A Whole-of-Government Approach to Increasing Worker Power

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About the Author

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INTRODUCTION

The declining power of workers is a national crisis with both economic and socio-political consequences. Labor's share of national income has declined relative to capital's since the 1980s, despite workers' increased productivity.[1] Workers' bargaining leverage, generated through viable voice and exit options—their ability to strike a better employment bargain through leverage-backed demands at work ("voice") or credible quit threats for other, better opportunities ("exit")—has declined as workers face higher labor market concentration, anticompetitive employer conduct, low union density, and eroded labor protections and enforcement.[2] This declining power increases income inequality, which can slow economic growth and increase economic instability, debt, and inflation.[3] In social and political terms, income inequality can impact productivity, intergenerational mobility, health and well-being

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[1] *See* Michael Elsby et al., *The Decline of the U.S. Labor Share* (Brookings Papers, 2013); Anna Stansbury & Lawrence Summers, *Declining Worker Power Hypothesis* (Brookings Papers, 2020). Wages and benefits currently make up 62.9 percent of national income, nearly the same as pre-pandemic levels (62.7 percent in the fourth quarter of 2019). *See* FRED, *Share of Labor Compensation in GDP at Current National Prices for United States* (2021); Jason Furman & Wilson Powell, *US Wages Grew at Fastest Pace in Decades in 2021, But Prices Grew More* (Peterson Inst. for Int'l Econ., 2022), https://www.piie.com/blogs/realtime-economic-issues-watch/us-wages-grew-fastest-pace-decades-2021-prices-grew-even-more; Econ. Pol'y Inst., *The Productivity-Pay Gap* (2021), https://www.epi.org/productivity-pay-gap/. Another indicator of workers' declining power is the non-accelerating inflation rate of unemployment (NAIRU), which has declined. *See infra* Stansbury & Summers; Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality* (EPI, 2021), https://files.epi.org/uploads/215903.pdf.

[2] *See generally* Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. Chi. L. Rev. (forthcoming 2023); Ioana Marinescu & Jake Rosenfeld, *Worker Power and Economic Mobility* (WorkRise Report, 2022), https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf.

[3] *See, e.g.*, Josh Bivens, *Inequality is Slowing U.S. Economic Growth* (EPI, 2017); Federico Cingano, *Trends in Income Inequality and Its Impact on Economic Growth* (OECD Working Paper No. 163, 2014); Till van Treeck, *Did Inequality Cause the U.S. Financial Crisis*, *28* J. Econ. Surveys 421 (2013); Andrew Berg & Jonathan Ostry, *Inequality and Unsustainable Growth* (IMF Staff Discussion Note, 2011); Wojciech Kopczuk et al., *Earnings Inequality and Mobility in the United States*, 125 Q.J. Econ. 91 (2010); Michael Kumhof & Romain Rancière, *Inequality, Leverage and Crisis* (IMF Working Paper No. WP/10/268, 2010); Matteo Iacoviello, *Household Debt and Income Inequality, 1963-2003*, 40 J. Money, Credit & Banking 929 (2008); Roel Beetsma & Frederick Van Der Ploeg, *Does Inequality Cause Inflation?*, 87 Pub. Choice 143 (1996).

outcomes, and even democratic participation and political stability (including political polarization).[4]

Declining worker power is the product of law, economic governance, and decisions within our governmental institutions and regulatory agencies. In the past, when economy- or sector-wide crises emerged in other areas—whether in system-wide national security failures before 9/11 or regulatory breakdowns leading up to the financial crisis—scholars and policymakers understood that discrete regulation by separate agencies was insufficient: A broader, whole-of-government effort was necessary.[5] Such an effort has radical consequences: Congress and the executive branch worked together to pass legislation, restructure government, establish new agencies, redesign interagency coordination, and create redundancies and oversight to reshape public policy and how public institutions effectuate it.

Yet no similar effort has been directed at our labor market crisis, despite legal and institutional contributors to that crisis. Judicial rulings, congressional action and inaction, and government underenforcement has eroded our "labor justice system"—the network of laws, government institutions, and rights allocations that set the parameters of worker power—reducing labor's bargaining leverage against capital.[6] Millions of workers are

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[4] *See, e.g.*, Kate Pickett & Richard Wilkinson, The Spirit Level (2010); Lawrence Jacobs & Theda Skocpol, eds., Inequality and American Democracy (2005); Nolan McCarty et al., *Political Polarization and Income Inequality*, https://www.princeton.edu/~nmccarty/ineqpold.pdf (forthcoming); Zeynep Ugur, *How Does Inequality Hamper Subjective Well-Being? The Role of Fairness*, 158 Soc. Indicators Res. 377 (2021); Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 Am. J. Pol. Sci. 48 (2008). For evidence that work has ceased to serve as a vector for economic mobility, *see* Michael Schultz, *The Wage Mobility of Low-Wage Workers in a Changing Economy,* 5 Russel Sage Foundation J. Soc. Sci. 159 (2019); Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 Sci. 398 (2017); Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. Econ. Persp. 79 (2013).

[5] For interagency intelligence failures, *see, e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the US, The 9/11 Commission Report (2004); Anne Joseph O'Connell, *The Architecture of Smart Intelligence*, 94 Calif. L. Rev. 1655 (2006). For interagency failures before the financial crisis, *see, e.g.*, Financial Crisis Inquiry Comm'n, Financial Crisis Inquiry Report (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131 (2012).

[6] *See, e.g.*, Michael Piore & Andrew Schrank, Root-Cause Regulation (2018); Shannon Gleeson, Precarious Claims (2016); Shannon Gleeson, Conflicting Commitments (2012); Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 Admin. L. Rev. Accord 199 (2021); Hiba Hafiz, *The Brand Defense*, 43 Berkeley J. Empl. & Lab. L. 1 (2022); Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002); Karl Klare, *Judicial Deradicalization of the Wagner Act*, 62 Minn. L. Rev. 265 (1978).

excluded from legal protections, and those who are not must navigate dozens of fractured and decentralized agencies with underlapping and overlapping jurisdiction that impacts the range of their voice and exit options.[7] Similar to the failures of the financial crisis, the failures in American labor markets are the product of weakened and absent market institutions. These institutions no longer facilitate fair exchange in accordance with broader economic governance goals that include combatting unequal bargaining power between employers and workers and ensuring worker voice and participation in the terms and conditions of their employment.[8] Fundamentally, this brief argues that a whole-of-government approach is required to address these failures and strengthen labor market institutions. To do so, all agencies whose regulatory purviews impact the employment bargain should build into their policy approach mechanisms for ensuring that their programs and policies affect worker power in the labor market.

