may find that their chosen categorization of workers is rejected based on the real nature of the relationship—for example, the putative employer’s control of the means and manner of the work and the extent of the worker’s integration into the enterprise. That is, adjudicators may find that the firm has misclassified an employee as an independent contractor and is in fact subject to one or more of the legal duties and burdens of employer status that it might have sought to avoid by contract. In such cases, the formalities of the contract—which function as a purported waiver by the employee of nonwaivable employee rights—will be disregarded.

Unfortunately, misclassification still appears to be rampant.<sup>82</sup> Part of the problem is that the formalities of the relationship—even if they would be disregarded in case of a legal challenge—establish workers’ own assumptions about their status. And misclassified workers themselves—even if they know enough to think they should be treated as employees—must generally take the initiative and bear the cost of challenging their

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<sup>81</sup> *Id.*

<sup>82</sup> One federal government report found that 10–30% of firms audited in nine states misclassified employees, resulting in billions of dollars in tax revenue lost. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 1, 11 (2009) [hereinafter EMPLOYEE MISCLASSIFICATION].

misclassification.<sup>83</sup> Those who do so face a legal morass in the form of multifactor balancing tests, with nearly as many variations as there are labor and employment statutes—federal, state, and local.<sup>84</sup> And at the end of the day, if an employer is found to have misclassified employees, it rarely faces any kind of penalty—just the liabilities it should have borne all along.<sup>85</sup> That’s not much by way of deterrence. The classification issue is one of the most hotly contested in all of labor and employment law. And for the foreseeable future, this area of law remains a hot mess.

Much the same can be said of “joint-employer” doctrines, under which a lead employer and its contractors may be held jointly responsible for the latter’s employees under some labor statutes, including the Fair Labor Standards Act<sup>86</sup> (FLSA) and the NLRA.<sup>87</sup> The lead employer’s control—actual or potential—is again at the center of the inquiry. But beyond that, joint-employer doctrine is another morass of multifactor balancing tests.<sup>88</sup>

Joint-employer doctrine is also a political football that gets kicked back and forth across the field with changes in administration. To illustrate: Under the leadership of David Weil, who literally wrote the book on fissuring, the Obama-era U.S. Department of Labor’s (DOL) Wage and Hour Division expanded the reach of joint-employer status under the FLSA.<sup>89</sup> President Donald Trump’s DOL then set about to undo that work through rulemaking.<sup>90</sup> Weil was nominated to return to the DOL under President

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<sup>83</sup> *Id.* at 15 (“Approximately 80 percent of the investigations . . . involving misclassification were initiated because of complaints from workers about possible labor violations.”).

<sup>84</sup> For a helpful overview of the wide array of classification tests out there, see Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 740–50 (2020); see also Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 141–46 (2017).

<sup>85</sup> See EMPLOYEE MISCLASSIFICATION, *supra* note 82, at 15.

<sup>86</sup> 29 U.S.C. §§ 201–219.

<sup>87</sup> See Steven A. Carvell & David Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. UNIV. BUS. L. REV. 5, 12–13 (2015) (providing an overview of joint employer doctrine).

<sup>88</sup> Even just under federal law, the DOL, NLRB, and Equal Employment Opportunity Commission all have different definitions of what constitutes a joint employer. *Id.* at 13–21.

<sup>89</sup> See U.S. Dep’t of Lab., Wage & Hour Div., Administrator’s Interpretation No. 2016-1 on Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Worker Protection Act (Jan. 20, 2016).

<sup>90</sup> See Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2820 (Jan. 16, 2020) (adopting a four-factor test that narrows the applicability of joint-employer status).

Joseph Biden, but opposition from employers and their congressional allies killed the nomination.<sup>91</sup> The Biden DOL nonetheless rescinded the Trump-era joint-employment rule and proposed a new one based on prior precedents.<sup>92</sup> Politics have similarly driven the waxing and waning of the NLRB's joint employer doctrine, which determines, among other things, which firms must bargain with a union representing a contractor's employees.<sup>93</sup>

So, in principle, the law can look through some of the formalities of fissuring to defeat their employment-avoidance aims. But politics plays a large role in whether it does so. And practical realities ensure that employers mostly have their way in any case, for they can establish a strong *de facto* presumption of nonemployer status through their control of the formalities of the relationship, which are only rarely challenged.

