TEMPLE LAW REVIEW

VOL. 98 NO. 1 **FALL 2025**

ARTICLES

OPEN THE BOOKS!

Kyle Bigley[*]

ABSTRACT

The eclipse of collective bargaining by individual bargaining as the predominant wage-setting institution in the United States has proved disastrous for work law's distributional goal of vertical equity—ensuring that workers receive a fair share of the firm's joint product—as evidenced by labor's declining share of income and increasing labor income inequality. Because of the impasse of labor law reform and labor law's broad preemptive scheme, work law's vertical equity mantle has fallen to state employment law, which has traditionally been reluctant to regulate individual bargaining.

In response to a recent spate of state "pay transparency laws," this Article argues that workplace information transparency offers state policymakers a means of advancing vertical equity. Broadly, these laws grant workers the right to discuss wages with coworkers and require employers to post pay information in job postings. To date, the central purpose of these laws has been to promote work law's other distributional goal—horizontal equity—or the principle of equal pay for equal work. To that end, the laws appear to have made admirable progress in reducing the gender pay gap. However, despite preliminary economic evidence that pay transparency may reduce overall pay, the legal scholarship has not yet considered these laws' implications for vertical equity.

To fill this gap, this Article engages in a "sympathetic critique" of pay transparency's effects on vertical equity and offers a policy proposal to avoid the unintended consequence of pay reduction. It argues that although pay transparency

* Associate, Bloch & White, LLP. B.A., University of Pennsylvania, J.D., Yale Law School. This Article reflects only my personal views and not those of my employer or clients. I am enormously grateful to the student workers of the *Temple Law Review* team for their hard work and incisive editing on this piece and to Kayla Morin for her thoughtful commentary. All errors are my own.

erodes some informational asymmetries between workers and employers, extant laws may make employers less likely to increase wages, facilitate wage-suppressing collusion, and fail to address broader informational asymmetries that emerge from nonpay financial information and other sources of employer labor market power.

To address these deficiencies, this Article proposes a comprehensive transparency policy that would (a) require employers to furnish both pay and nonpay financial information to workers on a regularized basis, and (b) facilitate union organization. In support of this policy, it offers a novel justification for transparency grounded in wage-determination and social egalitarian theory. In so doing, this Article shows how the transparency project might at once advance both vertical and horizontal equity.

TABLE OF CONTENTS

INTRODUCTION

With hydraulic-like effect, the steep decline in unionization and collective bargaining over the past four decades has precipitated the predominance of *individual bargaining*[1] between employers and nonunion workers as the central means of wage setting in the United States. Disastrously for U.S. workers, however, this wage-setting regime has corresponded with workers receiving declining shares of national income and facing increasing labor inequality.[2] Faced with these trends, U.S. work law—the body of law that governs the labor relationship, including but not limited to, labor and employment law—risks abdicating one of its central distributional objectives: the equitable distribution of a firm's joint product between labor, management, and capital owners, or what this Article calls *vertical equity*.

Work law's crisis is acute. Labor law reform faces a dead end at both the federal and state levels,[3] facing political impasse (or worse) and a stultifying preemption scheme, respectively. Meanwhile, employment law has traditionally regulated individual bargaining by imposing substantive minimum mandates on employers—such as antidiscrimination duties, limits on discharge, and minimum wage-and-hour standards—rather than by facilitating worker collective action to boost wages above the mandated minimum.[4]

1. As used here, individual bargaining refers to nonunion wage setting between workers and employers, although nonunion workers can legally jointly request wage increases from their employers. I use "individual bargaining" capaciously to encompass what economists call both "wage bargaining," wherein employers and workers bargain over a wage, and "wage posting," where employers post wages on a take-it-or-leave-it basis. *See, e.g.*, Robert E. Hall & Alan B. Krueger, *Evidence on the Determinants of the Choice Between Wage Posting and Wage Bargaining* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16033, 2010), https://www.nber.org/system/files/working_papers/w16033/w16033.pdf [https://perma.cc/T88Q-7E2F]. This Article's discussion of wage setting extends to both job search for posted positions and wage determination for incumbent workers.

2. *See infra* Part I.B.

3. For shorthand, this Article generally uses "state" to refer to both the state and local levels.

4. This is admittedly an oversimplification, particularly with minimum wage law, which intends to promote high-productivity work, *see* Brian Callaci, *Competition Is Not the Cure*, BOSTON REV. (Nov. 23, 2021), https://www.bostonreview.net/articles/competition-is-not-the-cure/ [https://perma.cc/8D8P-GGWM], and once created a role for workers' collective action, *see* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 625–26 (2019) [hereinafter Andrias, *An American Approach to Social Democracy*]. As Ben Sachs argues, in addition to serving as "another arrow in the quiver available to workers and unions" or as a "means for the union to prove its mettle to employees," employment law can also function as a "legal architecture for workers' collective action" by functioning as the "locus of the workers' collective activity and as the legal mechanism which protects that collective activity from coercive attempts to curtail it." Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2707 (2008). See *infra* Part I.A for a broader discussion of employment law's relationship to vertical equity.

