



Lawrence Mishel

Centering unequal bargaining power in workplaces



Economist Lawrence Mishel considers accepted notions among economists regarding relative power of employers and employees in the American workplace:

- Bruce Kaufman “criticizes the currently dominant perspective, in which it is assumed that ‘competitive selection pressures remain strong enough that employers and employees are led to adopt (mostly) efficient contract terms.’”
- The decline in union membership, states post-2010 passing right-to-work laws, non-compete and no-poaching agreements, employer collusion in the tech sector, mandatory arbitration, and employers’ monopoly and monopsony power have all contributed to wage stagnation and workers’ loss of collective capacity.
- Mishel cites a new paper by Anna Stansbury and Lawrence Summers as “a final marker on the evolution of the economics profession: ‘The decline in worker power is one of the most important structural changes to have taken place in the U.S. economy in recent decades.’”
- The conversation about worker power changed during this year’s presidential primaries, and even moderate Democratic nominee Joe Biden “had an extensive and bold ‘plan for strengthening worker organizing, collective bargaining, and unions.’”
- Today, a large majority of Americans support more worker voice, believe that unions are good for the country and the economy, and want aggressive labor policy. Mishel calls this “common sense.”

The assumption of equal power in labor market exchanges between employers and employees is false yet pervasive in economics, employment law, political science, and even philosophy. The damage caused by this assumption is far reaching. The faith in equal power between employers and employees diminishes our freedoms, undermines our constitutional, statutory, and common law protections in the workplace, generates wage and income inequality and wage stagnation, and undercuts civic engagement and representative democracy.

Fortunately, recent years have seen a shift — generally partial and incomplete in academic and policy realms — toward placing the imbalance of bargaining power in the workplace at the center of our understanding of labor markets.

Philosophy: freedom and authoritarian workplaces

In her book *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk about It)*, University of Michigan philosopher Elizabeth Anderson has made a powerful argument for a reconsideration of the prevailing wisdom on the nature of the arrangements between employers and employees.

Anderson equates the “private government” of the workplace to “communist dictatorships in our midst”:

Imagine a government that assigns almost everyone a superior whom they must obey. Although superiors give most inferiors a routine to follow, there is no rule of law. Orders may be arbitrary and can change at any time, without prior notice or opportunity to appeal. Superiors are unaccountable to those they order around. They are neither elected

nor removable by their inferiors. Inferiors have no right to complain in court about how they are being treated, except in a few narrowly defined cases. They also have no right to be consulted about the orders they are given.

Anderson points out that most discussions of freedom posit the conflict between individuals and the state but overlook the immense and consequential power employers exert over employees. These powers include limiting the freedoms of speech (what you say in social media, after work); to associate (e.g., employers can fire you for participating in a gay softball league); to go to the bathroom on the job; and to marry whom you may love. The pandemic has also made clear that employers readily fire people for voicing their concerns over their safety on the job and that employers are empowered to force workers to do their jobs under unsafe conditions, with governments helping to put the squeeze on (denying unemployment insurance to those refusing to work at unsafe workplaces). Anderson notes that economists, in contrast, claim that “wherever individuals are free to exit a relationship, authority cannot exist within it.” Economists, as discussed below, are abandoning this notion.

Anderson concludes that public discourse

pretends that the constitution of workplace government is somehow the object of voluntary negotiation between workers and employers. This is true only for a tiny proportion of privileged workers. The vast majority are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers. It is high time that public discourse acknowledged this reality and the costs to workers’ freedom and dignity that private government imposes on them.

Anderson readily acknowledges that hierarchy and managerial authority are necessary aspects of work but challenge the notion that unlimited authority is warranted and beyond reproach.

Economics: reviving the importance of power in labor economics

It is encouraging that the concept of power is reemerging in economic analysis. However, the profession has not yet embraced the near universality of unequal bargaining power shaping employment terms and remains focused on “imperfections” in otherwise competitive markets. Nor have economists yet accepted that labor is unlike other commodities and therefore requires distinctive treatment.

Hierarchy and managerial authority are necessary aspects of work but challenge the notion that unlimited authority is warranted and beyond reproach.

Bruce Kaufman provides a masterful overview of the contending labor market perspectives in economics since the 1880s. He criticizes the currently dominant perspective, in which it is assumed that “competitive selection pressures remain strong enough that employers and employees are led to adopt (mostly) efficient contract terms.” This implies that neither individual firms nor workers have any power over wages or basic terms of employment and that “labor as a commodity” requires no different type of analysis than any other commodity.

A major crack in this consensus developed with David Card and Alan Krueger’s findings in the early 1990s that a higher minimum wage did not necessarily lower employment. The debate around their work was explosive and emotional, and their findings were considered on par with religious heresy. As more empirical work confirmed Card and

Krueger’s findings, there were also efforts to revise economic theory to explain them, most notably Alan Manning’s work on dynamic monopsony.