#### IV. REBALANCING MARKET POWER BY CURBING EMPLOYEE-REPLACEMENT OPTIONS

So we find that existing U.S. law has a superficially well-stocked toolbox of regulatory techniques for curbing or reviewing firms' replacement of employees through fissuring, relocation, automation, or otherwise. But a closer look reveals that most of the tools are dull, broken, or the wrong size for the job. That may be reassuring to those who doubt the social utility of intervening in apparently rational managerial decisions about where and how to accomplish the tasks required to compete successfully in product markets. To those who are persuaded, as I am, that the proliferation of employee-replacement options has contributed significantly to the erosion of workers' labor market power, it suggests a reform agenda. Truth be told, it leads by a somewhat unfamiliar path to a rather familiar reform agenda—one that is likely to raise equally familiar economic objections, which I'll briefly address here.

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<sup>91</sup> Nick Niedzwiedek & Eleanor Mueller, *Moderate Dems Hand Biden His First Nomination Vote Defeat*, POLITICO (Mar. 30, 2022), <https://perma.cc/S6DL-588J>.

<sup>92</sup> See Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40,939, 40,939 (July 30, 2021); Standard for Joint Employer Status, 87 Fed. Reg. 54,641 (Sept. 7, 2022).

<sup>93</sup> For example, President Trump's NLRB promulgated a rule defining "joint employer" as one that exercises "direct and immediate control" over "essential terms . . . of their employment." 29 C.F.R. § 103.40 (2020). The President Biden's NLRB has proposed a new rule that would redefine "joint employer" as one that "possesses the authority to control . . . particular employees' essential terms and conditions of employment." Standard for Determining Joint Employer Status, 87 Fed. Reg. 54,641 (Sept. 6, 2022).

### A. Job Security and Collective Employee Voice

I'll focus here briefly on two big deficits in the existing U.S. law of work relative to that of some other advanced capitalist democracies: the vast majority of U.S. employees lack any guarantee of job security, in that employers need not *justify* their dismissal or replacement by whatever means, and they lack any mechanism to *participate*, through collective bargaining or otherwise, in employer decisions that threaten to replace or displace them.<sup>94</sup> One way to address both deficits might be through conventional labor-law reforms—like those in the proposed Protecting the Right to Organize Act<sup>95</sup> (PRO)—that make it easier for workers to gain union representation and the right to bargain for both job security and a say in employee-replacement decisions. Such reforms are plainly in order, in my view. But even if we imagine away the stubborn political logjam that has long blocked collective labor-law reform, it is unlikely that reforms to the basic NLRA model would come close to enabling most workers to secure either job security or a collective voice at work through unionization. I'll leave those issues for another venue.

We might look abroad for alternative solutions, as some U.S. labor scholars and advocates have done over recent decades. In particular, we might look to the experience of some European countries with a strong social democratic tradition and lower levels of income and wealth inequality than in the United States.<sup>96</sup> There we find ample experience with both legal protections of job security and robust mechanisms of worker voice in addition to collective bargaining. Unjust-dismissal laws require employers to justify dismissals or else to compensate dismissed workers.<sup>97</sup> And codetermination laws provide, among other things, for the establishment of elected “works councils” in enterprises of a certain

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<sup>94</sup> Compa, *supra* note 20, at 26–27.

<sup>95</sup> H.R. 842, 117th Cong. (2021).

<sup>96</sup> See *Income Inequality*, Org. Econ. Coop. & Dev., <https://perma.cc/KZ74-KY6U>; *Income and Wealth*, Org. Econ. Coop. & Dev., <https://perma.cc/8BWV-L76L>.

<sup>97</sup> For a comparative overview of unjust dismissal laws in some major European countries, see Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 387–419, 434–43 (2014). Unjust dismissal laws are usually accompanied by other laws designed to discourage evasive maneuvers (e.g., excessive use of temporary or part-time contract workers). Those are grouped together in prevailing analyses of employment protections. See Zoe Adams, Louise Bishop, Simon Deakin, Colin Fenwick, Sara Martinsson Garzelli & Giudy Rusconi, *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 158 INT'L LAB. REV. 1, 7 (2019).

scale, based on a modest showing of employee interest. Works councils enjoy legally enforceable entitlements to consultation and codetermination within enterprises, including over many kinds of decisions that displace workers.<sup>98</sup> Works councils supplement collective bargaining over basic economic terms (which takes place chiefly at the sectoral, not the enterprise, level).<sup>99</sup> Employment protection laws and works councils should tend to boost workers' labor market power, in part by constraining employers' ability to replace them.<sup>100</sup>

Any such reform agenda would face innumerable issues of institutional design and more-than-daunting political hurdles that I will ignore here. But I do want to briefly address a particular set of policy concerns: both unjust dismissal laws and works councils (if effective) would encumber firms' flexibility by design, constraining employee displacement and tilting firms' strategic calculus toward other (and perhaps slower) responses to changing market conditions and opportunities. Moreover, both sets of reforms tend to operate in favor of incumbent employees to the potential detriment of would-be employees—both new entrants to the labor market and those who might prefer to switch jobs. These concerns warrant a brief look at empirical evidence on the economic impact of employee protections.

