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Data as Labor: Retrofitting Labor Law for the Platform Economy

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Data as Labor: Retrofitting Labor Law for the Platform Economy

Eugene K. Kim*

ABSTRACT

Users of online platform services like YouTube, Google, and Facebook have begun to form unions in an effort to influence platform policies, but have received limited attention. While unions in name, these groups fall outside the ambit of the National Labor Relations Act (NLRA), because their members are not compensated and controlled like traditional employees. This Article distinguishes between “active” contributors, who consciously contribute to platforms, and “passive” contributors, who unconsciously generate usable data in their interactions with platforms, and proposes that labor law can provide a framework for the organizing attempts of active contributors. Using the NLRA as a starting point, this Article reconceptualizes two doctrines of labor law—the definition of employee and the appropriate bargaining unit—to provide a regulatory framework for these nascent organizations. While implementing such changes through federal legislation may be politically difficult, state action is an alternative means of securing legal recognition for organizations of active contributors and regulating the use of passively produced data.

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I. INTRODUCTION

In 2018, a group of YouTube content creators formed what they called the “YouTubers Union,” hoping to lobby the platform for greater transparency over video monetization.¹ In what was informally known as the “adpocalypse,” YouTube had implemented algorithms to ensure that videos met advertisers’ standards,² but in doing so demonetized content producers in ways that caught public scrutiny, including the demonetization

1. Bijan Stephen, *YouTube Says It Won’t Negotiate with the YouTubers Union*, VERGE (Aug. 26, 2019, 12:55 PM), <https://www.theverge.com/2019/8/26/20833315/youtube-union-youtubers-negotiate-germany-meeting> (listing the creators’ demands, which included “monetization for smaller channels; the right to speak with a real person if a channel is to be deleted; transparent moderation decisions; ending demonetization; the end of Google Preferred, a different system for delivering ad money to creators; and the rules around content moderation to be clarified”).

2. Julia Alexander, *The Golden Age of YouTube Is Over*, VERGE (Apr. 5, 2019, 9:31 AM), <https://www.theverge.com/2019/4/5/18287318/youtube-logan-paul-pewdiepie-demonetization-adpocalypse-premium-influencers-creators> (responding to a series of insensitive or graphic postings on popular YouTube channels, advertisers withdrew from YouTube, partially out of fear of promoting the content, prompting YouTube to create algorithms that require videos to meet specific criteria, such as a longer run-time, to be monetized through advertisements).

of a number of videos discussing LGBTQ identity and experience.³ In 2019, the group counted 23,000 members and presented its demands to YouTube, but the company declined to meet, stating that it “[had] made clear that [it is] not going to negotiate their demands.”⁴

The Union’s efforts are one of many by users of an online platform to obtain a greater say in the platform’s rules: Facebook users have attempted to organize to obtain greater control over their data after the Cambridge Analytica scandal,⁵ and in a longer shot, a class of plaintiffs sued Google for requiring its users to complete visual recognition tasks—known as CAPTCHAs—without compensation, and then using the data to train AI systems.⁶ These efforts vary broadly in the extent to which their participants may claim to be workers in the classical sense: YouTubers creating videos would seem to have a stronger claim to that status than individuals who idly click around Facebook. Yet one commonality is that, while unions in name, almost none of these organizations are legally cognizable as unions under the National Labor Relations Act (NLRA), the American statutory framework for mediating negotiations between companies and employees. Simply put, contributors to platforms like YouTube are not considered employees under the statutory framework.⁷

Some scholars have described the activity of platform users as analogous to labor, because their contributions and activity on the platform are essential inputs for the online platforms and require some amount of manual exertion, whether that be clicking a link or producing a video.⁸ Although these

3. Aja Romano, *A Group of YouTubers Is Trying to Prove the Site Systematically Demonetizes Queer Content*, VOX (Oct. 10, 2019, 9:40 AM EDT), <https://www.vox.com/culture/2019/10/10/20893258/youtube-lgbtq-censorship-demonetization-nerd-city-algorithm-report>.

4. Stephen, *supra* note 1.

5. Toby Sterling, *Facebook Users Unite! ‘Data Labour Union’ Launches in Netherlands*, REUTERS (May 23, 2018), <https://cn.reuters.com/article/instant-article/idUSKCN1IO2M3>.

6. *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101 (N.D. Cal. 2016).

7. *See infra* Part III.

8. *See generally* ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 205 (2018) (analogizing the production of data to labor); Imanol Arrieta Ibarra et al., *Should We Treat Data as Labor? Moving Beyond “Free”*, 108 AM. ECON. ASS’N: PAPERS & PROC. 38 (2008) (arguing that data should be treated as labor rather than capital).

contributions, or “data work,” often feel like leisure—for instance, liking Facebook pages or producing amusing YouTube content—the digital economy has transformed once leisurely or idle activities into economically productive and potentially lucrative ones. Users’ input can be essential to a platform’s function, but many users have little say in how a platform is governed, so scholars and platform users have proposed forming collective bodies of users to bargain with platforms so that the platform is responsive to its user’s needs. Similar to the traditional labor context, platform users have limited bargaining power in the status quo vis-à-vis platforms, due to the users’ geographic dispersion and the limited number of substitutes for the platforms’ services. Organizations of users aspire to enhance the bargaining power of users and give them greater say in how their data are stored and deployed.

While there have been numerous proposals to regulate or constrain the power of platform companies like Facebook and Google,⁹ there has been less academic work on how to organize the very users that fuel the platforms’ success, or to regulate those organizations once formed. Notably, some of these organizations may be illegal under antitrust law in the status quo, insofar as they are not legally cognizable as unions and collude to achieve economic benefit.¹⁰ One proposal that has been gaining traction in the EU is to create data intermediaries that pool members’ data rights and license them to platforms.¹¹ In November 2020, the European Commission issued a proposed

9. See, e.g., Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (arguing “that many online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information should be seen as information fiduciaries toward their customers and end-users”); Josh Simons & Dipayan Ghosh, *Utilities for Democracy: How the Algorithmic Infrastructure of Facebook and Google Must be Regulated*, BROOKINGS INST. (Aug. 2020), <https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated> (arguing that Facebook and Google should be regulated under a public utility model).

10. See Sari Mazzurco, *Democratizing Platform Privacy*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 792, 860–62 (2021) (describing demands for data privacy by form of a consumer “mass exit” from the digital platform as a potential Sherman Act violation for restraining trade).

11. See *Proposal for a Regulation of the European Parliament and of the Council on European Data Governance*, COM (2020) 767 final (Nov. 25, 2020) (“[The proposal aimed to] foster the availability of data for use by increasing trust in data intermediaries and by strengthening data-sharing mechanisms across the EU.”).

data governance framework to regulate such intermediaries,¹² but notably absent from the proposal is any mention that the intermediaries could exercise user rights *collectively*.¹³

This Article makes the case that labor law and its provisions for collective bargaining are the most sensible mechanisms for fostering and regulating attempts by certain platform users to bargain vis-à-vis platforms. In doing so, it stresses the importance of not just regulating the market power of firms but the potential effectiveness of building the bargaining power of users, drawing from the theory of countervailing power pioneered by John Kenneth Galbraith.¹⁴ A purely deconcentrating approach, for instance through antitrust law, will have limited effectiveness, due to frictions in online labor markets¹⁵ and network effects¹⁶ that make it likely that some degree of market power among platforms will persist. The alternative approach would be to foster and regulate countervailing power on the other side of the market.¹⁷ Such a structure not only serves redistributive goals, but also improves economic efficiency, by ensuring that workers have the appropriate incentives to contribute to the market and preventing firms from reducing equilibrium quantities to

12. *Id.*

13. Compare *id.*, with *Proposal for a Regulation of the European Parliament and of the Council on European Data Governance* Title III, Art. 9(2)(c), at 24 COM (2020) draft (Oct. 2020), <https://drive.google.com/file/d/1b4ud4hJKlSAEeqfodHuDbEBcxV9Scppvn/view> (mentioning collective action).

14. See generally JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952) (discussing how economic power can be used to check economic power). For a more recent treatment of how the law can facilitate countervailing power, see generally Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 *YALE L.J.* 546 (2021).

15. Arindrajit Dube et al., *Monopsony in Online Labor Markets*, 2 *AM. ECON. REV.: INSIGHTS* 33, 44–45 (2020) (finding “strong evidence” that considerable monopsony power exists “even in a thick labor market where search frictions may appear to be low”).

16. See, e.g., Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don't*, *HARV. BUS. REV.* (2019), <https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont>.

17. See, e.g., Mark Stelzner & Mark Paul, *How Does Market Power Affect Wages? Monopsony and Collective Action in an Institutional Context* 15 (Dec. 2018) (unpublished manuscript), <https://equitablegrowth.org/working-papers/how-does-market-power-affect-wages-monopsony-and-collective-action-in-an-institutional-context>.

suppress price.¹⁸ Labor law provides a structure for market participants to develop this countervailing power in a way that is economically productive.

This Article separates data work into “active” work, where users consciously contribute to platforms, and “passive” work, where platforms collect user data as a byproduct of user activity. Active data work more closely resembles the classical notion of labor, and readily lends itself to the enterprise bargaining model of the NLRA. But if labor law is to remain relevant, policymakers will need to reimagine what labor law means in the digital age, as work moves from physical worksites to platforms and individual contributions shift from physical labor to personal data. To chart a path forward, this Article starts from the current federal regime under the NLRA and reconceptualizes three foundational doctrines of labor law, two of which have to do with the definition of “employee” that bounds the scope of the NLRA, and the third of which has to do with the characteristics along which users can collectively bargain. First, if labor law is to regulate organizing among data workers, it is worth considering whether some uncompensated workers should be considered “employees,” an issue that has been raised in the context of volunteer interns but is also relevant in the platform economy: many contributors to the data economy participate without compensation, but are excluded from the NLRA’s ambit because the Act does not define “employee” in any specific way.¹⁹ Second, the common-law control analysis used under the NLRA and many state statutes excludes workers not subject to traditional, top-down supervision, and it is worth considering whether a greater number of workers should be covered. While the control requirement has been critiqued in other contexts, notably gig work²⁰ and subcontracting,²¹ this Article discusses how proposals to expand the control requirement of employment would benefit data workers as well.²² Third and finally, the NLRB’s analysis of bargaining units—which has traditionally

18. See, e.g., GEORGE J. BORJAS, LABOR ECONOMICS 183–87 (7th ed. 2016) (describing the monopsony model and the effect of a wage floor).