This Article argues that a recent spate of state and local "pay transparency" laws offers both an opening and an imperative for employment law to address work law's goal of vertical equity.[5] Broadly, these laws require employers to post pay ranges for new positions or permit employees to discuss wages with one another under so-called right-to-talk laws.[6] Policymakers have enacted these laws primarily to narrow the gender and racial pay gaps,[7] an element of what this Article identifies as work law's other central distributional goal, *horizontal equity*, or the principle that workers should receive equal pay for equal work, regardless of workers' individual characteristics. By mitigating gendered and racialized negotiating dynamics, these laws appear to be making admirable progress in reducing gender and racial pay gaps.[8] And, as Professor Orly Lobel argues, these laws mark an important shift in employment law, moving "beyond the substantive prohibition of pay discrimination to focus on process," and from a "litigation framework" to a "governance approach that encourages dynamic, ongoing and proactive efforts by

5. There has been momentum at the federal level for pay transparency too. Congress proposed a bill that would require employers to disclose salary ranges for jobs. *See, e.g.*, Salary Transparency Act, H.R. 1599, 118th Cong. (2023). The Federal Acquisition Regulatory Council issued a proposed rule on January 30, 2024, that would require U.S. federal contractors and subcontractors to post pay ranges, although the Council withdrew it at the end of the Biden administration. Federal Acquisition Regulation: Pay Equity and Transparency in Federal Contracting, 89 Fed. Reg. 5843, 5844–45 (proposed Jan. 30, 2024) (withdrawn Jan. 8, 2025). Because of the current federal balance of power, this Article proposes a state-level policy; however, the policy, its justification, and the broader discussion of pay transparency's potential for increasing wages could apply equally at the federal level if policymakers are willing to take up the issue.

6. *See infra* Part II.B. One promising recent state-law development is a Colorado law effective on February 1, 2025, which, among other things, requires rideshare companies to disclose to drivers the price the consumer paid for the ride and the amount the rideshare company paid to the driver, excluding tip. S.B. 24-075, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024), 2024 Colo. Legis. Serv. Ch. 409 (West) (to be codified at COLO. REV. STAT. ANN. § 8-4-127 (West 2025)). The U.S. District Court for the District of Colorado denied Uber's motion for a preliminary injunction enjoining the law, where Uber pressed First Amendment concerns. *See* Order Denying Motion for Preliminary Injunction at 7–8, Uber Techs., Inc. v. Moss, No. 25-cv-00096 (D. Colo. Jan. 31, 2025), 2025 WL 1420940, at *4. As of publication, the effects of this law are unknown.

7. *See, e.g.*, Office of Federal Procurement Policy; Federal Acquisition Regulation, Pay Equity and Transparency in Federal Contracting, 89 Fed. Reg. 5843, 5848 (proposed Jan. 30, 2024) (withdrawn Jan. 4, 2025) (proposing pay transparency in federal contracting based on state-level evidence that "salary range disclosure requirements reduce gender and racial/ethnic pay gaps by reducing pay secrecy and helping workers negotiate"); Nancy J. Puelo, Lauren C. Schaefer & Kimia Pourshadi, *Navigating the Complexities of Pay Transparency Legislation*, NAT'L L. REV. (Jan. 13, 2025), https://natlawreview.com/article/navigating-complexities-pay-transparency-legislation [https://perma.cc/EDN2-LGM3] ("Often expanding on existing pay equity laws, many state and local governments have enacted or proposed legislation with the stated goal of reducing pay inequity and combating wage discrimination."); Kristen "Shaw" Mettler, *Effective Pay Transparency Requires Benefit Transparency*, HARV. L. REV. BLOG (Nov. 21, 2024), https://harvardlawreview.org/blog/2024/11/effective-pay-transparency-requires-benefit-transparency-h-4890/ [https://perma.cc/BZW2-8KCS] (explaining that pay transparency can help shrink gender and racial pay gaps); *Pay Range Transparency Is Critical for Driving Pay Equity*, NAT'L WOMEN'S L. CTR. (Mar. 15, 2024), https://nwlc.org/resource/salary-range-transparency-reduces-gender-wage-gaps/ [https://perma.cc/WG85-5XEG] ("The outdated practice of keeping pay secret allows discrimination and unjustified pay gaps to flourish and keeps employees from trusting they are paid fairly.").