In neoclassical economic theory, in which labor markets were usually assumed to be fully competitive, the economic impact of legal restraints on dismissal seemed clear: employment protections that made it more difficult or costly to fire or lay off workers would inhibit new hiring, depress economic dynamism, increase

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<sup>98</sup> For several illuminating studies, see Walther Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 53, 58–60 (Joel Rogers and Wolfgang Streeck eds., 1995) [hereinafter WORKS COUNCILS], Joel Rogers and Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCILS 1, 11–16 (Joel Rogers & Wolfgang Streeck eds., 1995), and Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, in WORKS COUNCILS 313, 313–14 (Joel Rogers & Wolfgang Streeck eds., 1995), and see generally Carola M. Frege, *A Critical Assessment of the Theoretical and Empirical Research on German Works Councils*, 40 BRIT. J. INDUS. RELS. 221 (2002).

<sup>99</sup> Countries with codetermination laws tend to have more centralized systems of sectoral collective bargaining as well as higher union density. See Simon Jäger, Shakked Noy & Benjamin Schoefer, *What Does Codetermination Do?*, 75 INDUS. L. REV. 857, 880 (2022).

<sup>100</sup> *Id.* at 865–66 (reviewing studies that show that codetermination is associated with modest reductions in involuntary separations in Germany).

unemployment, and impair overall economic performance.<sup>101</sup> The official line of the World Bank for many years reflected that neoliberal consensus and prescribed maximum flexibility in the hiring and especially the firing of workers.<sup>102</sup> The Bank's 2007 *Doing Business Report* thus ranked countries in part by the ease of firing workers; the United States came out on top.<sup>103</sup>

In recent decades, the neoclassical and neoliberal consensus has been increasingly challenged. One group of scholars, summarizing "the voluminous literature on the economic effects of labour laws" as of 2019, concluded that "the theoretical effect of firing restrictions on employment levels is ambiguous."<sup>104</sup> On the one hand, as the neoclassicists maintained:

[T]he imposition of statutory controls could induce distortions or imperfections in the allocation of resources by raising firms' firing (and hence hiring) costs . . . [S]lowing down labour market transitions may have broader negative effects, including deterring innovation by market entrants concerned about high severance costs in the event of business failure and exaggerating the effects of the economic cycle.

On the other hand, if fairness at work is a benefit that workers value but employers tend to under-provide, for example because of adverse selection effects, dismissal legislation can induce an increase in labour supply and also help shift the employment exchange to a more efficient contractual equilibrium.<sup>105</sup>

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<sup>101</sup> See, e.g., Olivier Blanchard & Pedro Portugal, *What Hides Behind an Unemployment Rate: Comparing Portuguese and U.S. Labor Markets*, 91 AM. ECON. REV. 187, 196 (2001) (asserting that employment protections "naturally" lead to longer and more painful unemployment); Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q.J. ECON. 699, 704–06 (1990) (providing an overview of the theory supporting the neoclassical position). Those predictions found some empirical support. Lazear, *supra*, at 724–25; Andrea Bassanini, Luca Nunziata & Danielle Venn, *Job Protection Legislation and Productivity Growth in OECD Countries*, 24 ECON. POL'Y 349, 369–73 (2009). For parallel findings on works councils, see John T. Addison & Paulino Teixeira, *The Effect of Works Councils on Employment Change*, 45 INDUS. RELS: J. ECON. & SOC'Y 1, 12 (2006) (finding slower employment growth at plants with works councils than those without).

<sup>102</sup> WORLD BANK, *DOING BUSINESS 2008: COMPARING REGULATION IN 178 ECONOMIES* 19–23 (2007).

<sup>103</sup> *Id.* at 19.

<sup>104</sup> See Adams et al., *supra* note 97, at 3 (quoting David H. Autor, John J. Donohue III & Stewart J. Schwab, *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211, 214 (2006)).