The Biden administration is the first to recognize and begin operationalizing a whole-of-government approach to worker organizing and labor market competition in order to address declining worker power. In two executive orders, President Biden mobilized the Federal Government's "full authority" to promote and implement policies that both "encourage worker organizing and collective bargaining and . . . promote equality of bargaining power between employers and employees," and, on the other hand, create a "competitive marketplace" for workers with "more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage."[9] The Orders created a Task Force on Worker Organizing and Empowerment and a White House Competition Council, both of which include top White House and cabinet-level officials, to establish and coordinate policies that strengthen worker power. And for the first time ever, the labor and antitrust

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[7] For a fuller discussion of bargaining leverage through voice and exit, *see, e.g.*, Hafiz & Marinescu, *supra* note 2; Marinescu & Rosenfeld, *supra* note 2.

[8] *See, e.g.*, 29 U.S.C. § 151; Hafiz, *Interagency Coordination*, *supra* note 8, at 232-36 (laying out statutory bases for outcome-based interagency coordination, including achieving macroeconomic and microeconomic goals, institution building, anti-subordination, and democratic and expressive policies).

[9] Executive Order on Worker Organizing and Empowerment (EO 14,025), 86 FR 22,829, § 1 (Apr. 26, 2021); Executive Order on Promoting Competition in the American Economy (EO 14,036), 86 FR 36,987, § 1 (July 9, 2021); *see also White House Task Force on Worker Organizing and Empowerment: Report to the President* (Feb. 7, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf.

agencies have signed Memoranda of Understanding to share information, train agency staff, and refer investigations to strengthen enforcement against employers with buyer power.[10]

These commitments are pivotal but remain in the earliest implementation stages. Their success in achieving a full, whole-of-government approach will depend on presidential engagement and robust coordination and execution across the executive branch and the administrative state. Establishing clear benchmarks, building top-down and bottom-up personnel relationships, and adopting stronger interagency procedures is critical for sustainable success to emerge from the fragmented components of labor policy execution. Much more than fulfilling on-paper commitments will be required to increase worker power. A whole-of-government approach will require integrating a broader set of agencies (including at the state and local levels), fine-tuning and recalibrating macroeconomic policy through interagency coordination, and establishing a unified and coherent set of substantive guidelines and metrics for triggering legal duties, presumptions, and liabilities on employers when enforcers establish strong employer power or weak worker power.

This issue brief first outlines the sources of declining worker power (Part I). It then identifies the various government institutions and authorities that impact the trajectory of worker power, delineating mechanisms they can deploy to reverse that decline under a whole-of-government approach (Part II). The brief then expands a whole-of-government approach to macroeconomic policy to tackle employer power even during periods of inflation (Part III).

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[10] Memorandum of Understanding between the US Dep't of Justice and US Dep't of Labor (Mar. 10, 2022), https://www.justice.gov/opa/press-release/file/1481811/download; Memorandum of Understanding between the Federal Trade Commission and the National Labor Relations Board (July 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf; Memorandum of Understanding between the US Dep't of Justice and National Labor Relations Board (July 26, 2022), https://www.justice.gov/opa/press-release/file/1522096/download.

I. SOURCES OF DECLINING WORKER POWER

The sources of declining worker power are many and well-discussed, but this brief concentrates on sources within the federal government's authority to remedy through strengthening labor market institutions that increase worker power through voice and exit.[11]

First, diminished legal protections have cut against workers' ability to assert countervailing power against strong employers. Workers' collective rights under federal labor law have eroded due to: statutory exemptions to labor law's protections, legal limitations to sector- or industry-wide bargaining, workers' exposure to antitrust liability, and reduced substantive protections for workers' right to organize, strike, collectively bargain, and boycott firms that deal with their employer.[12] Employers have also bypassed labor and employment law liability through workplace restructuring and outsourcing or subcontracting work to evade compliance costs.[13] Until recently, and for much of their enforcement history, antitrust agencies focused on unlawful *worker* coordination, declining to enforce against employers' unlawful monopsony and anticompetitive mergers and agreements.[14]

Second, weak labor market institutions have contributed to declining worker power. These include worker-led bodies like unions and government institutions that monitor and enforce labor protections on the shop floor. Union density has declined in the private sector from a high of 33 percent in 1953 to a mere 6.1 percent now, dramatically reducing workers' collective bargaining leverage to lift compensation in the vast majority of private workplaces.[15] Labor

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[11] *See id.* While immigration and trade policy impact employers' reservation profit and workers' reservation wage by increasing firms' outside options and labor market tightness, this brief brackets discussion of such policy due to space limitations.
[12] *See* Hiba Hafiz, *Structural Labor Rights*, 119 Mich. L. Rev. 651, 673-88 (2021).
[13] *See* David Weil, The Fissured Workplace (2014); *id.*
[14] Ioana Marinescu & Eric Posner, *Why Has Antitrust Law Failed Workers?,* 105 Cornell L. Rev. 1343 (2020); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 4 (2020); Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. Chi. L. Rev. 381 (2019); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & Contemp. Soc. Problems 65 (2019); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031 (2019); Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018).
[15] US Bureau of Lab. Statistics, *Union Members Summary* (2022), https://www.bls.gov/news.release/union2.nr0.htm; Leo Troy, *Trade Union Membership, 1897-1962* (NBER Occasional Paper 92, 1965).

agencies such as the National Labor Relations Board (NLRB), US Department of Labor (USDOL) and its sub-agencies, and the Equal Employment Opportunity Commission (EEOC), have been chronically under-resourced, leading to an underenforcing of legal protections that strengthen worker power and improve workers' outside options while reducing strong employers' outside options to drive down wages and working conditions.[16] Most importantly, the agency tasked with ensuring equal bargaining power between workers and employers—the NLRB—has been banned by Congress from hiring experts in economic analysis able to monitor workers' relative power or assess the impact of agency rules and decisions on that power.[17] Antitrust agencies' enforcement record has enabled strong market institutions that support employers against workers, even as these agencies have historically failed to coordinate with labor regulatory institutions to provide labor market policy guidance, share information, or engage in joint enforcement and investigations targeting destructive employer power.[18] Thus, where workers lack power due to limited substantive protections and enforcement, they have had limited help from the network of government institutions tasked with regulating and calibrating worker power as a united front.