19. See *infra* Section II.A.

20. See, e.g., Eugene K. Kim, Note, *Labor’s Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428 (2020).

21. See generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2017).

22. See *infra* Section II.B.

grouped workers along physical worksite boundaries and employer control hierarchies—will need to embrace a wider variety of factors as work moves online and traditional control hierarchies fade. This Article suggests that personal identifying factors—like age or geography—may be relevant for bargaining insofar as user data is sold according to those characteristics.²³ While efforts to amend the NLRA have been largely unsuccessful, the Article concludes by discussing the implications of state legislation and sectoral bargaining in the data work context, as a means of both advancing labor law doctrine for active participants and protecting passive participants.²⁴

This Article proceeds as follows. Part II offers an operational definition of data work and outlines the argument for extending protections generally, and through labor law specifically. Part III uses the data-as-labor lens to outline a critique of the NLRA's current definition of employee, proposing changes to labor law doctrine that can extend coverage to active data workers. Part IV does the same for the NLRB's approach to bargaining units, proposing a new strategy for the agency's future bargaining adjudications and potential rulemaking, and discusses how sectoral bargaining can be used to advance the goals of both active and passive data workers. Part V concludes.

II. DATA AS LABOR

This Part provides an operational definition of data work and outlines the economic and dignitary reasons for permitting data workers to organize. It concludes by considering the various strategies that have been proposed for enabling and regulating such organizations, and makes the case that labor law provides the most sensible framework for ensuring that data workers have a voice in the platform economy.

A. WHAT IS DATA WORK?

This Article defines data work as the act of contributing information about oneself or the world to a recipient who derives an economic benefit. While broad, this definition excludes most traditional forms of work, which often involve the transformation of existing resources and capital into goods (e.g.,

23. See *infra* Section III.A.

24. See *infra* Section III.B.

manufacturing), or physical and mental exertion in the provision of requested services (e.g., medicine). But it includes a wide variety of tasks that individuals perform on digital platforms, from conscious and creative tasks like producing YouTube videos or authoring Wikipedia articles, to more passive tasks like interacting with Facebook posts or clicking on Google results.

The notion of data work is premised on the insight that the digital age has transformed behaviors that might once have been considered leisurely or idle into economically productive ones. In the platform economy, individuals opining on the merits of toys or playing games have become multi-millionaires,²⁵ and these contributors collectively drive the business models of the world's most influential platforms. Users completing CAPTCHAs to prove they are human help Google digitize books²⁶ and train image recognition systems that power driverless cars.²⁷ Data work as a concept calls attention to the social benefits of these forms of activity and the extent to which the individuals that perform them have a say in how their contributions are used.

Some forms of data work will be more active or conscious than others. On the active side are creative, long-term forms of data work like creating video content, which may more clearly resemble “labor” as traditionally understood: requiring physical and mental exertion, planning, or sacrifice. On the passive side are near-clerical or inadvertent contributions, like building search histories on Amazon or liking content on Facebook. These behaviors, while they generate economically productive data, consume minimal mental energy. Some forms of data work are paid, while others are unpaid: YouTube compensates some (but not all) of its content creators per ad click or view, and participants on platforms like Google Task Mate²⁸ and Amazon

25. Caitlin O’Kane, *Top 10 Highest-Paid YouTube Stars of 2018, According to Forbes*, CBS NEWS (Dec. 4, 2018, 12:13 PM), <https://www.cbsnews.com/news/top-10-highest-paid-youtube-stars-of-2018-forbes>.

26. Guy Gugliotta, *Deciphering Old Texts, One Woozy, Curvy Word at a Time*, N.Y. TIMES (Mar. 28, 2011), <https://www.nytimes.com/2011/03/29/science/29recaptcha.html>.

27. James O’Malley, *Captcha If You Can: How You’ve Been Training AI For Years Without Realising It*, TECHRADAR (Jan. 12, 2018), <https://www.techradar.com/news/captcha-if-you-can-how-youve-been-training-ai-for-years-without-realising-it>.

28. *Task Mate*, GOOGLE PLAY, https://play.google.com/store/apps/details?id=com.google.android.apps.nbu.tinytask&hl=en_US&gl=IN (last visited Nov. 16, 2021) (“Earn money by completing tasks for businesses around the world on

mTurk²⁹ are paid for more passive tasks. On the other side, most Instagram content producers are unpaid (although the platform recently announced YouTube-like compensation for producers of video content),³⁰ and most forms of passive data work, like Facebook, Amazon, or Google use, are uncompensated.

	Compensated	Uncompensated
Active	Some YouTube content creators	Facebook content; Wikipedia editors ³¹
Passive	Amazon mTurk	Google search queries

Figure 1. Data work, compensation, and exertion.

In addition, data workers can be distinguished by the extent to which they perceive themselves to be part of a community. Many platform users have little to no interaction with others, like Google users. Yet others have consciously organized themselves into groups, like Facebook users. And in the middle are users who have social interactions but relatively unstructured ones, like YouTube subscribers or commenters. We might expect that Facebook users and YouTube users would be more likely to view themselves as a community than Google users.

Google’s Task Mate app. Examples of tasks include taking a photo of a nearby restaurant, answering survey questions, or helping translate sentences from English to your local language.”).

29. *Amazon Mechanical Turk*, MTURK, <https://www.mturk.com/> (last visited Nov. 16, 2021) (“Amazon Mechanical Turk (MTurk) is a crowdsourcing marketplace that makes it easier for individuals and businesses to outsource their processes and jobs to a distributed workforce who can perform these tasks virtually. This could include anything from conducting simple data validation and research to more subjective tasks like survey participation, content moderation, and more.”).

30. Arielle Pardes, *Instagram Will (Finally) Pay Influencers*, WIRED (May 27, 2020, 11:00 AM), <https://www.wired.com/story/instagram-finally-pay-influencers-badges-igtv-ads>.

31. Some Wikipedia editors are paid by outside organizations, raising concerns of bias. Joe Pinsker, *The Covert World of People Trying to Edit Wikipedia—For Pay*, ATLANTIC (Aug. 11, 2015), <https://www.theatlantic.com/business/archive/2015/08/wikipedia-editors-for-pay/393926> (describing a case where business employees of a medical device manufacturer attempted to edit the Wikipedia page of a surgical procedure that uses their device).

Highly social (explicit group formation)	Facebook, social networks
Unstructured social interactions	YouTube, blogs
Minimally social	Google, mTurk

Figure 2. Data work and group identification.

This taxonomy illustrates the heterogeneity of the data economy, for which a single regulatory regime would likely be inapt. But before discussing the regulatory structure under which data workers might bargain with platforms, this Article turns to the question of why such bargaining could be socially productive.

B. WHY PROTECT DATA WORKERS?

Allowing data workers to organize can be defended not just as a matter of economic equity, but one of efficiency as well. This Section outlines both explanations.

1. Equity and Dignity

Policymakers have wrestled with the question of how to address job displacement that results from automation. One prominent proposal is the enactment of a universal basic income (UBI), which guarantees a certain amount of money to low-income or unemployed workers.³² Income guarantees such as these are designed to prevent the exacerbation of income inequality given that technology tends to increase the returns to capital and skilled labor, while it reduces returns to lower-skilled labor.

The data as labor framework offers another perspective to the problem and challenges the notion that low-skilled labor will be rendered helpless by technological changes.³³ Rather, labor-displacing technologies like AI depend on vast data sets that these same individuals produce, whether by teaching a CAPTCHA how to identify stoplights or teaching algorithms about individual consumption habits. Rather than reduce the return to low-skilled labor, technology depends crucially upon

32. *E.g.*, Andrew Yang, *Universal Basic Income is the Solution to a Worsening Problem*, THE HILL (Jan. 11, 2019, 7:00 AM), <https://thehill.com/opinion/finance/424766-universal-basic-income-is-the-solution-to-a-worsening-problem>.

33. For a seminal discussion of this idea, see Ibarra et al., *supra* note 8, at 39.

it—indeed, computing the “return to data” is an active area of economic research.³⁴ However, as stands, producers of data-dependent technologies have little incentive to compensate or collaborate with data producers, given the geographic dispersion of those producers and the absence of bargaining channels. It is crucial to note that many of these technologies are made publicly accessible for free—for instance, Google’s search engine. But others are not, and as artificial intelligence continues to advance and its capabilities grow more sophisticated, the returns to data may very well increase rather than decrease,³⁵ exacerbating inequality unless data workers retain a seat at the table.

While much data work can appear like leisure, the technological advances of the last few decades indicate that data work is socially productive. Enabling platform users to make requests of platforms would recognize the value of their contributions in a way a UBI would not.

2. Efficiency

In addition to helping attain a more even distribution of economic resources, organizing data workers may expand the pool of resources available if the market for data is a monopsony or oligopsony. Under a classic model of labor monopsony, firms reduce the quantity of labor demanded to suppress wages and boost profit.³⁶ This causes employment to be inefficiently low. One way of correcting the inefficiency that arises from monopsony is to allow workers to bargain for wages, such that the monopsonist is no longer a price setter. By bringing wages closer to competitive equilibrium levels, employment and output increases. In the context of the platform economy, monopsonists

34. Ibarra et al., *supra* note 8, at 42.

35. See, e.g., POSNER & WEYL, *supra* note 8, at 224–30. Estimating the marginal product of data is a subject of ongoing research, although one unpublished study of the data generated by Uber drivers suggests drivers would receive significant payment if they formed a data union. One seminal, though indirect, study of the value of user contributions to platforms demonstrated that Google click-through rates dropped from 26 to 14 percent when Wikipedia results were removed, indicating that Google’s ad revenues benefit crucially from the voluntary contributions of Wikipedia editors. These benefits greatly exceed those that might obtain from improvements to search algorithms. Connor McMahon et al., *The Substantial Interdependence of Wikipedia and Google: A Case Study on the Relationship Between Peer Production Communities and Information Technologies*, 2017 ICWSM 142, <https://ojs.aaai.org/index.php/ICWSM/article/download/14883/14733>.