The erosion of labor’s share of income, acknowledgment of soaring income and wealth for the top 1.0 percent and 0.1 percent (see symposium in the July 2013 *Journal of Economic Perspectives*), and continuing wage stagnation through the recovery from the Great Recession led to further reexamination and an increasing recognition of employers’ power in the labor market. Correspondingly, there has been diminishing adherence to the notion that wage stagnation and inequality is the unfortunate by-product of positive forces such as automation. Larry Summers signaled the shift when he observed, “The idea that you can just have better training and then there are all these jobs, all these places where there are these huge shortages and we just need to train people is an evasion of the problem.”



Lawrence Summers



Jason Furman

It was notable that the Obama Council of Economic Advisers, under Chairman Jason Furman, issued reports focused on monopoly power in product markets (i.e., between firms and consumers) and on monopsony power between employers and employees. Both reports claimed that employer power damaged workers’ wages and job quality.

Various developments pointing to employer power in the labor market have increasingly attracted economists’



Josh Bivens



Heidi Shierholz



Alan Krueger (dec.)

The second-most-interesting debate (after the profession’s gender problem) in economics right now is over antitrust and monopoly power.

research attention: the spread of noncompete agreements; employer use of no-poaching agreements; explicit employer collusion in the tech sector; the existence of employer concentration in the labor market; and increased firm concentration in product markets.

The issue of power in markets was a prevalent topic at the 2019 American Economic Association meetings:

The second-most-interesting debate (after the profession’s gender problem) in economics right now is over antitrust and monopoly power. Two things have pushed the antitrust issue to the fore — economists have started to cite excessive market power as a drag on growth and wages, while energized activists are rising up to challenge lax regulation that allowed a wave of mergers in the past few decades.

This recent concern about power in markets, however, is still limited in a number of ways. The primary limitation is that the existence of employer power over wage-setting is being viewed as occurring only in specific settings, such as where a firm is only one of a few sellers of products/services (i.e., monopoly) or one of a few buyers of labor (i.e., monopsony). But as Josh Bivens and Heidi Shierholz have usefully pointed out,

bargaining between employers and workers always takes place on an unlevel playing field even in nonconcentrated markets that have not been riven by noncompete agreements or other explicit aids to employer power. Labor markets are generally tilted against individual workers simply because workers only have one job to lose while employers typically have access to plenty of workers. . . . The fact that power is exercised — even in labor markets characterized by free entry of employers — has often been overlooked or even denied by economists.

Alan Krueger, in an important address to the elite audience at the Kansas City Federal Reserve Board’s annual symposium in Jackson Hole, Wyoming, notes his break with the consensus on the “assume a competitive labor market” approach:

Although economists’ go-to model of the labor market is often one with perfect competition — where bargaining power is irrelevant because supply and demand determine the wage, and there is nothing firms can

do about it — in many applications I think it is more appropriate to model the labor market as imperfectly competitive, subject to monopsony-like effects, collusive behavior by firms, search frictions, and surpluses that are bargained over. As a result of these labor market features, firms should be viewed as wage-setters or wage-negotiators, rather than wage-takers.

That a leading economist such as Krueger would make such a statement in front of the economics establishment, and receive positive feedback, was a significant development. It is also telling that Krueger buried the lead in a footnote connected to the quotation above, which reads,

Notice that I don’t call these features “imperfections.” They are the way the labor market works. The assumption of perfect competition is the deviation from the norm of “imperfection” as far as the labor market is concerned.

It is tragic that Krueger’s untimely death prevents us from benefiting from his follow-up work.

A final marker on the evolution of the economic profession, at least on the center-left, is a new paper by Anna Stansbury and Lawrence Summers, which states “the decline in worker power is one of the most important structural changes to have taken place in the U.S. economy in recent decades.” Stansbury and Summers also argue that eroded worker power helps explain the fall in labor’s share and growing wage inequality, as well as the rise in the top 1 percent’s income share.

Economics cannot explain important aspects of labor market performance without centering issues of workplace power, including race and gender disparities, the lack of adequate compensating differentials for risk, and wage suppression and growing wage inequality. Correspondingly, effective policy solutions must acknowledge and be centered on correcting imbalances in workplace power.

Law: worker power in employment law

In 2018, Justice Ruth Bader Ginsburg highlighted the inherent power imbalance in employment contracts as the key fault line between liberal and conservative legal opinion on employment regulation in her dissent in *Epic Systems v. Lewis*. By a 5–4 majority, the Supreme Court held that an employer may lawfully



Associate Supreme Court Justice Neil Gorsuch



Associate Supreme Court Justice Ruth Bader Ginsburg (dec.)

“Employees must have the capacity to act collectively in order to match their employers’ clout in setting terms and conditions of employment.”

—Supreme Court Justice Ruth Bader Ginsburg (dec.)

require its employees to agree, as a condition of employment, to take all employment-related disputes to private arbitration on an individual basis, and to waive their right to participate in a class action or class arbitration (i.e., collective action).

Justice Neil Gorsuch (writing for the majority) presents the issue as a matter of individual contracting:

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

In contrast, Justice Ginsburg locates the dispute in the historical context of the National Labor Relations Act and the Norris-LaGuardia Act of the 1930s, which explicitly rejected the established employer practice of requiring workers to sign contracts (“yellow dog” contracts) promising they would abstain from forming unions. Justice Ginsburg notes these laws were based on the premise that “employees must have the capacity to act collectively in order to match their employers’ clout in setting terms and conditions of employment.” In this context, the employer-designed arbitration clauses forcing employees to forgo the use of class actions in either a court or arbitration are simply updated versions of the yellow dog contracts prohibited more than 80 years ago.