These legal regimes and institutions overlay a third contributor to declining worker power: labor market failures, especially labor market concentration and anticompetitive employer conduct that compound workers' switching costs, or the impediments workers face when seeking to switch to better employment options. These include search frictions,[19] information asymmetries,[20] mobility costs, and heterogeneous preferences[21] or discrimination that limit

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[16] Weil, *supra* note 15; Hafiz & Marinescu, *supra* note 3; Marinescu & Rosenfeld, *supra* note 3.

[17] 29 U.S.C. § 154(a); Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wisc. L. Rev. 1115 (2017).

[18] More recent antitrust enforcement and coordination with the NLRB and USDOL are at their earliest stages and will require institutional investment and more robust procedural and substantive mechanisms to materialize their benefits for worker power. For interagency agreements, *see supra* note 10.

[19] Search frictions are the costs that workers bear when seeking alternative employment. *See generally* Richard Rogerson et al., *Search-Theoretic Models of the Labor Market: A Survey*, 43 J. Econ. Lit. 959 (2005).

[20] By "information asymmetries," I refer here to challenges workers face when seeking information about alternative employment, including information about available offers, compensation, and amenities. *See generally* Michael Rothschild, *Models of Market Organization with Imperfect Information: A Survey*, 81 J. Pol. Econ. 1283 (1973).

[21] "Heterogeneous preferences" refers to the range of taste differences that employers and workers have within the labor market that can increase matching costs. For example, some workers may choose a lower-paying job with a shorter commute over a higher-paying job with a longer commute.

workers' ability to easily quit undercompensated or unsafe employment.[22] Reducing workers' exit options reduces their bargaining leverage to improve their wages and working conditions.[23]

Fourth, workers generally lack personal wealth and sufficient government resources to survive without a job, reducing their ability to leave bad jobs and reducing worker power. Given the very low personal savings rate and high household debt nationally, state-provided assistance in the form of nonwork income assistance, like unemployment insurance and food stamps, as well as in-kind benefits in the form of public health insurance, housing, and training or skills development programs, are more important than ever before in enabling credible worker exit.[24] These programs depend critically on federal, state, and local fiscal policy.

Finally, monetary policy—or the federal government's responses to labor market tightening—impacts worker power when interest rate adjustments disincentivize investments that impact employment levels. Higher employment levels increase labor market tightness and, accordingly, worker power.[25] When the Federal Reserve increases interest rates, worker power declines as employers cut back on labor costs and unemployment rates increase. In inflationary periods, employers with monopsony power can more easily fire workers because it is easy to rehire them when interest rates decline.[26]

These federal agency-administered policy sources have contributed to the decline of worker power and, in aggregate, have suppressed worker compensation and worsened working

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[22] Hafiz, *Structural Labor Rights*, *supra* note 13, at 657-59; José Azar et al., *Labor Market Concentration*, J. Hum. Res. 1218-9914R1 (2020); Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. Econ. & Org. 633, 633 (2020); Marinescu & Posner, *supra* note 16, at 1362-82.

[23] Hafiz & Marinescu, *supra* note 3; Marinescu & Rosenfeld, *supra* note 3; Evan Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J. L. & Econ. 53 (2021); Matthew Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (SSRN, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Tirza Angerhofer & Roger Blair, *Collusion in the Labor Market*, CPI Antitrust Chronicle (2020).

[24] US Bureau of Economic Analysis, Personal Saving Rate (July 2022), https://www.bea.gov/taxonomy/term/746; Federal Reserve Bank of New York, Center for Microeconomic Data, Household Debt and Credit Report (Q2 2022), https://www.newyorkfed.org/microeconomics/hhdc; Marinescu & Rosenfeld, *supra* note 3, at 19-21.

[25] Hafiz & Marinescu, *supra* note 3; Marinescu & Rosenfeld, *supra* note 3.

[26] Anastasia Burya et al., *Monetary Policy Under Labor Market Power* (IMF Working Paper No. 2022/128, 2022), https://www.imf.org/en/Publications/WP/Issues/2022/07/01/Monetary-Policy-Under-Labor-Market-Power-520239.

conditions.[27] Strengthening workers' bargaining leverage against employers thus requires a whole-of-government approach with joint priority-setting and significant coordination.

II. A WHOLE-OF-GOVERNMENT APPROACH TO SUPPORT WORKERS

Pursuant to President Biden's executive orders, a number of federal agencies have been tasked with taking more aggressive enforcement measures to aid worker organizing and challenge anticompetitive employer conduct. While the labor and antitrust agencies have led a number of initiatives, much more could be done to establish and enforce a coherent set of policies to strengthen worker power and create government institutions that, together, could build and protect worker power gains against strong employers. A true whole-of-government approach includes, but reaches beyond, the labor and antitrust agencies to consumer protection agencies and agencies that ensure social safety net protections to increase workers' voice and outside options. The agencies should coordinate about where to direct their limited resources, focusing policy setting and enforcement on areas where declining worker power has hit workers the hardest.

To do this, the agencies need a uniform set of metrics—what Ioana Marinescu and I in previous writing have termed "Bargaining Power Indicators"—to identify for themselves and other agencies where workers are struggling most, indicated through: (1) measures of workers' voice and control inside the workplace and (2) workers' exit options within the labor market.[28] Agencies should track and share evidence from investigations and enforcement relevant for these measures. First, regarding worker voice, the labor agencies have and can share bargaining power indicators measured through worker voice metrics in the form of *union membership rates*, *strike activity rates*, *organizing drives*, and *labor law violations*, including employer refusals to recognize nascent unions or collectively bargain. Where organizing drives or successful unionization efforts in specific industries, sectors, or geographic areas fail to match workers' demonstrated desire to collectively bargain, other agencies can direct

[27] *See, e.g.*, Hafiz, *Interagency Coordination*, *supra* note 8; Mishel & Bivens, *supra* note 12, at 57-70.
[28] For a more detailed discussion, *see* Hafiz & Marinescu, *supra* note 3.

resources there, for example, by more aggressively regulating mergers that would increase labor market concentration in those areas.