36. Borjas, *supra* note 18, at 183–87.

could suppress the effective “price” they pay for data, whether that price takes the form of cash payments, free services, or user-favorable terms, lowering the amount of data produced and contributed at equilibrium. Data worker organizations could bargain for higher payments, better services, or more favorable terms, increasing data production. Whether or not platforms are monopsonists is an empirical question that will depend crucially on market definition, and the extent to which users can substitute between platforms. But in data markets where users have few viable substitutes, some degree of user organization can help ensure that users are properly rewarded for their contributions, increasing both the quality and quantity of data produced. This is especially true in markets for active data, where data production is conscious and more likely to respond to incentives.³⁷ Some services already attempt to compensate individuals for the data they produce: Amazon MTurk is a well-known example of a paid crowdwork platform, and other firms pay individuals to test their algorithms.³⁸

C. WHY LABOR LAW?

The question of whether collectors of data—what Jaron Lanier calls “siren servers”³⁹—represent a monopsony or oligopsony is an empirical question that depends crucially on market definition and is beyond the scope of this paper. But as popular attention to the influence of platforms has grown, so has the call for greater antitrust enforcement.⁴⁰ Antitrust law aims to keep markets competitive, ensuring that all commodities—

37. *But see* Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 29 PHIL. & PUB. AFF. 170, 197 (2000) (discussing how material incentives may “crowd out” intrinsic motivation to do certain tasks).

38. *See, e.g.*, Annalee Newitz, *The Secret Lives of Google Raters*, ARS TECHNICA (Apr. 27, 2017, 9:40 AM), <https://arstechnica.com/features/2017/04/the-secret-lives-of-google-raters>.

39. JARON LANIER, WHO OWNS THE FUTURE? 53–58 (2014).

40. *See, e.g.*, John D. McKinnon, *Republican and Democrat Lawmakers Step Up Efforts to Adopt Tougher Tech Laws*, WALL ST. J. (Oct. 19, 2021), <https://www.wsj.com/articles/u-s-lawmakers-step-up-pressure-to-adopt-tougher-tech-laws-11634635802> (“Legislation to curb the influence of big technology companies, including putting new restrictions on online content, is starting to gain traction in Congress as lawmakers narrow their targets and seek to build on public attention.”).

including data—are efficiently priced.⁴¹ Because the platform economy presents new challenges for the application of antitrust laws, scholars and policymakers have worked extensively to develop new economic frameworks and legal remedies to address the unique issues involved.⁴²

Rather than focus solely on deconcentrating market power, this Article makes the case for amplifying the voice of platform users. In doing so, it draws on the theory of “countervailing power”⁴³ that resembles the theory of balance of power from international relations. While the economic ideal is for all markets to be competitive—both labor demand and labor supply—it is possible for efficient outcomes to be reached under monopsony conditions if there is also market power on the labor supply side.⁴⁴ Recall that under monopsony, employers reduce employment to depress wages and increase prices. To be more complete, we can consider not just wages but also non-monetary forms of compensation, benefits, work conditions, etc.: these aspects of employment will also be suppressed under monopsony. If workers also have market power, they will be able to bargain for higher quality-adjusted wages that are close to the workers’ marginal productivity. Although higher input costs would appear inefficient, a monopsonist’s *effective* marginal costs decrease in the presence of supply-side market power: this is because monopsonists face two costs when hiring, the first being marginal wages, and the second being lost profits due to increased wages across the board. Worker organizations remove the latter effect by bargaining for wages, reducing effective marginal costs, and incentivizing greater employment and production.

As a second-best strategy, countervailing power is easiest to justify when market power appears inevitable on one side of the market, and there are two reasons to believe this may be the case

41. See *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Nov. 16, 2021) (“Congress passed the first antitrust law, the Sherman Act, in 1890 as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” (internal quotation omitted)).

42. See, e.g., Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952 (2021); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

43. GALBRAITH, *supra* note 14.

44. See Stelzner & Paul, *supra* note 17, at 15 (empirical evidence); BORJAS, *supra* note 18, at 183–87 (discussing effects of wage floors in monopsony).

within the market for digital labor. First, empirical studies have discovered significant labor market frictions in the market for platform work: one study of Amazon's MTurk found that work requesters (employers) had significant market power, arising in part from workers' inability to differentiate between different tasks, requesters' inability to differentiate between workers, and other information asymmetries.⁴⁵ Even while online platforms have the power to drastically reduce the search and moving costs we might traditionally associate with physical labor markets, certain labor market frictions—including the fundamental task of matching workers with hirers—seem to persist.

Second, network effects in the platform economy mean that there will be significant economic forces in favor of consolidation. The utility to consumers of four undifferentiated social networks, each with one-fourth the membership of Facebook, is less than the utility of one Facebook, given that individuals value the platform more if it has more users. Therefore, reducing the platform economy to an atomistically competitive one may sacrifice economic gains. Labor law—and worker organizing—can be a way to confront the demand-side market power that will exist either due to network effects or labor market frictions, and fairly distribute the benefits that arise from the platform economy.

As an alternative approach, scholars such as Jack Balkin suggest that platforms can be regulated and deemed to have fiduciary duties to their users, as doctors and lawyers have to their clients.⁴⁶ But this “information fiduciary” approach has been criticized because for-profit platforms will have conflicting duties to their shareholders.⁴⁷ A similar issue pertains to efforts by platforms to self-regulate.⁴⁸ As other scholars have noted, a more lasting solution would be to alter market structure in a way that restores or approximates competitive markets, and allows

45. See Dube et al., *supra* note 15, at 44–45.

46. Balkin, *supra* note 9, at 1186 (introducing the “information fiduciary”).

47. Sylvie Delacroix & Neil D. Lawrence, *Bottom-up Data Trusts: Disturbing the ‘One Size Fits All’ Approach to Data Governance*, 9 INT'L DATA PRIV. L. 236, 241–42 (2019); Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 504 (2019).

48. See, e.g., Lily Hay Newman, *Google Will Delete Your Data by Default—In 18 Months*, WIRED (June 24, 2020, 12:36 PM), <https://www.wired.com/story/google-auto-delete-data>. Other search engines, notably Bing, explicitly reward users for using the search engine. *Microsoft Rewards*, MICROSOFT, <https://www.microsoft.com/en-us/rewards> (last visited Oct. 24, 2021).

parties to reach a competitive equilibrium by pursuing their self-interest.⁴⁹

Another approach would be to expand the protections of employment law, or the basic entitlements that society grants to workers. For example, the Russell Sage Foundation has privately implemented a minimum wage for crowdsourced work.⁵⁰ But because some workers place a high premium on flexible work, the one-size-fits-all solution of employment law may reduce opportunities for workers to benefit from existing flexibility. Collective bargaining gives workers the right, not the obligation, to organize; if they exercise that right, workers and management can achieve compromises tailored to each workplace.

The strongest case for reforming labor law comes from the fact that data workers unions have already begun to form. In 2019, YouTube announced that it would not negotiate with the YouTubers Union, an early-stage organizing effort that focused its efforts on YouTube's video monetization policies.⁵¹ The union received greater attention once it gained the support of IG Metall, the largest industrial union in Europe, and earned a meeting with Google Germany to "discuss some fundamental questions about the future of work," but tangible progress is still forthcoming.⁵² While data workers unions are gaining traction, there is no regulatory structure to foster dialogues with platforms or place legal boundaries on organizing activity.

Labor law is not the only way to build countervailing power.⁵³ One alternative, which is an active topic of discussion

49. Delacroix & Lawrence, *supra* note 47, at 240; Khan & Pozen, *supra* note 47, at 528. There have also been efforts to deliver ads to viewers without tracking them or selling their data. *Ethical Ads*, READ THE DOCS, <https://docs.readthedocs.io/en/stable/advertising/ethical-advertising.html> (last updated Sept. 3, 2020).

50. *Research Grants: Budget Requirements*, RUSSELL SAGE FOUND., <https://www.russellsage.org/how-to-apply/apply-project-grants/budget> ("With increasing frequency, academic researchers use crowdsourcing workers (e.g., MTurk) to complete study-related tasks. RSF requires that compensation for crowdsourcing workers be appropriate for the time and effort that they devote to their study-related task. The payment amount must be based on the minimum wage in the state where the fiscal agent for the grant is located or at least \$10.00 per hour, whichever is higher.") (last visited Oct. 24, 2021).

51. See Stephen, *supra* note 1.

52. *Id.*

53. See, e.g., Andrias & Sachs, *supra* note 14, at 560 (discussing how legal regimes may be constructed to best facilitate countervailing power).

in the EU, would be a market-based, property-law solution that creates data cooperatives or coalitions to trade member data to platforms, similar to royalty-sharing organizations like Broadcast Music, Inc. (BMI)⁵⁴ and the American Society of Composers, Authors and Publishers (ASCAP).^{55, 56} If governments are able to grant individuals strong property rights in their data, individuals can license their data to cooperatives, which would sell the data as a bundle to platforms. This solution has its greatest appeal for passive data production, which often goes unnoticed by the contributor and is generally homogeneous, making it easy to aggregate and sell. For active data production, however, aggregating and valuing user contributions will be harder given their heterogeneity. Labor law provides a framework for grouping contributors and for selecting representatives to bargain over a wide range of factors in the platform relationship, whether or not the final outcome is compensation for services performed.

This Article decomposes the task of retrofitting labor law by identifying two key questions that define the scope of labor law: (1) who is protected, and (2) along what lines can workers organize. It then suggests that if labor law is to embrace data work, its answers to both of these questions must change. Part III addresses the first question by examining and proposing an alternative to labor law's current definition of "employee," with a focus on unpaid workers and workers outside of traditional control structures. Part IV addresses the second question by demonstrating how traditional bargaining unit factors are inappropriate for the platform economy, proposing new factors to supplement them, and proposing sector-wide bargaining as a solution for passive data workers.

54. *See About, BMI*, <https://www.bmi.com/about> (last visited Nov. 16, 2021) ("BMI was founded in 1939 by forward-thinkers who wanted to represent songwriters in emerging genres, like jazz, blues and country, and protect the public performances of their music. Operating on a non-profit-making basis, BMI is now the largest music rights organization in the U.S. and is still nurturing new talent and new music.").