8. *See infra* Part II.B.

private organizations and stakeholders."[9] The horizontal equity goals of pay transparency are undoubtedly critical and, for good reason, have attracted the bulk of the scholarship.[10]

This Article expands the focus of extant scholarship to argue that transparency—if done effectively—offers state and local policymakers a means of using *employment law* to address work law's distributional goal traditionally associated with labor law, vertical equity.[11] This project is critical because preliminary economic evidence suggests that *certain forms* of pay transparency—for instance, right-to-talk laws—may reduce overall pay, even while equalizing pay between similarly situated workers.[12] In its current form, then, transparency may present policymakers with an uncomfortable tradeoff between horizontal and vertical equity. But as this Article argues, workers can have their cake and eat it, too. To do so, however, policymakers must be clear-eyed about the promise and limitations of transparency, both as currently implemented in law and as a broader project.

In arguing that transparency can address work law's vertical equity goal, this Article makes three central contributions to the transparency literature. First, it offers a sympathetic critique of the transparency project by evaluating its vertical equity implications.[13] Although pay transparency may erode some informational asymmetries between workers and employers, it suffers from several significant limitations.[14] For

---

9. Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 549 (2020).

10. Since 2011, when Professor Cynthia Estlund observed that "the idea of mandatory disclosure has made barely a cameo appearance in the field of labor and employment law," Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2011) [hereinafter Estlund, *Just the Facts*], a burgeoning transparency literature has developed, primarily focused on transparency's implications for reducing gender and racial pay gap, *see, e.g.*, Stephanie Bornstein, *Confronting the Racial Pay Gap*, 75 VAND. L. REV. 1401, 1443–50 (2022) (explaining transparency's potential for reducing racial pay gaps); Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 293 (2021) (proposing "affirmative disclosure requirements on larger employers in the areas of unequal pay by sex and race, lack of promotion of women and racial minorities, and sexual and racial harassment" to improve the enforcement of antidiscrimination law); Lobel, *supra* note 9, at 547 (arguing that pay transparency moves beyond substantive prohibition of pay discrimination to a focus on process).

11. This approach to work law—using employment law *means* to fulfill traditional labor law *ends*, vertical equity and collective action—builds on scholarship that has challenged the bifurcation of work law into labor and employment law. *See, e.g.*, Jonathan F. Harris, *Consumer Law as Work Law*, 112 CAL. L. REV. 1, 9 (2024) (demonstrating the relevance of consumer law for work law); Andrias, *An American Approach to Social Democracy*, *supra* note 4, at 629 (unearthing the Fair Labor Standards Act's (FLSA) relevance for collective action traditionally associated with labor law); Sachs, *supra* note 4, at 2687 (tracing workers' turn to the employment law statutes of FLSA and Title VII to facilitate worker organization and collective activity, a "legal architecture we conventionally call labor law"). Relatedly, in an example of what Professors Kate Andrias and Ben Sachs call "jurisdiction shifting," this Article's policy proposal offers state policymakers a means of advancing federal labor law goals. Kate Andrias & Benjamin I. Sachs, *The Chicken-and-Egg of Law and Organizing: Enacting Policy for Power Building*, 124 COLUM. L. REV. 777, 782 (2024).

12. *See, e.g.*, Zoë B. Cullen & Bobak Pakzad-Hurson, *Equilibrium Effects of Pay Transparency*, 91 ECONOMETRICA 765, 768 (2023) [hereinafter Cullen & Pakzad-Hurson, *Equilibrium Effects*] (finding that although the enactment of right-to-talk laws reduced the gender pay gap, they also reduced wages by about 2% overall); Zoë B. Cullen, *Is Pay Transparency Good?*, 38 J. ECON. PERSPECTIVES, Winter 2024, at 153, 154–55 [hereinafter Cullen, *Is Pay Transparency Good?*] (collecting studies).

13. *See infra* Part II.C.

14. See *infra* Part II.A for a discussion of pay transparency's roots in information economics and monopsony theory.

example, pay transparency affects employers' behavior by (a) producing costly spillover effects that make employers less likely to increase wages, and (b) facilitating wage-suppressing collusion between employers. Additionally, because information-disclosure duties are presently limited to *pay information* rather than broader *financial information*,[15] pay transparency does not inform workers of employers' ability to pay, thereby failing to fully reduce informational asymmetries at the point of bargaining.[16] Finally, transparency's focus on *information* risks overlooking other sources of labor market power. In other words, if transparency fails to increase workers' bargaining power, it will also likely fail to increase wages. Worse, if transparency increases employers' access to labor market information, employers may be better able to act on that information by virtue of their superior bargaining strength.[17] While information *may* be power,[18] transparency must also work to boost workers' bargaining power.

Second, this Article offers a normative justification for a more comprehensive transparency project to facilitate workers' bargaining for higher wages. Rather than grounding transparency in market failure,[19] which may unintentionally reproduce objectionable aspects of neoclassical theory,[20] it argues that transparency is necessary because of the difficulty of attributing to the various "factors of production" their contribution under conditions of "interdependent production."[21] Because of the difficulty of setting pay equal to "contribution," typically defined as marginal product, workers must be able to "monitor[]" the fairness of, and "make claims" on, the firm's division of joint product between various stakeholders, which broader transparency provides.[22] This Article further grounds workers' right to this information in a social egalitarian theory of

15. This information includes the firm's overall wage structure across seniority levels, revenue, profits, and costs.

16. U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 6 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/5EEC-K66Y] (providing an overview of the bargaining model).