Second, agencies can collect and share bargaining power indicators as measured through workers' exit options. Indicators of weak worker power generated by limited exit options include labor market tightness, labor market concentration, labor's share (the fraction of output workers receive in the form of compensation), minimum wage levels, switching costs, and employers' employment and antitrust law violations that indicate monopsony, such as violations of wage-and-hour law, workplace health and safety law, discrimination law, and antitrust law, including unlawful monopsonization, wage-fixing and information sharing, mobility restraints, market allocation agreements, or other vertical agreements.[29] Where agencies collect evidence of these indicators, that evidence should be shared as a red flag for broader government attention and agency enforcement.

In addition to recommending how agencies can use these Indicators, this Part lays out top-priority enforcement policies to strengthen worker power.

Labor Agencies and Worker Power

Federal labor agencies—the NLRB, USDOL and its subagencies, and the EEOC—are critical in shaping the parameters of worker power by impacting worker voice as well as providing the best alternative options workers and employers have to any specific employment agreement.[30] The NLRB administers the primary levers for impacting worker voice within the firm and is tasked under the National Labor Relations Act (NLRA) with ensuring "equal[] . . . bargaining power between employers and employees."[31] It does so by guaranteeing workers' right to organize, collectively bargain, and engage in concerted activity (Section 7) and enforcing against violations of those rights as unfair labor practices (Section 8), but it also makes determinations about who gains access to those rights as "employees" (rather than exempted "independent contractors") and which firms have compliance and collective bargaining duties as "employers" or "joint employers" if firms contract out for labor inputs

[29] *See id.*
[30] *See id.*
[31] 29 U.S.C. § 151; Hafiz, *Structural Labor Rights*, *supra* note 13.

through franchising, subcontracting, or outsourcing.[32] If the Board decides that workers or firms are not within its jurisdiction, that can impact workers' bargaining leverage by determining whether their efforts to organize are protected, and whether the law can coerce compliance from employers to recognize unions and collectively bargain or suffer penalties for violations.

The federal agencies can also calibrate the relative bargaining leverage of workers and firms by making it easier or more difficult for both workers and employers to access outside options. Specifically, the agencies can notify workers of their rights and impose disclosure requirements on firms regarding past labor violations and existing wage scales, reducing workers' search costs and information asymmetries that can accrue to employer power. USDOL can establish and enforce minimum wage and maximum hour laws to limit firms' outside options for low-wage work, and the NLRB can impose collective bargaining duties on employers when and if they refuse to bargain about union security or job protections, strengthening those protections and increasing firms' firing costs. USDOL can also administer training, education, and apprenticeship programs to expand alternative employment options as exit options for workers and use the federal government's spending power through its Office of Federal Contract Compliance Programs to establish better-paying, high-quality jobs that lift industry standards in contracting projects across the country.

Thus far, the Biden administration has strengthened worker power through a number of labor agency actions. First, it has worked to strengthen worker voice by proposing to expand employer liability to "joint employers" that indirectly control the terms and conditions of work, including in franchising and subcontracting.[33] Bringing those employers within its jurisdiction and mandating that they collectively bargain will give workers greater leverage to improve their share of the gains from trade from lead firms that have raked in their highest profits yet since 1950.[34] The NLRB has also moved to protect pro-union expression in the workplace and targeted employers in high-profile union fights, signaling to organizing

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[32] 29 U.S.C. §§ 152(2)-(3), 157-58(a).

[33] NLRB, *Proposed Rule - Standard for Determining Joint-Employer Status*, 87 FR 54641 (Sept. 7, 2022).

[34] *See* Reade Pickert, *US Corporate Profits Soar with Margins at Widest Since 1950*, Bloomberg News (Aug. 25, 2022), https://www.bloomberg.com/news/articles/2022-08-25/us-corporate-profits-soar-taking-margins-to-widest-since-1950.

workers around the country that the labor laws will be enforced.[35] These enforcement actions have contributed to the 58 percent increase in union election petitions in the first three quarters of fiscal year 2022 and a 76 percent increase in strikes in the first half of 2022 compared to 2021, nearly tripling the number of workers on strike.[36] Second, the labor agencies have worked to increase workers' (and decrease employers') outside options primarily through spending: directing federal contracting dollars to firms on condition that they provide high-quality jobs on a nondiscriminatory basis. Employers receiving federal contracting money must pay $15 an hour and be subject to pay-equity audits to guard against discriminatory pay, but they must also inform employees of their federal labor rights and sign project labor agreements with unions on projects valued at or above $35 million.[37] Lifting workplace standards in the private sector limits employers' race-to-the-bottom wage-setting and strengthens workers' outside options, increasing their reservation wage—that is, the lowest wage rate a worker would be willing to accept for a particular type of job.

Still, with dramatically low union density and rampant wage theft, there is a long way to go to reverse declining worker power. Recent empirical work can point the way to top-priority policy areas to strengthen worker power.[38] First, regulatory slack, primarily due to limited agency resources, limits the bite of existing worker protections and contributes to significant noncompliance, which reduces worker power. To increase enforcement and reduce duplication of agency resources, the labor agencies could produce policy guidance or clarify through rulemaking that they will presume—subject to an employer defendants' rebuttal in court—"employee" or "employer" status under labor and employment law where Bargaining

[35] *See Tesla, Inc.*, 370 NLRB No. 131 (2022); Michael Sainato, *Workers are Mobilizing Despite Obstacles*, Guardian.com (Sept. 13, 2022), https://www.theguardian.com/us-news/2022/sep/13/unions-starbucks-trader-joes-chipotle-petco.

[36] NLRB, Press Release, *Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed* (July 15, 2022), https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding; Rani Molla, *How Unions Are Winning Again, In 4 Charts*, Vox.com (Aug. 30, 2022), https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes.

[37] USDOL-WHD, *Increasing the Minimum Wage for Federal Contractors*, 86 FR 67126 (Nov. 22, 2021); Executive Order on Use of Project Labor Agreements for Federal Construction Projects (Feb. 4, 2022); Executive Order on Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparence (Mar. 15, 2022); USDOL, OFCCP, Directive 2022-1 Revision 1, *Advancing Pay Equity Through Compensation Analysis* (Mar. 15, 2022), https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1.