55. *See About Us, ASCAP*, <https://www.ascap.com/about-us> (last visited Nov. 16, 2021) ("We license over 16 million ASCAP songs and scores to the businesses that play them publicly, then send the money to our members as royalties.").

56. Others have proposed "data trusts" that would also collectively exercise individual data rights. Delacroix & Lawrence, *supra* note 47, at 240–41; *see also* Katharina Pistor, *Rule by Data: The End of Markets?* 83 L. & CONTEMP. PROBS. 101, 120–22 (2020) (proposing a collective governance structure for databases).

III. RETHINKING EMPLOYMENT: BEYOND COMPENSATION AND CONTROL

This Part proposes two critiques of the definition of “employee” that currently dictates the scope of the NLRA’s protections, and proposes amended standards that would cover active data workers, i.e., data workers who purposefully contribute to platforms that derive an economic benefit from their contributions. This proposal leaves the protection of passive data work, which is far broader, to the possibility of sectoral bargaining, described *infra* in Section III.B.

The current definition of “employee” under the NLRA requires that an employee be both compensated and controlled by the employer.⁵⁷ The first two Sections in this Part address each prong in turn and make the case that accommodating active data work will require protecting workers who are uncompensated or not subject to traditional supervision. The final Section explores the role state action can play in implementing reforms.

A. PROTECTING UNPAID LABOR

This Section focuses on the first prong of how courts have defined “employee” in the NLRA context: namely, the requirement that an employee be hired, or receive compensation for their services. While some data workers are paid by their platforms, most data workers, even among the subset that this Article classifies as “active,” are uncompensated, although the platforms benefit from their contributions. These contributors would have no collective bargaining remedy under the NLRA’s definition of “employee.” Subsection 1 outlines the current law and its origins, Subsection 2 presents an economic rationale for why more unpaid workers, like unpaid data workers, should be allowed to collectively bargain, and Subsection 3 proposes an alternative test for the compensation prong and discusses its ramifications.

While this Article is mostly motivated by the rise of data work, the question of whether to protect unpaid workers long

57. See *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002); Amnesty International, 2019 NLRB LEXIS 632, at *8–9 (2019); *WBAI Pacifica Foundation*, 328 N.L.R.B. 1273, 1275 (1999).

predates the platform economy.⁵⁸ Most of the case law to date has focused on the non-profit sector, and sensibly so: the Fair Labor Standards Act (FLSA) prohibits for-profit firms from hiring unpaid volunteers.⁵⁹ Unsurprisingly, much of the scholarship and case law tends to favor non-profit firms, and is wary of protecting volunteers lest the legal burden discourage altruism.⁶⁰ However, the emergence of data work—which is performed for for-profit firms—provides a new perspective for understanding uncompensated work.

1. The Origins of the Current Approach

Under current law, the first step of a court's inquiry into whether a worker is an employee is whether or not the worker is compensated. For the majority of active data workers who receive no compensation for their contributions, the inquiry will end here. Courts and the NLRB have held that the NLRA only protects workers who are compensated and receive more than nominal compensation. Within the labor law context, the leading case on the topic is *Seattle Opera v. NLRB*, a case decided by the D.C. Circuit concerning whether auxiliary choristers, who received only a flat \$214 per production, had the right to bargain collectively with the Seattle Opera.⁶¹ The court held that a person is an "employee" if "(1) he works for a statutory employer in return for financial or other compensation . . . and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed."⁶² The court then found that the \$214 payment was sufficient compensation, because it was given "in return for labor or services performed" and was not a "reimbursement for out of

58. See, e.g., Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147–50 (2006); Leda E. Dunn, Note, "Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism? 61 FORDHAM L. REV. 451–53 (1992).

59. See 29 U.S.C. §§ 203(e)(4)–(5) (2018) (excluding volunteers for the government or non-profit firms from FLSA's protections); 29 C.F.R. § 553.101 (2020) (defining volunteer).

60. See, e.g., Dunn, *supra* note 58, at 453 ("This Note argues that the present disparity in coverage of volunteer workers under federal employment laws discourages voluntarism by excluding from the definition of employee volunteer workers who need protection, while extending coverage to volunteer workers who neither need nor desire such coverage.")

61. 292 F.3d at 759–60.

62. *Id.* at 762.

pocket costs,”⁶³ and also found that the choristers were controlled by the Seattle Opera.⁶⁴ In line with the D.C. Circuit’s reasoning, the NLRB has consistently held that individuals who are paid nothing for their work will not be considered employees under the NLRA.⁶⁵

Most data workers are not paid any money at all, suggesting they would not be considered employees under *Seattle Opera*. However, one might argue that in exchange for their data, users get the benefit of using the platform.⁶⁶ In other words, even though many data workers receive no money, there is another issue of whether the nonpecuniary benefits they receive from the platform would be considered compensation or just nominal benefits.

Courts have struggled to determine what constitutes compensation, in cases where workers receive some benefits but not much compared to a prototypical employee. *Seattle Opera* itself is one example: while all three judges appeared to agree that reimbursement for out-of-pocket expenses would not count as compensation, Judge Randolph, in dissent, characterized the \$214 as reimbursement, performing some back-of-the-envelope math to suggest it might not even cover travel and parking costs.⁶⁷ In *WBAI Pacifica*, the NLRB seemed open to the possibility that reimbursement for travel and child care could constitute compensation, but disregarded the point due to insufficient evidence that volunteers actually claimed such reimbursement.⁶⁸ We can look to cases concerning employment status at nonprofits under Title VII, which courts have also interpreted to cover only compensated workers, but in these cases as well, defining compensation requires some careful line-drawing:

63. *Id.* at 762–63.

64. *Id.* at 765.

65. *See, e.g.*, Amnesty International, 2019 NLRB LEXIS 632 (2019); WBAI Pacifica Foundation, 328 N.L.R.B. 1273, 1273 (1999).

66. *See, e.g.*, Scott Goodson, *If You’re Not Paying For It, You Become the Product*, FORBES (Mar. 5, 2012, 12:34 PM), <https://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/?sh=3e4090e75d6e>.

67. 292 F.3d at 774–75 (Randolph, J., dissenting).

68. *WBAI Pacifica*, 328 N.L.R.B. at 1275.

(A) A visiting lecturer provided with library privileges at a medical school and no other compensation was deemed not compensated.⁶⁹

(B) A search-and-rescue pilot who was eligible for death benefits, free military flights, free flight simulator time, tax deductions, air time, and training was deemed not compensated.⁷⁰

(C) A volunteer firefighter who received a retirement pension, life insurance, death benefits, disability insurance, and some medical benefits was deemed compensated.⁷¹

These cases taken together seem to suggest that courts currently consider compensation to include salary or “numerous job-related benefits,”⁷² and to exclude isolated benefits or reimbursement for expenses. Therefore, data workers whose only reward is access to a platform’s services—for example, Facebook contributors—would probably not be considered employees in the status quo, which easily aligns with current intuitions about labor.

The question of whether employment requires compensation under the NLRA is in large part an issue of statutory interpretation, although the NLRA itself offers little guidance. “Employee” is defined, circularly, to “include any employee,”⁷³ leaving many judges to consult dictionaries for the ordinary meaning of the term. In *NLRB v. Town & Country Electric*, the Supreme Court cited the American Heritage Dictionary, writing that “[t]he ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation.’”⁷⁴ The case was not decided on the compensation prong, but rather endorsed the agency’s ability to interpret “employee” broadly.⁷⁵ However, *Town & Country Electric*’s ordinary meaning approach was cited in *Seattle Opera* to conclude that workers must be compensated to

69. *Tadros v. Coleman*, 717 F. Supp. 996, 998, 1005 (S.D.N.Y. 1989).

70. *Neff v. Civil Air Patrol*, 916 F. Supp. 710, 714–15 (S.D. Ohio 1996).

71. *Pietras v. Bd. of Fire Comm’rs*, 180 F.3d 468, 471, 473 (2d Cir. 1999).

72. *Id.* at 473.

73. 29 U.S.C. § 152(3) (2018).

74. 516 U.S. 85, 90 (1995).

75. *Id.*

be considered employees.⁷⁶ Similarly, the Eighth Circuit cited Webster's Dictionary in reaching the same conclusion under Title VII.⁷⁷

The compensation requirement also seems influenced by the "economic realities" test used to define employee status under FLSA. Under the economic realities test, courts look not to traditional signals of employer control, as under the common-law agency test traditionally used to define "employee" under the NLRA,⁷⁸ but rather to how much the employee depends economically on his or her employer.⁷⁹ This test would suggest that most volunteers would not be employees, because they are economically independent. Yet in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court applied the economic realities test to find that volunteer workers were employees covered by FLSA.⁸⁰ The case concerned a religious foundation that earned income from a number of commercial businesses staffed by "volunteers," many of whom were "drug addicts, derelicts, or criminals."⁸¹ The volunteers "received no cash salaries, but the Foundation provide[d] them with food, clothing, shelter, and other benefits."⁸² The Court found these benefits were sufficient to foster economic dependency and constitute compensation,⁸³ but stressed the unusual circumstances and noted that "[o]rdinary volunteerism is not threatened by this interpretation of [FLSA]."⁸⁴ As examples of "ordinary volunteerism," it listed "volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy,"⁸⁵ seeming to refer to non-commercial activities involving economically independent workers. This case appears to be the only time the Supreme Court has ruled on the employee status of volunteers, so it is

76. *Seattle Opera v. NLRB*, 292 F.3d 757, 761–62 (2002).

77. *Graves v. Women's Pro. Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir. 1990).

78. *See, e.g., FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009).

79. *See, e.g., Tony & Susan Alamo Found. v. Sec'y of Lab.*, 417 U.S. 290, 301 (1985); *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33–34 (1961).

80. *Tony & Susan Alamo Found.*, 417 U.S. 290.

81. *Id.* at 292.

82. *Id.* at 290.

83. *Id.* at 301.

84. *Id.* at 302–03.