17. *See, e.g.*, Lobel, *supra* note 9, at 600 ("[T]o grant equal rights in the absence of equal opportunity is to strengthen the strong and weaken the weak." (alteration in original) (quoting LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 213 (1985))).

18. *See generally* BENJAMIN HARRIS, THE HAMILTON PROJECT, INFORMATION IS POWER: FOSTERING LABOR MARKET COMPETITION THROUGH TRANSPARENT WAGES 4 (2018), https://www.brookings.edu/wp-content/uploads/2018/02/es_2272018_information_is_power_harris_pp.pdf [https://perma.cc/7RNN-R94J] (arguing that wage transparency can be used as a strategy for improving worker bargaining power).

19. *See, e.g.*, Estlund, *Just the Facts*, *supra* note 10, at 369–73 (arguing that "disclosure of information to employees and prospective employees can help make employment contracts and labor markets more efficient as to terms and conditions that are left to contract by better matching employee preferences and employers' proffered terms of employment"); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 787–88 (2014) [hereinafter Estlund, *Extending the Case*].

20. Sanjukta Paul, *Charting the Reform Path*, 120 MICH. L. REV. 1265, 1271 (2022); *see* Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 72, 73 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022).

21. *See infra* Part III.A.

22. Jake Rosenfeld & Patrick Denice, *The Power of Transparency: Evidence from a British Workplace Survey*, 80 AM. SOCIO. REV. 1045, 1047–49 (2015).

the firm, arguing that labor's status as, at the very least, a coequal, constitutive part of the firm entitles it to relevant information about its shared enterprise.

Third, this Article proposes a comprehensive state-level transparency law to aid workers' individual-bargaining efforts and facilitate workers' collective organization into unions.[23] Unlike the extant transparency law and scholarship, which has focused almost exclusively on *pay* transparency,[24] this Article proposes broad disclosure of both pay and *nonpay financial information* regarding the firm's profitability, productivity, revenues, and cost breakdowns. This disclosure would facilitate vital "monitoring" and "claim-making" functions by informing workers of the size and distribution of the firm's joint product between stakeholders. And, in recognition of the limitations of nonunion bargaining, the law's comprehensive nature could function as a powerful union organizing tool by revealing injustices in pay.[25]

The Article's argument proceeds as follows. Section I provides the theoretical groundwork and frames the problem. It first describes work law's regulation of the two wage-setting regimes—collective bargaining through labor law and individual bargaining through employment law—and identifies vertical and horizontal equity as two of work law's central distributional goals. Next, it argues that the decline of collective bargaining has undermined work law's traditional goal of vertical equity, as evidenced by the declining labor share of national income and increasing labor income inequality. Section I concludes by sketching the dilemma facing policymakers: With labor law reform either a political dead end or often preempted, the most likely policy avenue to promote vertical equity is state-level employment law. However, because employment law has historically subjected individual bargaining to regulation, primarily through minimum substantive mandates, promoting vertical equity through state employment law will require new imagination and creativity.

Section II critically evaluates recent state- and local-level transparency laws, which offer a promising opening for policymakers to reconsider the role of employment law in addressing vertical equity. Drawing on recent economics scholarship, Section II finds that although pay transparency reduces the gender pay gap—the laws' primary concern—it may also reduce overall pay. Animated by this concern, this Section considers the promise and limitations of transparency as a means to increase workers' wages. It argues that current pay transparency law fails to reduce informational asymmetries that emerge from employers' nonpay financial information. Moreover, where pay transparency does not boost workers' bargaining power, transparency may fail to meaningfully increase wages or even produce lower wage levels.

In light of this analysis, Section III advances its novel justification and policy proposal for comprehensive workplace information transparency. It sketches this proposal and argues that more comprehensive financial transparency can facilitate

23. *See infra* Part III.B.

24. *See, e.g.*, Michael M. Oswalt, Jake Rosenfeld & Patrick Denice, *Power and Pay Secrecy*, 99 IND. L.J. 43, 46–48 (2023); Lisa J. Bernt, *Workplace Transparency Beyond Disclosure: What's Blocking the View?*, 105 MARQ. L. REV. 73, 103–20 (2021); Estlund, *Extending the Case, supra* note 19, at 781–82.

25. *See infra* Part III.C.

workers' collective organization into unions, which countervails potential employers' responses.[26] A brief conclusion follows.

I. WORK LAW, INDIVIDUAL BARGAINING, AND THE DECLINE OF WORKER POWER

This Section lays the groundwork for the rest of the Article by identifying the vertical equity problem it seeks to address and arguing for the urgency of state employment law to address work law's historic vertical equity objective.