[38] *See* Hafiz & Marinescu, *supra* note 3.

Power Indicators provide sufficient evidence that a targeted employer has monopsony power to determine the wages and working conditions of contracted-for labor.[39] This would extend the agencies' jurisdiction—and, thus, legal duties and obligations—to a broader set of employers while combatting misclassification of workers as "independent contractors," placing the burden on employers to prove otherwise.

To strengthen worker voice, the NLRB could expand the number of firms workers can boycott and picket to include firms with market power to determine workers' wages and working conditions.[40] In an obscure but transformative prohibition on "secondary activity," the Taft-Hartley Act dramatically limited workers' ability to boycott and picket firms that deal with their employers in ways that pressure those employers to come to better collective bargaining terms and strengthen nonunionized workers' leverage industry-wide. The Board could clarify that it will not interpret firms that have market power over workers' compensation to be unlawful targets of such secondary activity. Such a change could increase the potency of workers' collective action. In fact, the former president of the AFL-CIO, Richard Trumka, advocated for the abolition of the entire NLRA just to get rid of the "secondary boycott provisions that hamstring labor at every turn."[41] The Board could take more aggressive action to prevent employer coercion of organizing workers, including by enforcing against employers' anti-union captive audience meetings and allowing worker demonstration of majority union support through card-check recognition that triggers employer collective bargaining duties.[42]

Antitrust Agencies and Worker Power

The antitrust agencies—the US Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC)—impact worker power by policing the labor exemption to antitrust

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[39] For a narrower version of this recommendation, *see* Andrew Elmore et al., *Rebooting Joint-Employer with Presumptions*, OnLabor.org (July 7, 2022), https://onlabor.org/rebooting-joint-employer-with-presumptions-a-modest-proposal/.
[40] *See* Hiba Hafiz, *Picketing in the New Economy*, 39 Cardozo L. Rev. 1845 (2018).
[41] Richard Trumka, *Why Labor Law Has Failed*, 89 W. Va. L. Rev. 871, 881 (1987).
[42] *See* Hafiz & Marinescu, *supra* note 3; Office of the General Counsel, Memorandum GC 22-04, *The Right to Refrain from Captive Audience and other Mandatory Meetings* (Apr. 7, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458372316b.

law, which immunizes worker coordination from liability and treble damages (worker voice), and regulating both employers' and workers' exit options. First, these agencies can increase workers' exit options—workers' ability to credibly threaten to quit because they have other, better employment opportunities—and thus increase workers' reservation wage. Agency levers to increase workers' exit options include regulating mergers and firm monopsony to reduce labor market concentration, challenging wage-fixing, employer information-sharing, and market allocation or no-poaching agreements, mobility restrictions in employment contracts, and other obstacles to labor market entry like occupational licensing. Second, the agencies can decrease employers' exit options—or employers' ability to fire or undercompensate workers because they have other, cheaper labor suppliers—and thus lower firms' reservation profit. Agencies can decrease employers' exit options by targeting wage discrimination and worker misclassification as evidence of employer buyer power or even as unlawful anticompetitive conduct under the antitrust laws.[43]

Thus far, the antitrust agencies have begun enforcing against wage-fixing and no-poaching agreements between competitors and have drafted policy guidance explaining their view of the legal ramifications of wage-fixing, information-sharing, no-poaching, and other forms of coordination between employers.[44] The agencies have also announced and begun reviewing the labor market effects of mergers, challenged issuance of state certificates of public advantage allowing health-care industry mergers, and begun exploring how employers' use

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[43] *See id*.

[44] *See, e.g.*, *United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021); *United States v. DaVita* Inc., No. 1:21-CR-00229, 2022 WL 266759 (D. Colo. Jan. 28, 2022); *United States v. Surgical Care Affiliates*, No. 3:21-CR-00011 (N.D. Tex. Jan. 5, 2021); *United States v. Hee*, No. 2:21-CR-00098 (D. Nev.); U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (2016), https://www.justice.gov/atr/file/903511/download.

of noncompete agreements and conduct toward gig workers can violate antitrust law.[45] They plan to issue revised Merger Guidelines that more clearly explain how they will incorporate labor market effects analysis into merger reviews.[46]

Antitrust agencies could do more to challenge employer power by strengthening worker voice and exit options. Most generally, they could prioritize enforcement where Bargaining Power Indicators suggest workers need the most aid, such as in medium- to highly concentrated labor markets and labor markets with pervasive labor and employment law violations, low union density, nascent organizing drives, or strike activity suggesting employers' refusal to collectively bargain and ability to unilaterally dictate contract terms. On worker voice, they could abandon prior enforcement challenging worker coordination, clarifying their view that *all* worker organizing, including organizing among independent contractors,[47] is immunized under the labor exemption, in line with appellate court reasoning finding the same.[48]

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[45] *See, e.g.*, US Dep't of Justice, Press Release, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster* (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon; Matthew Perlman, *FTC Touts Labor as it Reviews Microsoft's Activision Deal*, LAW360.COM (June 17, 2022), https://www.law360.com/articles/1503579/ftc-touts-labor-as-it-reviews-microsoft-s-activision-deal; Fed. Trade Comm'n, *Comment to Texas Health and Human Services Regarding Certificate of Public Advantage Applications* (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf; Fed. Trade Comm'n, *Draft FTC Strategic Plan for FY2022-2026* 11, 16, 19 (Nov. 12, 2021), https://www.regulations.gov/document/FTC-2021-0061-0001; Statement of Interest of the United States, *Beck et al. v. Pickert Medical Group et al.*, No. CV21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022); Brief of the United States Department of Justice as Amicus Curiae, *The Atlanta Opera and Make-Up Artists & Hair Stylists Union*, No. 10-RC-27692 (NLRB, Feb. 10, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458369c7e3; Fed. Trade Comm'n, *Policy Statement on Enforcement Related to Gig Work* (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf.

[46] Fed. Trade Comm'n, *Request for Information on Merger Enforcement* 5-7 (Jan. 18, 2022), https://www.regulations.gov/document/FTC-2022-0003-0001.