<sup>105</sup> *Id.* at 3.

Moreover, employment protections—that is, laws regulating dismissals and layoffs and the use of temporary and part-time workers—might “provide elements of insurance and income smoothing that are not straightforward to obtain through private contracting, due to information asymmetries and collective action costs.”<sup>106</sup> Empirically, some evidence linked stricter employment-protection laws with “enhanced worker–employer cooperation and labour productivity,” and with “increases in firm-level innovation, the logic being that workers are more prepared to share knowledge with managers if the firm can make credible job security commitments.”<sup>107</sup> But how do all the costs and benefits add up?

The latest and most comprehensive word on the economic impact of employment-protection legislation (EPL) comes from a massive comparative study out of Cambridge University, where researchers created a carefully coded data set on EPL that spans 117 countries over four decades.<sup>108</sup> Focusing on data from 1990 to 2013, the researchers found that EPL was associated with small but mostly *positive* long-term net effects on national economic performance, including modestly *lower* unemployment levels in the longer run and a higher labor share of national income.<sup>109</sup> The impact on labor’s share is consistent with the relationship posited here between workers’ job security and their labor market power.<sup>110</sup>

These results may seem surprising. The restrictions that EPLs impose on firms’ flexibility in shedding workers would seem almost inexorably to inhibit their willingness to hire new employees. Among the explanations suggested by the Cambridge

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<sup>106</sup> *Id.* at 2.

<sup>107</sup> *Id.* at 2–3.

<sup>108</sup> For a detailed description of the methodology and coding of the data set, called the Cambridge Centre for Business Regulation Labour Regulation Index (CBR-LRI), see Zoe Adams, Parisa Bastani, Louise Bishop & Simon Deakin, *The CBR-LRI Dataset: Methods, Properties and Potential of Leximetric Coding of Labour Laws*, 33 INT’L J. COMPAR. LAB. L. & INDUS. RELS. 59, 66–75 (2017).

<sup>109</sup> Adams et al., *supra* note 97, at 20. Some scholars criticize the CBR-LRI for not including social security regulations and for focusing on formal law instead of coverage or effectiveness. See Petra Mahy, Richard Mitchell, Carolyn Sutherland, Peter Gahan, Anthony O’Donnell, Sean Cooney, Gordon Anderson, Lingfeng Mao & Andrew Stewart, *Measuring Worker Protection Using Leximetrics: Illustrating a New Approach in Four Asia-Pacific Countries*, 67 AM. J. COMPAR. L. 515, 523 (2019). But they recognize the CBR-LRI as essentially the state of the art in this field. *Id.*

<sup>110</sup> The researchers found a significant correlation with measures of overall economic inequality in OECD countries, though not across all 117 countries. Adams et al., *supra* note 97, at 17–18.

researchers for the modestly positive net results is that employment protections appear to be associated with higher public and private investments in worker training.<sup>111</sup> In particular, job-security protections should tend to encourage employers to invest in incumbent workers' skills and to cultivate their ability to switch to new tasks instead of treating them as disposable. A shift from replacement toward retraining could boost both workers' productivity and their labor market power and could thus mitigate the costs and mine the benefits of job security.<sup>112</sup>

Even the World Bank has changed its tune as the data have mounted. After years of instructing the world, and especially developing countries, that employment protections harmed firms, workers, and national economies, the Bank announced a new line in its 2015 *Doing Business Report*: “[e]mployment regulations are unquestionably necessary” and “benefit both workers and firms”; indeed, labor laws could impair national competitiveness and growth not simply where they were “excessive” but also where they were “insufficient.”<sup>113</sup>

The last proposition captures one caveat: the relationship between mandatory employment protections and economic performance is hardly linear—that is, more protective laws are not necessarily better. With respect to employment levels, for example, one study found that, “at low levels of regulation, an increase in EPL is associated with a rise in employment; at medium levels, with a ‘plateau,’ signifying little or no impact; and at higher levels, employment declines.”<sup>114</sup> In other words, job security is a good thing, but only up to a point. Still, the evidence strongly suggests that the United States could improve upon its unusually low level of employment protections before reaching the point of diminishing or negative returns.

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<sup>111</sup> See Simon Deakin, Jonas Malmberg & Prabirjit Sarkar, *How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010*, 154 INT'L LAB. REV. 1, 4–6 (2014).