First, it provides an overview of work law, the wage-setting regimes that work law channels, and work law's two central distributional objectives; vertical and horizontal equity. Second, it argues that with the decline of collective bargaining, work law risks abdicating its historic goal of vertical equity, as the labor share of national income has declined and labor income inequality has skyrocketed. Third, to set up the Article's policy intervention, it argues that the most likely policy avenue for promoting vertical equity is not with labor law—the historic repository for this goal—but with state employment law. This analysis frames Section III's state-law transparency proposal to address vertical equity.

A. Work Law, Wage-Setting Regimes, and Work Law's Distributional Goals

United States work law is the patchwork of federal and state law that governs the labor relationship.[27] Traditionally, work law has been broken down into two subfields: labor law, which governs collective action among workers, most notably unionization and collective bargaining, and employment law, which grants rights to workers "on an individual basis, irrespective of their membership in a union."[28] Labor law encompasses the National Labor Relations Act (NLRA), Railway Labor Act, and various public-sector labor laws. Employment law includes antidiscrimination law, such as the federal Title VII and the Equal Pay Act and state and local analogues; wage-and-hour law, such as the Fair Labor Standards Act (FLSA); and federal and state law carve-outs to the "employment-at-will" default, such as whistleblowing law and common-law claims.[29] The distinction between these two subfields has rested on their "fundamentally different approaches to protecting workers: employment law bestows individual rights, whereas labor law facilitates collective power" by supporting unionization.[30] Broadly, these two

26. This Article does not address potential legal challenges to its proposal.

27. While a diverse spate of "areas of law" affect the labor relationship—from consumer law and antitrust law to law and macroeconomics (such as monetary and fiscal policy) and state common law governing property rights and contract law—this Article's focus is cabined to what we call "labor and employment law" and two of its central distributional goals.

28. Andrias, *An American Approach to Social Democracy*, *supra* note 4, at 631–32. Other scholars have further divided "employment law" into two further categories, antidiscrimination law and "individual employment law," a catch-all category that includes statutory and common-law rights of individual employees. *See, e.g.*, Brishen Rogers, *What Does Social Equality Require of Employers? A Response to Professor Bagenstos*, 112 MICH. L. REV. 83, 83 (2014) [hereinafter Rogers, *What Does Social Equality Require of Employers?*]; Brishen Rogers, *Capitalist Development, Labor Law, and the New Working Class*, 131 YALE L.J. 1842, 1849 n.39 (2022); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 165 (2007).

29. Fischl, *supra* note 28, at 166.

30. Andrias, *An American Approach to Social Democracy*, *supra* note 4, at 632.

work law subfields map onto the two primary legal-economic regimes for wage setting in the United States: collective bargaining under labor law and individual bargaining subject to minimum mandates under employment law.[31]

The labor law regime governs collective bargaining. Unions formed and recognized under the NLRA may set wages with private-sector employers through collective bargaining.[32] In broad strokes, a union representing a majority of a group of workers appropriate for collective bargaining agrees to a collective bargaining agreement (CBA) covering the entire group of workers.[33] Unions and employers may use economic weapons, such as strikes and lockouts, respectively, to influence the terms of the agreement. Significantly, labor law primarily governs the procedures of collective bargaining—for example, requiring both parties to bargain in good faith[34] or to disclose information to one another,[35] and prohibiting the employer from changing employment terms unless the parties have reached "impasse"[36]—while neither governing the terms of the agreement nor requiring the parties to reach an agreement at all.[37]

Nonunion workers and employers set wages via "individual bargaining," where "bargaining" includes instances where both (a) wages are actually negotiated with offers and counteroffers, and (b) employers posting wages on a "take-it-or-leave-it opportunity."[38] Generally, individual bargaining is subject to light regulation by employment law's minimum substantive mandates, which include prohibitions on discrimination in the terms of employment or requirements that employers pay a minimum wage.[39] Notwithstanding this important body of doctrine, employers and workers are generally "free" to reach any agreement they choose, so long as it does not violate these substantive mandates. Indeed, employers are typically free to "offer any wage above or equal to the mandated minimum wage" or refuse to bargain at all.[40] As one court explained, the employer is "free to establish any terms and conditions it chooses, subject only to the forces of the marketplace."[41]

---

31. *See generally* Kenneth G. Dau-Schmidt & Carmen L. Brun, *Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship*, *in* 1 THE MECHANISMS FOR ESTABLISHING AND CHANGING TERMS AND CONDITIONS OF EMPLOYMENT 21, 21–35 (2004), *reprinted in* LABOUR LAW IN MOTION: DIVERSIFICATION OF THE LABOUR FORCE & TERMS AND CONDITIONS OF EMPLOYMENT 183, 183–203 (Roger Blanpain, Takashi Araki & Shinya Ouchi eds., 2005) (outlining the regimes).