[47] *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

[48] *See Confederación Hípica de Puerto Rico et al. v. Confederación de Jinetes Puertoriqueños et al.*, 2022 U.S. App. LEXIS 8925 (1st Cir. Apr. 4, 2022); *but see L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942).

To strengthen worker exit, in addition to finalizing merger guidelines and policy guidance or rulemakings on employers' use of mobility restraints like noncompetes, the agencies could take more aggressive action in regulating vertical agreements that harm workers. Specifically, in franchised and other vertically disintegrated industries, upstream firms like franchisors use both labor *and* product market restraints to control downstream firms' labor costs, including unilateral termination, input purchase requirement, and other provisions that directly impact downstream firms' demand for labor as a complementary input to production as well as their budgetary discretion to improve employment terms.[49] Especially where Bargaining Power Indicators reveal weak worker power, antitrust agencies should challenge the use of anticompetitive provisions in vertical agreements in conjunction with broader labor agency enforcement. Additionally, antitrust agencies should clarify: (1) how violations of labor and employment law can be indicative of employer market power (employers' ability to pay workers less or offer worse working conditions without workers' quitting), and (2) the types of conduct that constitute unlawful monopsonization (exclusive dealing arrangements, predatory waging, refusals to deal, tying, and other conduct).[50]

Finally, while the agencies have begun incorporating labor economics into their merger reviews, they have not yet institutionalized a role for labor agency involvement in assessing estimated on-the-ground merger impacts on workers and organizing capacity or in designing merger remedies that impact labor market competition. The agencies could use and extend the use of memoranda of understanding with the NLRB, USDOL, and EEOC to establish more formal involvement by those agencies to comment on mergers and offer recommendations on how best to condition any merger approvals on the merging firm's restructuring or commitment to conduct that strengthens worker power. For example, where the antitrust agencies find that a merger would likely increase labor market concentration, the NLRB could assess the merger's impacts on workers' relative bargaining power based on union membership, the history of labor rights violations, and the proposed status of union succession in the post-merger world, proposing conditioning mergers on easing union organizing through a card-check neutrality agreement or, where unions exist, clarifying

[49] *See generally* Hafiz, *Brand Defense*, *supra* note 8, at 32-42; Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. Chi. L. Rev. (forthcoming 2023); Brian Callaci et al., *Vertical Restraints and Labor Markets in Franchised Industries* (SSRN, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155571.
[50] *See* Marinescu & Posner, *supra* note 16.

union succession agreements and creating timelines for union elections and post-merger collective bargaining agreements.[51]

Consumer Protection Agencies and Worker Power

Consumer protection agencies—the Consumer Financial Protection Bureau (CFPB) and FTC—can also impact worker power by reducing market failures, such as information asymmetries in labor contracting and search costs in labor markets, that reduce workers' exit options. When firms obscure or fail to disclose compensation rates or the full terms and conditions of employment in labor contracts, or when they unilaterally change the terms of employment post-hire after workers are locked in, they create search frictions and limit workers' ability to properly assess and pursue their best employment options. While this creates labor market inefficiencies addressable under antitrust, employment, or contract law, it is also regulable as a consumer protection issue, viewing workers as consumers in service contracts.[52]

Workers can be viewed as "consumers" when their labor contractors use unfair and deceptive acts and practices (UDAPs) in their service contracts, especially when those labor contractors offer financial services to workers such as training repayment agreements. Employment contracts not only establish the terms of trade between employers and labor input providers—ordinarily a fee for services provided—but they also memorialize terms and conditions for a workers' receipt of their *employers'* services.[53] For example, employers make promises in employment contracts about how and on what basis compensation will be provided, what financing terms and income share agreements they will provide for worker training, and what the scope of the labor providers' business opportunities is both inside and outside the contractual arrangement. Just as banks and other financial institutions provide services relating to financing and payment to consumers and are therefore prohibited from

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[51] *See* Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37 (2020); Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L.J. 1491 (2022).
[52] *See, e.g.*, Jonathan Harris, *Consumer Law as Work Law* (SSRN, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172535; Christopher Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. (forthcoming 2023).
[53] *See* Harris, *supra* note 48.

engaging in UDAPs, employers may be regulated and prohibited from engaging in UDAPs in relation to workers. In the gig economy, labor contractors often withhold information, for example, on drivers' projected compensation prior to drivers' acceptance of a ride, the platform's take rate and end user pricing, and drop-off locations to drivers purchasing access to the platform's matching services in ways that can mislead reasonable drivers about material aspects of their offered contracts by the platform.[54]

Under the Biden administration, the consumer protection agencies have begun taking seriously the impacts of employers' deceptive and unfair practices toward workers, signaling their intent to challenge such practices in the gig economy and with regard to employer-driven debt in labor contracting, such as training repayment agreements (TRAs).[55]

Under a whole-of-government approach, the agencies could do much more. First, evidence of firm use of deceptive and unfair contracting practices in employment contracts should be collected, publicly disclosed, and flagged as Bargaining Power Indicators. This information is relevant for sharing with other agencies to set enforcement priorities, prove worker misclassification, or support market power or liability determinations under labor, employment, and antitrust law. The agencies' expertise with disclosure and transparency requirements could be integrated into federal contracting as part of existing initiatives to decrease information asymmetries in employment contracting, including by establishing form employment contracts, encouraging pay equity and transparency for job applicants, and imposing salary history bans.[56] The agencies could explicitly take on regulation and disclosure of workplace surveillance before workers' accept contract offers and require privacy rights notifications.[57]

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[54] *See* Steinbaum & Peterson, *supra* note 48.

[55] FTC, *Policy Statement*, *supra* note 45; CFPB, Press Release, *CFPB Launches Inquiry Into Practices that Leave Workers Indebted to Employers* (June 9, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/. For TRAs, *see* Jonathan Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723 (2021). For examination of unfair and deceptive practices in rideshare contracts, *see* Steinbaum & Peterson, *supra* note 48.

[56] *See* Executive Order on Advancing Economic Efficiency and Effectiveness in Federal (EO 14,035) (Mar. 15, 2022); US Dep't of Labor, OFCCP Directive 2022-01 (Mar. 15, 2022), https://www.dol.gov/agencies/ofccp/directives/2022-01.