85. *Id.*

unsurprising that its approach has been cited even beyond the FLSA context. The economic realities approach has been cited in the Title VII context to require that employees be compensated,⁸⁶ and has been referenced in NLRB decisions on employee status.⁸⁷

In addition to these statutory and precedential arguments, courts and the NLRB also seem persuaded by the argument that volunteers do not need legal protection because the work is intrinsically fulfilling. In his *Seattle Opera* dissent, Judge Randolph cited *Walling v. Portland Terminal*, in which the Supreme Court “refused to sweep within the law ‘each person who, without promise or expectation of compensation, but solely for his *personal purpose or pleasure* worked in activities carried on by other persons either for pleasure or profit.’”⁸⁸ Similarly, in *WBAI Pacifica*, the NLRB noted that the workers at hand “do not work for ‘hire’ in the ordinary sense of the word,” but “work out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community.”⁸⁹

In essence, courts and agencies believe that worker wages in these cases are zero because labor supply is high—the work is beneficial or intrinsically fulfilling, meaning that the market-clearing wage is non-positive. This logic has led some observers to criticize legal protections for volunteers, on the ground that the legal burden would discourage volunteerism.⁹⁰

2. The Limitations of the Current Approach

Prices are determined jointly by supply and demand. In the labor market, prices are wages, which are determined both by individuals’ supply of labor and firms’ demand for that labor. Therefore, if wages are low, there are two potential explanations: lots of individuals want to work, or few firms want to hire.

86. *Tadros v. Coleman*, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989).

87. *See WBAI Pacifica*, 328 N.L.R.B. 1273, 1276 (1999) (“Unpaid staff do not depend upon the Employer, even in part for their livelihood or for the improvement of their economic standards.”).

88. *Seattle Opera v. NLRB*, 292 F.3d 757, 774 (emphasis added) (citing *Walling v. Portland Terminal*, 330 U.S. 148, 152 (1947)).

89. 328 N.L.R.B. at 1275.

90. *See, e.g., Dunn, supra* note 58, at 453.

The current law on volunteer labor emphasizes its high supply, but seldom explores the possibility that demand is low, or more importantly, the reasons that demand may be low. This Article makes the case that platforms with monopsony power have an incentive to suppress their demand for user contributions to decrease its price and increase profit. To be sure, the supply-side explanation is compelling in the nonprofit context, which is where the question of volunteer labor has almost exclusively arisen. Individuals like the “volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy”⁹¹ hypothesized in *Tony & Susan Alamo Foundation* would seem primarily motivated by a desire to serve their community or act out the principles of their faith, rather than a need for economic compensation. In these cases, it is logical that wages would be zero: volunteers are enthusiastic to work because they find the work intrinsically fulfilling, increasing labor supply and reducing wages. Therefore, the argument goes, it makes no sense to suppress labor demand by imposing regulatory burdens on hirers: the more volunteer laborers, the better, both for the volunteers and for society.

In the non-profit altruism context, low labor demand may also justify low (or zero) wages. Part of the reason a charity may not compensate its volunteers is that it reaps little to no economic benefit from their work, which primarily benefits the community at large. In other words, from the charity’s perspective, the marginal product of a given worker is close to zero, and it is no surprise that the charity would be unwilling or unable to compensate that worker.

However, policymakers must look to the *reasons* for low demand when considering appropriate responses. In the case of the archetypal charity (consider a food bank), demand is low because marginal products are low. If policymakers were concerned about the work conditions of volunteers, imposing additional burdens on charities would be pointless. One proper response would be to allow charities to internalize their positive externalities, and possibly compensate charities for the good

91. *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 417 U.S. 290, 302–03 (1985).

they confer on the community. To some extent, this is already accomplished by tax deductions for charitable donations.⁹²

In other cases, demand will be low due to bargaining power on the side of the hirer, and in these cases imposing burdens on the hirer is essential to restoring market balance. Consider, for instance, the unpaid internships that students take with non-profit organizations. While many of these students will be drawn to the mission of the organization, and it is possible that some of them would decline compensation even if offered, for many students these unpaid internships are the only way to gain experience and burnish their credentials. In one seminal case, a student was required by her college to work for 200 hours as an unpaid intern, but was then legally barred from pursuing a sexual harassment claim under Title VII against her supervisor because she was uncompensated and not an “employee.”⁹³ The court later found that she was also barred from filing her claim under Title IX because her internship was not an “education program or activity.”⁹⁴ The court’s decision under Title VII was consistent with other decisions interpreting the statute.⁹⁵ But it is unclear why Title VII’s protections end where they do: volunteers like unpaid interns can be subject to poor work conditions like any other worker, and the fact that they are volunteers may reflect a lack of bargaining power that hirers can exploit.

Current market prices for data may reflect a similar market structure. To be sure, many data workers are paid outright. Even contributors who do not receive money for their contributions can be considered compensated in some sense: in exchange for their contributions to platforms, they receive access to those very platforms, and for many the act of contributing may be intrinsically fulfilling. The fact that individuals willingly contribute to platforms, however, does not imply that the current market equilibrium is optimal. If collectors of data have market power, they will be able to reduce the effective cost of data, which we can interpret as including not just monetary compensation to

92. See 26 U.S.C. § 170 (2018) (“There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year.”).

93. *O’Connor v. Davis*, 126 F.3d 112, 113, 115–16 (2d Cir. 1997).

94. *Id.* at 119.

95. *Id.* at 115–16 (citing *Tadros v. Coleman*, 898 F.2d 10, 11 (2d Cir. 1990); *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 74 (8th Cir. 1990)).

users but also control over how the platform operates. An important distinction between the data as labor context and the charity example explored above is that most platforms are for-profit businesses, and as such cannot claim that labor demand is low due to zero marginal product.

American labor law and the collective bargaining framework exist to ensure that bargaining power is balanced, and that negotiations produce solutions tailored for each workplace. While much of the discussion above has centered around price and wage for simplicity's sake, there are many other dimensions of the platform user experience that can be subject to discussion, such as when users can be removed from the platform, or how the platform can use their data. Collective bargaining allows workers to reach compromises with managers in a way that reflects both worker priorities and practical realities. Crucially, labor law provides workers with the option, but not the obligation, to bargain. If most users find their contributions intrinsically fulfilling or morally validating, they do not have to bargain with the platform at all.

This Subsection has made the case that by excluding uncompensated workers, labor law excludes workers that may lack the bargaining power that the NLRA was meant to provide. The next Subsection proposes an alternative approach to “employee” that would encompass those workers.

3. A New Approach: Services Performed Rather Than Compensation Received

Rather than define employee status based on compensation a worker receives, legislators can define employee to cover any worker who consciously renders a service (i.e., an “active” contribution) from which the employer willingly derives an economic benefit.⁹⁶ In other words, rather than look to the compensation received, we can look to the services performed and accepted.

This approach is taken, with one modification, from *Tadros v. Coleman*, a case that considered whether a volunteer was protected as an “employee” under Title VII.⁹⁷ Ultimately, the

96. It is natural to ask whether all such workers should be guaranteed a wage under employment law, but this topic is beyond the scope of this Article.

97. *Tadros v. Coleman*, 717 F. Supp. 996, 1000 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990).

court held that the plaintiff, Dr. Tadros, was not protected by Title VII because he was not paid.⁹⁸ Tadros was appointed as a “Visiting Lecturer in Ophthalmology” at Cornell Medical College, but appears to have held no concrete responsibilities and to have been subject to no supervision.⁹⁹ He received no compensation, although he was granted access to the medical library.¹⁰⁰ When his appointment was not renewed, he filed charges with the EEOC alleging a Title VII violation.¹⁰¹ Before relying on the standard compensation analysis, the court cited FLSA’s definition of “employ” as “suffer or permit to work”¹⁰² to make an appeal to common sense:

Congress did not invite the federal courts to serve as forums for people who seek to air their resentments. It is axiomatic that a would-be plaintiff must have rendered the defendant some kind of service in order to sue under Title VII. That service, moreover, must have been one from which the putative employer willingly derived a benefit [citing FLSA]. Title VII does not extend to *officious intermeddlers*.¹⁰³

This analysis, while covering a greater number of workers than the traditional compensation analysis, offers an alternative way of delineating which individuals an employer may be responsible for. It looks to the benefit conferred upon the employer by the worker, and requires that the employer take a conscious step to accept that benefit, rather than look to the benefit conferred upon the worker. In doing so, it excludes “officious intermeddlers” whom the employer has not consciously recognized. The responsibility for employers attaches when they make the decision to benefit from a person’s work.

Applying this test would extend the provisions of labor law to a significant number of data workers. The test requires both that the company willfully accept the user’s conscious contribution, and derive a benefit from the contribution. A company might signal its willful acceptance by storing user data on central databases, and then deploying the data for its benefit by using it to target advertisements, for example.

The one addition this Article makes to the language from *Tadros* is to require that the benefit be economic, in large part

98. *Id.* at 1004–05.

99. *Id.* at 1003.

100. *Id.* at 998.

101. *Id.* at 1000.

102. 29 U.S.C. § 203(g) (2018).

103. *Tadros*, 717 F. Supp. at 1003 (emphasis added).

to exclude charitable organizations that mostly act as conduits for volunteer labor. Consider again the two explanations for why labor demand may be low: either the employer does not stand to benefit economically from the individual's labor, as in the case of a charity, or the employer has market power and reduces wages to increase profits. In the former case, there is no economic rationale to impose costs on the charity: if anything, the charity and its volunteers should be rewarded by the state for the positive externalities of their conduct. In the latter case, worker organizing can counteract monopsony power and restore an efficient equilibrium. By requiring that the employer benefit economically from the labor it accepts, this test avoids burdening charities that depend on free labor to advance the social good.

For example, Wikipedia is a non-profit organization that depends on user contributions.¹⁰⁴ Just like for-profit platforms, it centrally stores user contributions, constituting conscious acceptance. But because Wikipedia does not earn profits and rather passes on any earnings, it does not willfully derive an economic benefit from those contributions, and its contributors would not be allowed to organize.

Even among for-profit platforms, the *Tadros* analysis would not create legal obligations every time the platform stored someone's data. First, the user must render a service to the platform. If the platform collected data that was passively generated by a user as she went about other tasks—for instance, browsing products on Amazon—no service would be rendered, and that behavior would not be protected under the NLRA. While that data is still valuable, passive data can be generated by anyone, anytime, often with no effort at all, and passive data workers would be difficult to organize and bargain with under a traditional model. This definition of rendering a service as requiring intentional action is consistent with interpretations of the phrase in other contexts, such as assumption of duty in tort law.¹⁰⁵

Second, passive data is often stored for the user's benefit, and not the platform's: features like AutoComplete or link

104. *About*, WIKIMEDIA FOUNDATION, <https://wikimediafoundation.org/about> (last visited Nov. 22, 2021); *Who Writes Wikipedia?*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Who_writes_Wikipedia%3F (last visited Nov. 22, 2021).