32. 29 U.S.C. §§ 151–169.

33. *Id.* § 159(a).

34. *Id.* § 158(d).

35. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring in part and dissenting in part).

36. NLRB v. Katz, 369 U.S. 736, 742–43 (1962).

37. H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970).

38. Hall & Krueger, *supra* note 1, at 1–2, 4.

39. *See* Brett H. McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887, 895 (2022) (describing the legal mandates placed on employers in determining employee compensation).

40. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 83–84 (2022).

41. Bentson Contracting Co. v. NLRB, 941 F.2d 1262, 1269 (D.C. Cir. 1991).

Broadly, one may map labor law onto collective bargaining and employment law onto individual bargaining. Labor law polices a stark divide between collective bargaining and individual bargaining because "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime."[42] On the one hand, it is an unfair labor practice for an employer to "bargain[] with a union that does not have majority support."[43] On the other, the NLRA largely extinguishes individual bargaining by prohibiting unionized employees from individually negotiating with employers and employers from seeking to bargain with individual employees absent the union's consent.[44] Meanwhile, groups of nonunion employees may present their employers with joint wage demands—and are protected from retaliation under the NLRA for doing so[45]—but the labor law duty to bargain does not attach to the nonunion employer.[46]

Notwithstanding work law's differential regulation of bargaining regimes, scholars have cautioned against a strict bifurcation between labor and employment law, which "reflects and reinforces an increasingly false opposition between the struggle for workplace democracy and the struggle for racial, gender, and other forms of justice in the workplace and beyond."[47] As a policy matter, adhering to a strict divide between labor and employment law risks overlooking potential areas for cross-pollination between the subfields; consequently, scholars have attempted to rethink the relevance of employment law for labor law.[48] In the same vein, this Article seeks to demonstrate the relevance of state-level employment law not only for conventional distributional goals of labor law but also for labor law itself, specifically, the collective organization of workers into unions.[49]

Work law as a unified field has two central distributional components, what this Article calls *horizontal equity* and *vertical equity*, which are more traditionally associated with employment law and labor law, respectively.[50] However, as this Article attempts to demonstrate, employment law may also be useful in advancing vertical equity, an insight made possible by unifying labor and employment law.

Horizontal equity is the principle of "equal pay for equal work"—that workers performing the same work should receive equal compensation, regardless of the worker's identity or group membership, such as race and gender.[51] The concept most

42. Brown v. Pro Football, Inc., 50 F.3d 1041, 1054–55 (D.C. Cir. 1995).

43. Mingtree Rest., Inc. v. NLRB, 736 F.2d 1295, 1298 (9th Cir. 1984).

44. *Brown*, 50 F.3d at 1054; NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); J.I. Case Co. v. NLRB, 321 U.S. 332, 338–39 (1944).

45. NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 540 (6th Cir. 2000).

46. *See* Linden Lumber Div. v. NLRB, 419 U.S. 301, 310 (1974).

47. Fischl, *supra* note 28, at 169.

48. *See, e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 325 (2005) (proposing nonunion employee participation in firm governance to "straddle[] the conventional divide between labor law and employment law"); Sachs, *supra* note 4, at 2707.

49. *See infra* Section III.

50. For a similar distinction, see Tomasz Obloj & Todd Zenger, *The Influence of Pay Transparency on (Gender) Inequity, Inequality and the Performance Basis of Pay*, 6 NATURE HUM. BEHAV. 646, 646 (2022) (distinguishing between pay inequity and pay inequality).

51. *See, e.g.*, City of Los Angeles v. Manhart, 435 U.S. 702, 711–12 (1978) ("The Equal Pay Act requires employers to pay members of both sexes the same wages for equivalent work."); Stephanie Bornstein, *Equal*

straightforwardly invokes the challenge of gender- and race-based discrimination, where female workers or workers of color are paid less than their male and white coworkers for the same job, a key factor in the so-called gender and racial wage gaps.[52] Work law instantiates these principles largely through employment law's antidiscrimination mandates, such as the federal Equal Pay Act (EPA) and Title VII, which stand "for the straightforward proposition that 'employees doing equal work should be paid equal wages, regardless of sex.'"[53] Less directly, labor law, too, promotes horizontal equity through unionization, which reduces the gender wage gap for unionized workers by about half compared to nonunion workers and also erodes racial wage gaps.[54] These effects stem from both unions' formal legal duties and how unions wield their collective power, such as by gaining and disclosing pay information that may detect unequal pay, standardizing pay across workers, and bargaining for antidiscrimination provisions and grievance procedures.[55]

Work law's second central distributional objective is *vertical equity*, the idea that workers should receive a (contested) "fair share" of the joint product they produce through their work.[56] Vertical equity has two primary components: (1) the division of