The employer–employee contracts in question did not necessarily arise in any actual bargaining. Justice Ginsburg refers to them as “unbargained-for agreements.” A footnote in the dissent notes that Epic Systems Corporation simply emailed

its employees an arbitration agreement requiring resolution of wage and hours claims by individual (as opposed to class or collective action) arbitration. The agreement provided that if the employees “continue[d] to work at Epic,” they would “be deemed to have accepted th[e] Agreement.”

It is simply remarkable that the court’s majority can view an agreement forced on incumbent employees (you accept the policy if you show up to work tomorrow) to exemplify a contract negotiated between equals. In fact, this case illustrates what constitutional scholar Sam Bagenstos considers to be a “return to *Lochner*,” a time when “judges invalidated labor laws based on their view that those laws prevented employers and workers from striking the best deal they could with each other.”

The *Lochner*-era assumption of equal bargaining power is still very present and widespread in employment law and underlies the law regarding “employment at will,” a worker’s status as an employee, forced arbitration, right-to-work laws, and anti-discrimination laws. Bagenstos asserts that “the assumption of equal bargaining between employers and workers in employment law continues to have a pervasive and insidious impact on workers.”

Political science: democracy and civic engagement

Workers need collective capabilities in order to shape their working conditions but also to obtain a voice in politics and policy. Political scientists have long noted that the workplace is an important site for practicing and learning civic skills and engaging in political discussions and participation. Unions, in particular, have been an important vehicle for civic engagement, political participation, voter turnout, and the adoption of pro-worker policies ranging from strengthening the social safety net to enacting worker protections for wages, safety and health, and nondiscrimination.

There is a revived interest among political scientists in examining the role of businesses, unions, and other worker organizations — worker centers — on civic engagement, political participation, and policy outcomes. One leading example is the work by Feigenbaum et al. showing that the wave of right-to-work laws passed from 1980 to 2016 weakened unions and thereby eroded voter turnout, reduced voter contacts, lessened votes for Democrats for president, governor, senate, U.S. and state legislatures, and moved state policies in a more conservative direction. That was, of course, the explicit point of passing right-to-work laws in the post-2010 period.

Worker power is now on the front burner

Strengthening workplace protections and labor standards, expanding worker power, and unions have moved to the forefront of public policy discussions in a way not seen over the last 50 years. Democratic presidential candidates have consistently adopted robust and aggressive labor and union policy

agendas, with very little disagreement between the moderates and the “left” candidates. Presumptive 2020 Democratic nominee Joe Biden, a “moderate,” has an extensive and bold “plan for strengthening worker organizing, collective bargaining, and unions” which includes:

- Making it easier for workers who choose to unionize to do so; banning employers’ captive-audience meetings; enabling card-check organizing; protecting intermittent strikes; banning permanent strike replacements; removing the ban on secondary boycotts; repealing “right to work” laws; guaranteeing the right to bargain for state and local public employees; and extending the right to organize and bargain collectively to independent contractors;
- Aggressively pursuing employers who violate labor laws, participate in wage theft, or misclassify employees as independent contractors; strengthening “joint employer” accountability; eliminating noncompete clauses and no-poaching agreements; applying and strictly enforcing prevailing wages; setting a federal minimum wage of \$15 per hour; ending mandatory arbitration; extending overtime pay; expanding long-overdue rights to farmworkers and domestic workers; and improving workplace safety and health.

This is common sense

Recent polling overseen by Columbia University’s Alex Hertel-Fernandez (2020) indicates that perceptions of vastly unequal power are pervasive, and policies to address unequal power resonate with the public.

Most Americans want workers to have more voice in the workplace, especially compared to their employers: 69 percent of all respondents said workers have too little power, including more than three-quarters of Democrats and nearly six in 10 Republicans.

Most Americans believe unions are good for the country and the economy as a whole: this includes more than 60 percent of all respondents, including nearly eight in 10 Democrats and more than one-half of all Republicans.

Eroded worker power helps explain the fall in labor’s share and growing wage inequality, as well as the rise in the top 1 percent’s income share.

Most Americans support aggressive labor policy:

there was the strongest support for wage boards (73 percent agree, including percent 39 strongly agree), a right to a physical space for co-worker discussion (71 percent agree, including 36 percent strongly agree), works councils (71 percent agree, including 29 percent strongly agree), just-cause termination rights (67 percent agree, including 38 percent strongly agree), and co-determination (65 percent agree, including 28 percent strongly agree).

One poll is not dispositive, but the notion that employers have power over workers and that policies need to address that reality is, I think, common sense to most Americans. Unfortunately, policymakers have not taken this to heart for several decades. Fortunately, it looks like this is changing. ■

Lawrence Mishel is a distinguished fellow at the Economic Policy Institute after serving as its president from 2002 to 2017. Mishel first joined EPI in 1987 as research director.

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