105. *See Wark v. United States*, 269 F.3d 1185, 1189 (10th Cir. 2001) (requiring affirmative act or promise to act, in addition to calculation).

suggestions use user data to enhance user productivity. Merely implementing these features does not cause the platform to willfully derive an economic benefit from user contributions, or require the platform to bargain with users.

This proposal constitutes the first half of this Article's proposed reform to the prevailing common-law definition of "employee." Rather than rely on the ordinary conception of employee as someone who works for wages, an employee may be defined as any worker who renders a service from which the employer willingly derives an economic benefit. The issue of employer control is the second half of the traditional employee definition, and the issue to which we now turn.

B. THE LIMITATIONS OF THE AGENCY MODEL

This Section reviews the control prong of the prevailing definition of "employee" in the labor law context, and argues that a new understanding of employee control, called the ABC test, would protect a greater number of workers in the platform economy. While the control requirement of the common-law definition of employee has received significant scrutiny due to the rise of the gig economy and hirers like Uber and Lyft,¹⁰⁶ this Section discusses how legislation implementing the ABC test would protect user contributions to platforms more generally. Most platform contributors are not controlled in the traditional sense, because they do not report to a supervisor or have fixed work schedules. Yet as in the gig economy, user contributions are critical to the profitability of platforms and are subject to forms of control that can affect users who depend on the platform for their livelihood. This Section begins by outlining the traditional approach and the ABC approach and then discusses how the latter might apply to data workers.

1. Efforts to Look Beyond Control

Courts applying the NLRA traditionally define "employee" using the common-law agency test, a multifactor test¹⁰⁷ that has

106. See, e.g., Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); Kim, *supra* note 20.

107. These factors include: "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's

been summarized as evaluating the level of control the hirer has over the work performed: workers subject to less control tend to be classified as independent contractors, not employees.¹⁰⁸ The limitations of the traditional agency approach were highlighted in *FedEx Home Delivery v. NLRB*, in which the D.C. Circuit held that FedEx delivery drivers were independent contractors not protected by the NLRA.¹⁰⁹ The court stated that the common-law control analysis had been narrowed over time to exclude factors like “evidence of unequal bargaining power” or “efforts to monitor, evaluate, and improve” a worker’s performance,¹¹⁰ and downplayed the argument that the drivers “perform a function that is a regular and essential part of FedEx Home’s normal operations, the delivery of packages.”¹¹¹ While the court was correct to notice that FedEx drivers are able to hire their own employees and sell their rights to deliver along certain routes, a later opinion by the Ninth Circuit, also concerning FedEx drivers, highlighted different aspects of their employment that suggested employee status but were excluded from the D.C. Circuit’s common-law analysis.¹¹² The court noted that FedEx controls the appearance of the drivers and their vehicles, the times they could work, and how and when they could deliver packages,¹¹³ and that the company holds a veto right over driver attempts to hire a helper or sell a route.¹¹⁴

Motivated by the limitations of the common-law agency test and concerned about the variety of forms that employee control

discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (footnotes omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (Am. Law Inst. 1958)) (collecting cases).

108. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496–97 (D.C. Cir. 2009) (“For a time, when applying this common law test, we spoke in terms of an employer’s right to exercise control, making the extent of actual supervision of the means and manner of the worker’s performance a key consideration in the totality of the circumstances assessment.”).

109. *Id.* at 504.

110. *Id.* at 496–97 (quoting *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989)).

111. *Id.* at 502.

112. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

113. *Id.* at 990.

114. *Id.* at 993–94.

can take, many states have implemented an alternative definition of “employee” known as the ABC test, which presumes that a worker is an employee unless each of three factors are met:

(A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) the worker performs work that is outside the usual course of the hiring entity’s business; and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.¹¹⁵

This test places the burden on employers to prove that workers qualify as independent contractors, and recognizes that while a traditional control inquiry can yield ambiguous results, certain workers may contribute so crucially to the business of their hirer—that is, perform work that is within the “usual course of the hiring entity’s business”—that they deserve protections akin to those of employees, regardless of the extent of control. Under this test, for-hire drivers have been deemed employees of their hirers, most controversially in the context of taxi platforms like Uber and Lyft.¹¹⁶

Much of the controversy over the ABC test arises from the fact that states like California have used the test to extend legal guarantees, like a minimum wage or unemployment insurance, to a greater number of workers.¹¹⁷ For-hire platform representatives and some workers have argued that extending these employment benefits would impose great costs not just on

115. See 2019 Cal. Stat. § 2775; *Dynamex Operations W., Inc. v. Superior Ct. of L.A. Cty.*, 416 P.3d 1, 34 (Cal. 2018) (applying the ABC test to determine whether workers should be classified as employees or independent contractors for purposes of California wage orders); see also DEL. CODE ANN. tit. 19, §§ 3501(a)(7), 3503(c) (2019) (enacting similar definitions of employment); MASS. GEN. LAWS ch. 149, § 148B (2019) (same).

116. *People v. Uber Techs., Inc.*, No. CGC-20-584402, 2020 Cal. Super. LEXIS 152, at *6–8 (Cal. App. Dep’t Super. Ct. Aug. 10, 2020).

117. See Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 64–65 (2015).

the platforms but workers themselves, who often benefit from the flexibility of platform work.¹¹⁸ However, collective bargaining is different, in that it guarantees no particular entitlement except for the right to organize and negotiate. Workers who value flexible work arrangements have no obligation to organize under labor law.

2. Implications for Data Work

While there has been much discussion of how the ABC test would affect gig workers, this Subsection makes the case that prong (B) of the test—which covers workers who work in the usual course of the hiring entity’s business—could encompass many data workers who are currently unable to organize because they are not controlled in the traditional sense.

Under the common-law approach, none of the workers described in the Figure 1 matrix are subject to sufficient employer control to be considered “employees.” Consider first workers engaged in paid, creative work, like YouTube creators. These workers meet almost none of the control factors discussed in either the D.C. Circuit or Ninth Circuit opinions on FedEx drivers: they are free to produce content whenever they please and mostly in whatever format they please. Further, they have “entrepreneurial potential,” a factor highlighted by the D.C. Circuit as a reason for classifying FedEx drivers as independent contractors¹¹⁹: many of them will seek sponsorships off the platform and sell merchandise to supplement their income from the platform.

The ABC test looks not just to control, but also, through its (B) prong, the extent to which a worker performs work “in the usual course of the hiring entity’s business.” When determining whether a worker performs work in the “usual course of the hiring entity’s business,” courts have looked to how interchangeable the worker is with a typical employee, and how important the worker is to the company’s business model. The leading case on the topic is *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, in which the California

118. See, e.g., Dara Khosrowshahi, Opinion, *I Am the C.E.O. of Uber. Gig Workers Deserve Better.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html>.

119. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498 (D.C. Cir. 2009).

Supreme Court applied the ABC test to delivery drivers.¹²⁰ In its analysis of the (B) prong, the court said that the ABC test protected “all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee.”¹²¹ The court later elaborated that the test served to prevent regulatory arbitrage, in which employers hired individuals to do the work of an employee, but under a different title, thereby avoiding the California wage orders.¹²² In a footnote, it cited a case that distinguished the hiring of specialists, who could probably not be substituted for a typical employee at the hiring firm.¹²³

In that same footnote, the court distinguished between workers that were “merely incidental” to the company’s business, and others that were an “integral part,” indicating that the latter would be more likely to work “in the usual course of the employer’s business.”¹²⁴ It cited a Maine case where a timber management company was held to employ a timber harvester, in part because the company derived a “significant portion of its profit” from selling the harvested timber.¹²⁵ This approach—looking, in essence, to the importance of the worker to the company’s business model and profitability—was cited with approval in a later California case applying the ABC test to Uber drivers.¹²⁶ That court cited an earlier federal case noting that “Uber simply would not be a viable business without its drivers.”¹²⁷

If Congress amended the NLRA to use the ABC test, many active data workers could qualify as employees in spite of their limited control over their work, if they were deemed to perform work within the usual course of the employer’s business. Looking through the lens of the (B) prong of the ABC test, the inquiry would be whether the workers substituted for employee labor

120. 416 P.3d 1, 34 (Cal. 2018).

121. *Id.* at 37.

122. *Id.* at 37–38.

123. *Id.* at 38 n.29 (citing *Great N. Constr., Inc. v. Dept. of Labor*, 161 A.3d 1207, 1215 (Vt. 2016)).

124. *Id.* (citing *McPherson Timberlands v. Unemp. Ins. Comm’n*, 714 A.2d 818 (Me. 1998)).

125. *McPherson*, 714 A.2d at 822.

126. *People v. Uber Techs., Inc.*, No. CGC-20-584402, 2020 Cal. Super. LEXIS 152, at *44 (Cal. App. Dep’t Super. Ct. Aug. 10, 2020).

127. *Id.* at *40 (quoting *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015)).

and were integral to the company's business, for which active data workers will have plausible claims. In contrast, passive data work, where a platform collects user data without the user knowing or consciously contributing, would likely fall outside a platform's usual line of business. Google, for instance, provides users with search services. Those search services are primarily the product of search algorithms refined by Google, and it is those services that attract users and enable Google to collect advertising revenues, not the raw data of other users.

Extending the protections of the NLRA by implementing the ABC test would cover active data workers that do not appear "controlled" in the traditional sense, but who perform services that are akin to those performed by employees and crucial to the company's business model. It would continue to exclude specialists that are hired for their expertise, or for one-off jobs, like the specialized historic restorers hired by a general construction company referenced in *Dynamex*.¹²⁸ But by broadening the scope of who is allowed to collectively bargain under American labor law, the ABC test would reduce incentives for companies to move work to uncompensated or underregulated sectors of the labor market.