[57] For legal implications of data collection at work, *see* Matthew Bodie, *The Law of Employee Data*, 97 IND. L.J. 707 (2022).

Social Safety Net and Increasing Workers' Reservation Wage

A wide range of federal agencies administer cash and in-kind assistance programs that can increase worker power by increasing workers' reservation wage and decreasing the labor supply, making labor more scarce to employers.[58] However, programs that impose strict work requirements—the Supplemental Nutrition Assistance Program (SNAP), the Earned Income Tax Credit (EITC), the Child Tax Credit (CDC), and others—can reduce worker power and depress wages, reducing program participation where modest benefits fail as adequate substitutes to sustainable wages.[59] Still, COVID aid packages and the Inflation Reduction Act have provided both cash and in-kind assistance to strengthen worker power.[60] From extended and more expansive unemployment benefits to funding for worker training, permanent increases in food stamps, and home energy costs, federal pandemic relief measures have done much to avert a severe poverty crisis. While there is a rich literature on substantive policies needed to continue and expand these efforts, there has been less attention on how to improve the impacts of these programs to increase worker power through a whole-of-government approach, using information gleaned from these programs to strengthen other agencies' enforcement priorities, policy design, and effectiveness with regard to worker power.

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[58] *See* Marinescu & Rosenfeld, *supra* note 3, at 19-21. In-kind benefits include: Fair Housing Act benefits, 42 U.S.C. §§ 3601 *et seq.* (administered by Department of Housing and Urban Development); Affordable Care Act health-care benefits, 124 Stat. 119 (administered by Department of Human Health and Services and Centers for Medicare & Medicaid Services, among others); Social Security Act benefits, 42 U.S.C. §§ 301-1305 (administered by Social Security Administration); Temporary Assistance for Needy Families Program benefits, 42 U.S.C. §§ 1308, 601-619 (administered by Office of Family Assistance); veterans' benefits (administered by Veterans Benefits Administration and DOL's Veterans' Employment and Training Service); Lifeline Program benefits from the Universal Service Fund (administered by Federal Communication Commission's Universal Service Administrative Company); and food stamps, 7 U.S.C. §§ 2011 *et seq.* (administered by Department of Agriculture).

[59] *See, e.g.*, Marinescu & Rosenfeld, *supra* note 2, at 20-21; Colin Gray et al., *Employed in a SNAP? The Impact of Work Requirements on Program Participation and Labor Supply* (NBER Working Paper No. 28877, 2021), https://www.nber.org/papers/w28877.

[60] Alí Bustamante, *A New Era for Worker Power: Labor Wins During the Pandemic, and the Policies We Need to Sustain Momentum* (Roosevelt Inst. Sept. 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/09/RI_ANewEraForWorkerPower_IssueBrief_202209.pdf; Center for Amer. Progress, *The Inflation Reduction Act Provides Pathways to High-Quality Jobs* (Sept. 14, 2022), https://www.americanprogress.org/article/the-inflation-reduction-act-provides-pathways-to-high-quality-jobs/.

First and foremost, interagency sharing of Bargaining Power Indicators can aid in setting priorities and expediting relief for workers with low bargaining power. For example, workers in industries or geographic areas with highly concentrated labor markets or low union density, or workers that are on strike, could be flagged by benefit-administering agencies in a "rapid-response approach," much like agencies triage to distribute benefits following a natural disaster or mass layoff.[61] Such an approach was adopted during the height of the COVID pandemic when the Biden administration mobilized a whole-of-government effort to freeze student loan and housing costs and increase access to benefits, including unemployment insurance, all through tremendous collaboration between benefits-administering agencies at the federal and state levels. These efforts had a tremendous impact on worker power, increasing employment and wages while narrowing racial pay and employment gaps.[62] A more sustained approach in this direction to increase worker power would examine and reassess work requirements for government assistance programs where evidence suggests such requirements have wage-depressing effects.[63] It would prioritize expedited receipt of benefits and ease benefits access through streamlined forms that reduce application burdens in circumstances of depressed worker leverage. Easing benefits access is particularly crucial because striking workers are banned from receiving food stamp benefits.[64] Second, information about unemployment rates and evidence of mass layoffs obtained by USDOL's Bureau of Labor Statistics could serve as potential evidence of employer market power in specific sectors or labor markets, which could alert the labor and antitrust agencies to prioritize enforcement in those markets.[65]

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[61] I thank Alí Bustamante for the helpful "rapid response" analogy.

[62] *See* Mike Konczal & Emily DiVito, *The Year the American Rescue Plan Made: 2021 in Review* (Roosevelt Inst. 2021), https://rooseveltinstitute.org/2021/12/09/the-year-the-american-rescue-plan-made-2021-in-review/.

[63] *See, e.g.*, Congressional Budget Office, *Work Requirements and Work Supports for Recipients of Means-Tested Benefits* 17 (June 2022), https://www.cbo.gov/publication/58199.

[64] For legal history, *see* Rachel Sandalow-Ash, *SNAP for Strikers*, OnLabor.org (May 6, 2020), https://onlabor.org/snap-for-strikers/.

[65] Hafiz & Marinescu, *supra* note 3.

III. INFLATION AND WORKER POWER: WHOLE-OF-GOVERNMENT APPROACH TO MACROECONOMIC POLICY

Microeconomic labor market regulation by agencies tasked with protecting workers' gains from and protections within their employment relationships has historically occurred on a parallel track with little or no coordination with agencies that set macroeconomic policy, primarily the Federal Reserve and the Treasury Department. On the macroeconomic policy track, monetary policies that increase labor market tightness can increase wages because there are more jobs for fewer workers.[66] Thus, in inflationary periods, if the Fed increases interest rates to tamp down on oversupply and stabilize pricing, most policymakers assume that workers will get higher wages due to decreased firm investment and hiring that tighten labor markets. The argument goes that policies strengthening worker power above and beyond that level can lead to a wage-price spiral with dangerous outcomes.[67]

There are at least two reasons to pursue policies that increase worker power during inflationary periods. First, wage increases do not always mean that workers increase their share of the economic pie. With corporate profit margins at their highest rate since 1950, workers' wages can still grow without necessarily raising prices.[68] Further, when employers have monopsony power, infracompetitive pay or hiring can reduce output, and increasing output can aid in combatting inflation. In summarizing the empirical literature, a Treasury Department report on "The State of Labor Market Competition" estimated the decrease in wages resulting from employer monopsony power "at roughly 20 percent relative to the level