---

Work, 77 MD. L. REV. 581, 585–86 (2018) (discussing the principle of "equal pay for equal work" in federal and state law). There is a broader debate about whether the proper inquiry for discrimination liability should be "equal work" or "comparable/substantially similar work." *See* Lobel, *supra* note 9, at 596–97. Whereas "equal pay" prohibits employers from "paying men and women different amounts for identical work if the only justification for the differential is sex," "comparable worth" would impose liability where "jobs of equivalent 'worth' or value to an employer or to society as a whole should be compensated equally even if the jobs are dissimilar in content." Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 891 (1986). Feminist scholars have argued for the "comparable worth" concept because dissimilar but equally valuable jobs might be paid differently because of discrimination—a higher-paying job is "largely male," such as electrician, while a lower-paying job is "largely female," such as nursing. *See* Paula England, *The Case for Comparable Worth*, 39 Q. REV. ECON. & FIN. 743, 743–44 (1999). Because this Article's focus is vertical equity, it largely sidesteps this important debate. For a discussion of pay transparency's implications for comparable worth, see Lobel, *supra* note 9, at 596–97.

52. Bornstein, *supra* note 51, at 585, 596–97 (noting that "[e]conomists now estimate that between one-third and one-half of both current pay gaps is attributable to two factors . . . : (1) occupational segregation by gender and race, and (2) stereotyping and discrimination" and recounting evidence that "even among the same field and *even the very same job*, women earn less on average than men and universally experience a pay gap"). The racial wage gap persists. *See, e.g.*, Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOC. SCI. 182, 182 (2018) (noting the income disparities between Black and white families remained nearly identical as of 2016 as they were in 1968); *cf.* Nancy Folbre, *Why the Gender Wage Gap Persists*, DEMOCRACY (Winter 2022), https://democracyjournal.org/magazine/63/why-the-gender-wage-gap-persists/ [https://perma.cc/3VRN-9NQA] ("Despite considerable progress since 1973, employed women in the United States still earned about 20 percent less per hour than men in 2019.").

53. Goodrich v. Int'l Bhd. of Elec. Workers, 815 F.2d 1519, 1523 (D.C. Cir. 1987) (quoting H.R. REP. NO. 309, at 2 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 688).

54. Kayla Patrick & Sarah David Heydemann, *Union Membership Is Critical for Equal Pay*, NAT'L WOMEN'S L. CTR. 1–2 (Mar. 2018), https://nwlc.org/wp-content/uploads/2016/02/Union-Membership-is-Critical-for-Equal-Pay-2018.pdf [https://perma.cc/QSV3-JEQ7].

55. Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST. (Apr. 3, 2017, at 08:00 ET), https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap/ [https://perma.cc/E9G5-7L3T].

56. *See* OTTO KAHN-FREUND, LABOUR AND THE LAW 6 (2d ed. 1977) ("The main object of [work law] has always been, and I venture to say will always be, to be a counter-vailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."). This Article

joint product between labor and capital, and (2) the division of labor income between different types of workers, for example, nonmanagerial and managerial workers. The interplay between these two constituent parts is significant: Firm A, in which 60% of joint product accrues to "labor," may seem to be more vertically equitable than Firm B, in which only 50% is paid out in labor compensation, but if a much higher share of labor income accrues to executive, managerial, and supervisory employees, Firm A may nonetheless be more vertically inequitable.[57]

Within work law, labor law is most obviously concerned with questions of vertical equity. By its own terms, the NLRA seeks to redress "depressing wage rates and the purchasing power of wage earners."[58] To that end, the core premise of labor law is that collective action can secure a greater share of the firm's joint product than individual action can alone.[59] Within employment law, the minimum-wage laws also instantiate an ideal of vertical equity: Congress enacted the federal FLSA "to provide 'fair labor standards' for employees, including those marginalized workers unable to exert sufficient leverage or bargaining power to achieve adequate wages in the absence of statutory protections."[60] Although antidiscrimination law is less obviously concerned with vertical equity, its goal of "assur[ing] equality of employment opportunities"[61] to all people "no matter [their] race, sex, or religious or ethnic background"[62] has vertical equity implications in pushing wages for all workers up. And employment law might indirectly facilitate the vertical equity goals by facilitating collective organization of workers.[63]

One might suppose that horizontal equity is more concerned with unjustified gender- and race-based inequality, while vertical equity is concerned with class-based inequality. To be sure, while horizontal equity does seek to redress overt forms of pay discrimination, vertical equity carries significant race and gender equity implications. Because of discrimination, labor market segmentation, and occupational segregation, many low-paying jobs and occupations tend to be dominated by female workers and workers of color;[64] consequently, increasing the share of income that accrues to labor

employs the term "vertical" not as a normative judgment about the relative value of the work that different workers perform within a firm but to capture the social reality created by the hierarchical organization of the capitalist firm, which unevenly distributes the joint product between shareholders or owners, managers, and workers.

57. Resolving the tension between these two is beyond the scope of this Article—the critical point is that work law seeks to ensure that workers, especially those at the bottom of the income distribution, receive sufficiently high wages.