<sup>112</sup> *Id.* at 17. Those productivity benefits of employment protections might offset other negative effects; the Cambridge study found no overall impact of employment protections on productivity. Adams et al., *supra* note 97, at 19–20.

<sup>113</sup> WORLD BANK, DOING BUSINESS 2015: GOING BEYOND EFFICIENCY 231 (2014). In the face of concerns about data irregularities, the Bank decided in 2021 to discontinue the report. Press Release, World Bank, *World Bank Group to Discontinue Doing Business Report* (Sept. 16, 2021), <https://perma.cc/K6C3-TTC6>.

<sup>114</sup> Adams et al., *supra* note 97, at 4 (citing Sandrine Cazes, Sameer Khatiwada & Miguel Malo, *Employment Protection and Collective Bargaining: Beyond the Deregulation Agenda* 14 (Int'l Lab. Off. Emp., Working Paper No. 133 (2012))).

A second caveat is that complementary institutions—such as greater public and private investments in worker training—may be necessary to capture the potential benefits and mitigate the costs of job-security protections. At the same time, as we’ve noted, job-security protections themselves should encourage firms to invest in training incumbent workers. The point about complementarity may hold as well for structures of worker participation and codetermination, which both reinforce and are reinforced by job-security protections, and which go hand in hand with longer job tenure, willingness to share information, and investments in training.

On the economic impact of worker representation, the Cambridge study is again instructive. It included, as part of its overall EPL index, a subindex for employee-representation variables, including “legislation on co-determination and employee information and consultation rights,” especially over collective dismissals or layoffs.<sup>115</sup> Among OECD countries, researchers found that the employee representation variables in particular were positively associated with both productivity and labor’s share of income.<sup>116</sup> Professor Simon Deakin, who leads the Cambridge study, concluded that, “[i]n supporting workers’ code-termination rights, labour laws can contribute not just to greater equality, as measured by labour’s share of national income, but also improved productivity and innovation, thus leading to higher employment.”<sup>117</sup>

These studies are the latest though not the last word on the net economic impact of laws protecting and empowering employees. Data rarely drive U.S. labor policy debates, at least not directly. But data might bring about a shift in the weight of informed opinion and eventually in conventional wisdom—if there is any such thing in our polarized times—about what kinds of employment laws are good for the society as a whole, and especially

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<sup>115</sup> *Id.* at 10.

<sup>116</sup> Deakin et al., *supra* note 111, at 1.

<sup>117</sup> Simon Deakin, *Industrial Democracy and Inequality*, in BENCHMARKING WORKING EUROPE 2021: UNEQUAL EUROPE 157, 170 (Eur. Trade Union Inst. & Eur. Trade Union Confederation eds., 2022). Professor Simon Jäger and coauthors noted that codetermination causes “at most” slight increases in wages, job security, and satisfaction and small positive effects on firm outcomes. Jäger et al., *supra* note 99, at 884. The authors suggested that the limited effects of codetermination in Europe may reflect the relative strength of other pro-worker institutions like unions, and that codetermination may have larger effects if introduced in the United States. *Id.*

for those who have been on the losing end of labor market trends for the past several decades.

#### CONCLUSION

Labor economists and legal scholars are increasingly cognizant of the reality of labor market power versus the assumptions of frictionless and efficient labor markets that have long animated much policy analysis. Workers can have more or less labor market power, and most workers seem to have less of it in recent decades, judging from labor's declining share of income and the growing divergence between productivity gains and wage increases.<sup>118</sup> The consequences of scarce bargaining power ripple through the lives of workers and their families. But this Essay is concerned less with the consequences than with the causes of workers' depressed labor market power.

I have argued here that several major labor market trends of the past half century—including automation and the growth of fissured, fractured, and footloose supply chains and nonstandard employment relations—share the tendency to enhance firms' ability to replace, displace, or avoid hiring full-time employees, and thus to depress workers' labor market power. The point of highlighting this particular set of causal factors is to direct our attention to policy tools and institutional reforms that can rebalance labor market power in workers' favor. Employers *decide* to replace employees with contractors or temporary workers or machines, and those decisions can be regulated in a variety of ways. There is a great deal of experience across the world with legal tools that constrain employers' ability to replace workers, and there is growing empirical evidence that these tools can be deployed successfully without the adverse consequences long predicted by employers and market fundamentalists. They should be among labor's priorities if and when pro-worker policy making again becomes feasible at the national level.

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<sup>118</sup> See U.S. DEP'T OF THE TREASURY, *supra* note 5, at 37–39.