[66] Hafiz & Marinescu, *supra* note 3.
[67] *See, e.g.*, Rachel Greszler, *Why Biden's Student Loan "Forgiveness" Will Make Inflation, Labor Shortage Worse* (Heritage Foundation, Aug. 29, 2022), https://www.heritage.org/jobs-and-labor/commentary/why-bidens-student-loan-forgiveness-will-make-inflation-labor-shortage; Roxanne Rotschild, *AHA Comments on the NLRB's Notice of Proposed Rulemaking Re: the Standard for Determining Joint-Employer Status* (Nov. 4, 2022), https://www.aha.org/lettercomment/2022-11-04-aha-comments-national-labor-relations-boards-notice-proposed-rulemaking-regarding-standard-determining.
[68] *See, e.g.*, Mike Konczal, *Why Market Power Matters for Inflation*, Testimony before the House Comm. on Oversight and Reform Subcomm. on Econ. and Consumer Pol'y (Sept. 22, 2022), https://rooseveltinstitute.org/publications/why-market-power-matters-for-inflation/.

in a fully competitive market."[69] Further, labor market policies that lift wages can be deflationary if they increase real wages and hiring and prevent extraction of labor effort that would otherwise produce excessive output.[70] Labor market regulation that lifts wages can contribute to broader macroeconomic policy, incentivizing more workers to enter the labor market to produce more goods and services. Second, while the US economy could experience inflationary growth, states and local markets may nevertheless be in recession while suffering higher levels of labor market concentration. But state and local governments lack authority to use monetary policy to encourage investment and growth.[71] Where state and local actors cannot use the monetary lever to spur investment, hiring, and/or wage increases, fiscal policy and labor regulation can aid in furthering macroeconomic policy goals.[72] For these reasons, expansionary labor market regulation could be deflationary and need not contribute to more aggressive monetary policy measures, like increasing interest rates.

Agencies tasked with setting and regulating macroeconomic policy could coordinate with labor regulatory agencies along many dimensions to facilitate growth and strengthen local institutions that impact labor market supply. To the extent labor market regulators succeed in reducing employer monopsony power and increasing output through enforcement, those measures should inform the degree to which the Federal Reserve uses interest rate levers to tamp down on inflation. Even though the Fed is an "independent" agency, its dual mandate to stabilize prices and achieve maximum employment requires an evidence-based understanding of where employer power and bargaining leverage (and weak worker power and bargaining leverage) can reduce employment and shape hiring decisions in labor markets, which, in turn, requires institutionalized collaboration with federal and state agencies.[73]

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[69] US Department of Treasury, *The State of Labor Market Competition* ii (Mar. 7, 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

[70] *See, e.g.*, Janet Currie et al., *Cut to the Bone? Hospital Takeovers and Nurse Employment Contracts*, 58 ILR Rev. 471 (2005).

[71] *See, e.g.*, Yair Listokin, Law and Macroeconomics 16 (2019) ("expansionary legal policy offers options to depressed jurisdictions that lack control over monetary policy in a currency union"); Mark Kelman, *Could Lawyers Stop Recessions?*, 45 Stan. L. Rev. 1215 (1993).

[72] Listokin, *supra* note 76, at 17-18, 97, 170-75.

[73] I thank Alí Bustamante for this crucial point.

Agencies regulating macroeconomic policy can also actively contribute to expansionary legal regulation where needed. At a minimal level, the Treasury Department's joint state/federal Questionable Tax Employment Practices Program (QTEP) could share its audits of tax noncompliance by employers regarding employee misclassification with labor agencies that are targeting independent contractor misclassification in violation of labor and employment law.[74] More importantly, where local institutions like state and local governments and employers are unable or unwilling to increase hiring and production—whether due to labor market concentration levels, employer monopsony, or limited capacity—expansionary fiscal policy can boost hiring and production without contributing to inflation. Local institutions can do more to impact labor market supply than federal institutions, so federal labor regulatory agencies—coordinating with both state and local agencies as well as agencies regulating macroeconomic policy—can identify top-priority areas for federal spending, particularly through federal contracting that boosts local production and increases labor market competition, reducing employer monopsony and increasing workers' exit options at the local level. In awarding federal contracts, the OFCCP and other federal contracting agencies can combat inflation through prioritizing entry in labor markets where Bargaining Power Indicators suggest labor supply is artificially low or undercompensated, especially with regard to infrastructure projects that generate beneficial spillover effects. For example, federal investment in local construction projects can lift wages in geographic markets where developers or construction firms have monopsony power, increasing investment and employment while also increasing housing stock. More housing stock or supply can in turn lower workers' housing costs, easing their pocketbooks when they are otherwise unable to lift real wages in inflationary periods.

CONCLUSION

Labor market institutions have collapsed as mechanisms for representing workers' interests in their workplaces and in our polity. We see this in our anemic union density, lack of worker representation in corporate governance and workforce development programs, and rampant working-class defection from political institutions they view as abandoning worker-led

[74] QTEP found "large-scale misclassification" between 2015 and 2020, reclassifying over 275,000 workers resulting in about $4 billion in wages. Treasury Dep't, *State of Labor Market Competition*, *supra* note 76, at 13 & n.41.

access to economic opportunity for themselves and their communities. Now more than ever, we require an all-hands-on-deck government approach to building and strengthening labor market institutions and actively policing the rules that govern the employment bargain. Strengthening worker power will require interagency priority-setting and coordination on economic policy and best practices to facilitate and bolster workers' voice and exit options. A subsequent issue brief will expand on mechanisms to ensure executive branch policy consolidation and execution of measures to increase worker power, but both procedural and substantive components of a coordination plan will be required to gain a clearer picture of where workers need the most government intervention to boost their bargaining leverage against strong employers.[75] Ensuring that government works for workers is our only hope for overcoming unprecedented inequality, achieving economic liberty and self-determination, and healing our fractured democracy.

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[75] For my prior research and examination of best practices in interagency coordination, *see* Hafiz, *Interagency Coordination*, *supra* note 6.