C. IMPLEMENTATION & STATE ACTION

While there have been moves to amend the NLRA directly and to broaden the protections of labor law on a federal level, these moves have had limited success, leading many to abandon federal labor law as a tool of worker empowerment.¹²⁹ Efforts to reform the NLRA continue, most notably through the proposed Protecting the Right to Organize (PRO) Act,¹³⁰ but these efforts are likely to face similar political challenges.

128. See *Dynamex Operations*, 416 P.3d at 38 n.29 (citing *Great N. Constr., Inc. v. Dep't of Labor*, 161 A.3d 1207, 1215 (Vt. 2016)) ("[A] general construction company[] had established that the specialized historic restoration work performed by the worker in question was outside the usual course of the company's business within the meaning of part B, where the work involved the use of specialized equipment and special expertise that the company did not possess and did not need for its usual general commercial and residential work.").

129. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 43–46 (2016).

130. Protecting the Right to Organize Act, H.R. 2474, 116th Cong. § 2 (2020); Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, WASH. POST (Feb. 6, 2020, 9:21 PM), <https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions>.

In addition to federal reforms, state action presents another pathway for broadening the protections of labor law in areas where there is popular support. Much as states such as California have used the ABC test to expand the breadth of employment entitlements, states can also enact statutes permitting individuals covered by the ABC test to form collectives, elect representatives, and negotiate vis-à-vis platforms. Similarly, states could enact statutes permitting uncompensated workers to form collectives and bargain.

This strategy has notably been used by the City of Seattle to permit for-hire drivers, who are largely considered independent contractors under the common-law approach, to bargain collectively with their hirers,¹³¹ although the approach has been challenged in court because municipal action may be preempted by federal antitrust laws.¹³² A similar move by a state would have the effect of exempting covered workers from antitrust liability for organizing under the state action doctrine, and would not be preempted by the NLRA insofar as it covered workers currently excluded from the federal definition of “employee.”¹³³

The obstacle with this approach is that it necessarily proceeds piecemeal, and creates a patchwork of state-by-state regulatory regimes that create compliance costs for employers. But employers may block proposed state legislation either by compromising with the relevant interest groups, or lobbying Congress to speak directly to the bounds of collective bargaining and thereby preempt state legislation. In other words, the threat of patchwork or inconsistent regulatory regimes may be attributed as much to the state legislation itself as to the absence of federal legislation that enables it.

IV. RETHINKING THE BARGAINING UNIT

In addition to the question of who counts as an employee, another crucial question of labor law is the size of the relevant bargaining unit: in other words, which workers can a union appropriately represent? This question is most relevant to

131. SEATTLE, WASH., ORDINANCE 124968 (Dec. 14, 2015) (codified at SEATTLE, WASH., MUN. CODE § 6.310.735 (2020)).

132. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 776 (9th Cir. 2018).

133. *See Kim, supra* note 20, at 464–73.

NLRB bargaining unit determinations, but is broadly relevant to any effort to organize individuals in a representative system. This Part examines how labor law currently defines bargaining units and argues that a broader approach will be necessary to accommodate platform work. Section A looks at the factors currently used by the NLRB for enterprise bargaining, which remains the basic unit of negotiation under the NLRA; it makes the case that the NLRB and other government authorities will need to consider additional factors in future adjudications, including certain demographic factors, if labor law is to adjust to the evolving nature of work. Section B will look to the possibility of sectoral bargaining as an alternative to enterprise-level bargaining, offering one possible path forward for state legislation.

Although the bargaining unit is a concept from labor law, any effort to build countervailing power among platform contributors must contend with the question of how that power will be subdivided and delegated. While larger groups acting in concert will have greater bargaining power, they are also more difficult to coordinate and are more likely to disagree over central goals. Therefore, finding an ideal group size is crucial. Traditionally, labor law identifies “communities of interest” that share certain goals and are more likely to bargain as cohesive wholes. The issue is how organizers can identify these communities in a digital age.

One alternative, which is gaining greater attention in the United States and is already practiced in Europe, is for workers to bargain with employers on a sector-wide basis, under the supervision and authority of the government.¹³⁴ This stands in contrast to traditional “enterprise bargaining,” in which a company’s employees negotiate with their particular employer, and sometimes do so in several separate negotiations, one for each category of employee.¹³⁵ This Part discusses the prospect of sectoral bargaining among data workers, and highlights how it may be especially appropriate for passive data workers specifically.

134. See David Madland, *How to Promote Sectoral Bargaining in the United States*, CTR. FOR AM. PROGRESS (July 10, 2019, 12:01 AM), <https://www.americaprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states>.

135. See *id.*

A. ENTERPRISE BARGAINING

Because collective bargaining under the NLRA typically takes place at the enterprise level, this Section briefly outlines current law on enterprise-level bargaining units, and describes the failures of current law to define work communities in the platform economy. It concludes by proposing that the NLRB and other government bodies reconsider the value of worker identity in defining labor communities, when user data is sold or monetized according to personal characteristics.

1. The Origins of the Current Approach

The NLRB currently groups employees based on a series of factors that have their roots in a traditional, physical worksite with well-defined control structures. When determining whether a bargaining unit is appropriate, the NLRB looks to whether the workers that comprise the proposed unit share a “community of interest,” which the NLRB may decide with nearly unreviewable discretion.¹³⁶ In making this determination, the NLRB has historically considered a range of factors, including (a) “[d]egree of functional integration,” (b) “[c]ommon supervision,” (c) [t]he nature of employee skills and functions,” (d) “[i]nterchange and contact among employees,” (e) “[w]ork situs,” (f) “[g]eneral working conditions,” (g) “[f]ringe benefits,” and (h) “[e]mployer’s administrative organization.”¹³⁷ These factors are well-suited to serve as proxies for “communities” within traditional workplaces: individuals who work together in the same location are more likely to share interests and a collective identity; individuals who are under common supervision are more likely to share common grievances, and so forth. Some of the factors reflect the characteristics or activities of employees, but many of them rely on the traditional, hierarchical control structure of firms to approximate how workers might self-identify.

Under the NLRB’s adjudications in *PCC Structurals* and *Boeing*, workers that comprise a bargaining unit must share a community of interests that outweigh any similarities with

136. *South Prairie Constr. Co. v. Loc. No. 627 Int’l Union of Operating Eng’rs*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

137. NAT’L LAB. RELS. BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 142 (2017).

workers outside of the unit.¹³⁸ While this test makes it more difficult for workers to create small bargaining units, it also prevents workers from being forced into a unit that may not best represent their interests, or excluded from units that would do a better job. The NLRB has not always followed this rule: during the Obama administration, adjudications like *Specialty Healthcare* only looked to similarities within the bargaining unit, making it easier for smaller units to form.¹³⁹ And prior to the Taft-Hartley Act, the mere fact that workers had organized was considered sufficient to constitute a shared “community of interest.”¹⁴⁰ The current state of the law respects extent of organization as one relevant factor, but states that it cannot stand alone, leaving the NLRB to look to other proxies for labor community.¹⁴¹

There are at least two theoretical approaches that might inform an approach to labor communities: one economic, the other sociological.¹⁴² Under an economic analysis, a bargaining unit should contain workers that are close substitutes.¹⁴³ These workers are most likely to be in a similar bargaining position vis-à-vis their employer and to share grievances. Further, the accretion of market power that results from the agreement of market participants will be directly proportional to the substitutability of those participants. Under this analysis, the relevance of factors like work situs, or interchange among employees, makes intuitive sense. In a traditional workplace, it may make more sense for a New York-based worker to organize with another New York worker, rather than one in California, because the New York manager may care very little about what the worker in California does.

Another motivating theory is sociological: bargaining units should contain workers that share a common identity or sense of

138. PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 5 (Dec. 15, 2017); Boeing Co., 368 NLRB No. 67, slip op. at 3 (Sept. 9, 2019).

139. Specialty Healthcare and Rehabilitation Center of Mobile, 357 N.L.R.B. 934, 944–46 (2011).

140. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 101, § 9(c)(5), 61 Stat. 136, 144 (codified at 29 U.S.C. § 159(c)(5) (2018)).

141. *Id.*

142. Martin H. Malin, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 13–18 (2000).

143. *Id.* at 15.

kinship.¹⁴⁴ Workers who share social bonds are more likely to share values and cooperate in building constructive proposals for management. Under this analysis, factors like work situs and interchange among employees still make sense, but for a different reason. In a traditional workplace, workers who report to the same facility are more likely to befriend and converse with each other. It may make more sense for two New York workers to bargain together because they already know each other, and perhaps share similar values and objectives.

2. A New Approach for the Platform Economy

A primary challenge for labor law in the coming years will be to identify worker communities as traditional workplaces move online. The emergence of platform-mediated digital work squarely challenges the two assumptions upon which the traditional “community of interest” factors are based: namely, that workplaces are physical,¹⁴⁵ and rely on centralized and hierarchical control structures to deploy labor. Many contributors to online platforms will never see their co-contributors in person: consider, for instance, a YouTube content creator, who can accomplish all of her work from home. Further, most data platforms accept and monetize user contributions without placing users into specified departments or under the responsibility of company executives. Rather, much of the supervision often falls to algorithms that monitor the entire platform.

This problem is similar to the original question of how workers for common carriers—like railroads and airlines—might organize and be regulated.¹⁴⁶ These workers, too, lacked the physical connections of a shared workplace, and could move between different administrative units of a single business. The ultimate solution—the Railway Labor Act—endorsed a national form of bargaining under which any employee involved in a “craft or trade,” regardless of location, could form a bargaining unit.¹⁴⁷ A similar regulatory framework, relying on nationwide

144. *Id.* at 16–18.

145. The move to remote work during the COVID-19 pandemic also puts pressure on this assumption.

146. See Malin, *supra* note 142, at 33–37.

147. See 45 U.S.C. § 152 (2018); see also Allied Pilots Ass’n, 22 N.M.B. 331, 426, 432–33 (1995) (holding that various carriers are classified as one transportation system).

bargaining, could be created for data workers, as discussed in the next Section. But it is likely that smaller-scale bargaining would precede a national effort.

In the data economy, and in particular the market for passively produced user information, a user's personal, identifying characteristics—such as age or residence—are relevant for organizing to a much greater extent than in a traditional workplace. Labor law has traditionally disfavored creating bargaining units along demographic characteristics,¹⁴⁸ preferring groupings based on an employer's control structures. But these control structures will be much less obvious as work moves online.

User contributions to platforms are frequently grouped and monetized based on demographic characteristics, creating constituencies along those lines. Consider, for instance, the Cambridge Analytica data breach, which disproportionately affected Facebook users from particular states: California, Texas, and Florida users were most represented in the leaked data.¹⁴⁹ If users in Florida—who might perceive their votes as especially important given their swing-state status—wanted to lobby for stricter regulations on how Facebook protected their data, that geographic grouping would be coherent from both an economic and sociological perspective. For a political strategist, data on Florida voters cannot be interchanged with data on California voters, and Floridians may have a sense of collective identity and kinship predicated on where they live and their importance to national elections. This is all true even though Facebook may not treat Floridians any differently in how they interact with the platform, or subject them to any different types of control or supervision. What differentiates users is how their inputs—namely, data—are deployed by the platform, often in ways that make them non-substitutable.

As the data economy grows, it may be appropriate to organize platform users according to user demographics, when passive user data is marketed and sold along those very demographic factors. In addition to situations where the

148. See NAT'L LAB. RELS. BD., *supra* note 137, at 149 (listing cases in which the NLRB declined to separate laborers into units based on age, sex, or race).

149. Richard Nieva, *Most Facebook Users Hit by Cambridge Analytica Scandal Are Californians*, CNET (June 13, 2018, 1:27 PM), <https://www.cnet.com/news/most-facebook-users-hit-by-cambridge-analytica-scandal-are-californians>.

relevance of personal characteristics may be obvious—like the Cambridge Analytica example above—regulators can look to the structure of the data tables shared by platforms with purchasers or users of its data, as a signal of what fields may be relevant to those purchasers or users. For instance, if credit card data is sold with the user’s location and age, it is likely that user data may be deployed differently depending on those characteristics. Under *PCC Structurals*, workers proposing bargaining units will still need to demonstrate that the commonalities within their group outweigh the commonalities across groups.¹⁵⁰ For instance, if a group of Facebook users with a certain eye color decided to make a concerted complaint against the platform, it is unclear why their eye color creates a community of interest when Facebook’s platform itself does not facially distinguish between eye colors. In this way, the *PCC Structurals* standard may be useful in ensuring that bargaining units do not become arbitrarily small.

For more highly organized platforms like Facebook, and others at the top of the spectrum in Figure 2, the platform’s own data on user interactions and groupings will be informative, if not dispositive, to understanding how users group themselves. Tools like Facebook groups allow users to define their own communities and interest groups, and may reveal shared values in a way that is relevant for structuring bargaining units.

As discussed, it is unclear whether the NLRA will ever be amended to encompass a greater number of workers, and so the question of how the NLRB will define bargaining units in the platform economy may be unnecessary to answer. But even short of amendments to the NLRA, these questions of identity in a digital workplace may arise anyway if remote work continues to become more popular among workers traditionally considered employees.¹⁵¹

B. SECTORAL BARGAINING

Because enterprise-level bargaining tends to fragment worker bargaining power along firm lines and is generally

150. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 9 (Dec. 15, 2017).

151. See Kim Parker et al., *How the Coronavirus Outbreak Has—and Hasn’t—Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work> (describing the increased prevalence of work from home and shifts in preferences).

incapable of addressing sector-wide labor grievances, labor activists have made the case for sector-wide, or sectoral bargaining, as a way of ensuring fair compensation and treatment across an industry.¹⁵² While sectoral bargaining can take on a variety of forms, it usually relies on governmental authority to extend protections beyond the group of workers that lobbied for them, to the industry as a whole.¹⁵³ For example, in a workers' board, worker representatives consult with business leaders and government officials to propose regulations to government agencies, which can enact the regulations as law.¹⁵⁴ While enterprise-level bargaining is the default under the NLRA, sectoral bargaining is common in many European countries¹⁵⁵ and Australia, where it has been credited with increasing worker wages and decreasing inequality.¹⁵⁶ Workers' boards are gaining traction in the United States, where many states have enacted statutes authorizing them.¹⁵⁷ In addition to augmenting worker bargaining power with the authority of the government, sectoral bargaining reduces the likelihood that any single employer will be competitively disadvantaged by worker organizing, because any concessions will also be imposed on competitors.¹⁵⁸

Because sectoral bargaining works by finding common grievances within large worker bodies, it may be especially relevant for passive data workers. Recall that this Article defines passive data work as the unconscious generation of data

152. See, e.g., Madland, *supra* note 134 (discussing how sectoral bargaining can create even more positive change than enterprise bargaining).

153. See *id.*

154. See Kate Andrias, David Madland, & Malkie Wall, *A How-To Guide for State and Local Workers' Boards*, CTR. FOR AM. PROGRESS 1 (Dec. 2019), <https://cf.americanprogress.org/wp-content/uploads/2019/12/Wage-Board-Report.pdf>.

155. Dylan Matthews, *Europe Could Have the Secret to Saving America's Unions*, VOX (Apr. 17, 2017, 9:30 AM EDT), <https://www.vox.com/policy-and-politics/2017/4/17/15290674/union-labor-movement-europe-bargaining-fight-15-ghent>.

156. Arindrajit Dube, *Using Wage Boards to Raise Pay*, ECONOMISTS FOR INCLUSIVE PROSPERITY 4 (Dec. 2018), <https://econfp.org/wp-content/uploads/2019/02/4.Using-Wage-Boards-to-Raise-Pay.pdf>.

157. See Andrias, Madland & Wall, *supra* note 154, at 4–5 (quoting various state statutes); Andrias, *supra* note 129, at 46–47 (describing the “Fight for \$15” minimum wage movement in the United States as a form of sectoral bargaining).

158. See Matthews, *supra* note 155.

in the course of platform use: individuals who use Google Search, for instance, produce data that is useful and monetizable by the firm, but that data is largely a byproduct of platform use, as opposed to a service or conscious contribution made by the user. While these sorts of users contribute value to platforms and may have grievances directed toward the platforms, organizing them through a traditional enterprise-bargaining model would be difficult, because any given platform will have countless passive contributors, and their interactions with the platform will be intermittent. Coordinating a vast and un-organized workforce through NLRB-approved bargaining units would be challenging, and each platform would be required to negotiate with each successful unit, entailing significant coordination and negotiation costs. Sectoral bargaining would combine many of those hypothetical negotiations into one, under the supervision of the government and led by representative platform users.

States interested in extending protections to data workers can enact legislation authorizing the use of workers' boards, as has been done in California, Colorado, and New Jersey.¹⁵⁹ States could then create a data work board, or more likely establish boards concerning specific types of data work. As in other sectors, representatives from government, labor, and business would negotiate proposed regulations on these topics, which would then be passed on for consideration by a governmental agency.

One challenge in enabling sectoral bargaining for platform users will be identifying representative users to take part in worker board negotiations. Traditionally, many workers' boards have drawn their representatives from existing labor organizations, who can use their member bases as evidence that they represent a significant portion of workers.¹⁶⁰ Until enterprise-level bargaining among data workers progresses further, data workers' boards would likely have to rely on other means of choosing representatives.¹⁶¹ Given the homogeneity of passive data workers as a class—and the fact that large numbers

159. Dylan Matthews, *Governors in These States Can Give Workers a Raise With the Stroke of a Pen*, VOX (July 19, 2019, 12:00 PM), <https://www.vox.com/future-perfect/2019/7/19/20698079/wage-boards-union-labor-movement-california-colorado-new-jersey>.

160. See Andrias, Madland & Wall, *supra* note 154, at 6 (describing ways to select members of the board).

161. *Id.*

of workers will be governed by similar terms and conditions—these alternative selection mechanisms may still produce representatives who can competently negotiate for their class.

Another challenge is that sectoral bargaining exacerbates the free-riding problem of collective bargaining, since workers do not need to be a part of a union or pay dues to benefit from negotiations.¹⁶² For this reason, sectoral bargaining works best in countries with already high union density.¹⁶³ Many Scandinavian countries give unions responsibility for running unemployment insurance, under the “Ghent system”—this creates an obvious incentive for workers to join unions, and these countries have among the highest union densities in the world.¹⁶⁴ Therefore, the success of sectoral bargaining may be tied to the success of enterprise-level bargaining.

One crucial benefit of sectoral bargaining is states and localities can legislate to permit such bargaining without fear of federal preemption. While state legislation that touches on traditional enterprise-level bargaining for employees is broadly preempted under the NLRA, sectoral bargaining does not encroach on the NLRB’s jurisdiction and may be pursued independent of federal action.¹⁶⁵ Therefore, workers who find an unsympathetic audience in the federal government can pursue state action, and vice versa.

Despite its limitations, sectoral bargaining presents a useful alternate strategy to labor activists if federal action is not forthcoming, and is especially useful within the context of passive data work given its ability to affect large worker bodies at once. Although sectoral bargaining benefits from enterprise-level bargaining—both because the latter increases union density and eases the selection of representatives—the reverse may be true as well, since sectoral bargaining can galvanize more workers to get involved.¹⁶⁶

162. See Matthews, *supra* note 155 (“Sectoral bargaining creates a free-rider problem even bigger than our current free-rider problem at the enterprise level, because all workers benefit from the higher wages that are negotiated . . . [s]o you have a strong disincentive to pay dues.”).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

V. CONCLUSION

As the platform economy grows and data becomes an increasingly valuable commodity, individuals who contribute their data increasingly desire a say in how their data are used. This Article has made the case that labor law can provide a framework for granting active contributors a collective voice, but doing so will require reconceptualizing both what it means to be a worker or employee, and how collective bargaining should occur. Under current law, the definition of “employee” that bounds the protections of the NLRA limits collective bargaining protections to workers who are both compensated and controlled by their hirers, excluding individuals who contribute for free or lack a formal supervisor. Once classified as an employee, workers are permitted to form bargaining units within physical plants or supervision units, but many workers today neither work in a fixed physical location nor report to a traditional supervisor.

In response, state and federal legislators should consider enabling uncompensated workers to organize, or expanding the requirement that organizing workers be controlled in the common-law sense. Further, organizers and regulators may decide to define communities of interest along personal characteristics when user data is monetized or deployed along demographic lines. These changes have the potential to facilitate important conversations between stakeholders in the platform economy and extend the relevance of labor law as work moves online.