58. 29 U.S.C. § 151.

59. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633–34 (2018) (Ginsburg, J., dissenting).

60. McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 247 (4th Cir. 2016).

61. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973), *modified*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

62. Ford Motor Co. v. EEOC, 458 U.S. 219, 230 n.13 (1982) (quoting 118 CONG. REC. 7569 (1972) (statement of Rep. Dent during debate on 1972 amendments to Title VII)).

63. *See* Sachs, *supra* note 4, at 2687; Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers' Rights*, 33 STUD. AM. POL. DEV. 50, 53 n.18 (2019).

64. Marina Zhavoronkova, Rose Khattar & Mathew Brady, *Occupational Segregation in America*, CTR. FOR AM. PROGRESS (Mar. 29, 2022), https://www.americanprogress.org/article/occupational-segregation-in-america/ [https://perma.cc/H5QY-HCN3].

and compressing pay among workers would also tend to reduce gender and racial inequality.[65]

B. Work Law's Abdication of Vertical Equity

Work law's regulation of bargaining and its ability to advance its distributional goals are not static; to the contrary, sweeping legal, economic, and institutional changes have altered how workers and employers bargain and set wages. Most significantly, the last half century has seen the precipitous decline of collective bargaining and predominance of nonunion, individual bargaining. This broad trend has been disastrous for workers and work law's vertical equity goal and has limited progress in advancing horizontal equity. Before turning to these distributive implications, I begin with a historical sketch of the rise and fall of collective bargaining and its eclipse by individual bargaining.

1. The Decline of Collective Bargaining and The Rise of Individual Bargaining

The past century has seen dramatic transformations in the regulation of the workplace, from the rise and the decline of labor law to the rise of employment law. The enactment of the Wagner Act in 1935 heralded a new era for unions, whose ranks swelled with new organizing drives protected by federal law. Private-sector union density ballooned to over a third of U.S. private-sector workers by 1956, and union influence on wages extended even beyond union members and CBA-covered workers.[66] Union contracts had significant spillover effects[67]: Nonunion employers pegged wage increases to collectively bargained rates and increased wages to stave off the (credible) threat of unionization.[68] Additionally, because unions increase the wages of nonunion workers' outside options, nonunion firms needed to increase wages to retain workers and maintain the attractiveness of their offerings.[69]

However, after peaking around 35% of private-sector workers, unionization declined precipitously from the 1980s on, falling to just around 6% of private-sector workers today.[70] As the number of unionized workers has fallen, the ambit of collective-bargaining coverage has fallen with it, as unions generate fewer spillover

---

65. *See* LAWRENCE M. KAHN, IZA WORLD OF LAB., WAGE COMPRESSION AND THE GENDER PAY GAP 1 (2015), https://wol.iza.org/uploads/articles/150/pdfs/wage-compression-and-gender-pay-gap.pdf [https://perma.cc/Y6U5-X6DF] ("Wage compression raises women's wages by more than men's because women are more likely to be at the bottom of the distribution.").

66. *See* Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349, 352 tbl.1 (2003).

67. John T. Addison, Pedro Portugal & Hugo de Almeida Vilares, *Union Membership Density and Wages*, 233 J. ECONOMETRICS 612, 612–13 (2022).

68. *See* Gene M. Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*, 14 ANN. REV. ECON. 93, 114 (2022).

69. Ihsaan Bassie, *Collective Bargaining and Spillovers in Local Labor Markets* 2 (Ctr. for Econ. Performance, Working Paper No. 1895, 2022), https://cep.lse.ac.uk/pubs/download/dp1895.pdf [https://perma.cc/L3YQ-7GC7].

70. Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. DEP'T OF THE TREASURY (Aug. 28, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy [https://perma.cc/7WQK-E9WY]; BUREAU LAB. STAT., U.S. DEP'T OF LAB., UNION MEMBERS—2024, at 1–2 (2025), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/W7ZD-PHJC].

effects in the broader economy. The reasons for this decline are much debated—spanning economic, technological, and legal changes—but many scholars argue that the NLRA legal regime is increasingly unable to achieve its stated goals of facilitating unionization and collective bargaining.[71]

As Professor Daniel J. Galvin observes, "At precisely the same time that labor law has withered, employment law has flourished, proliferating at the subnational level and expanding into new substantive domains."[72] This coincided with the enactment of the EPA in 1963 and Title VII in 1964, which prohibited discrimination based on protected categories, such as sex and race, in terms and conditions of employment.[73] Further substantive mandates, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and whistleblower protections, have continued to develop.[74] The employment law framework imposed on employers a duty to adhere to minimum standards in wages, hours, antidiscrimination, workplace safety, and grounds for discharge, albeit without displacing the default employment-at-will rule.[75] The new employment regime worked "an important transformation in the American workplace,"[76] providing a "vast array of legal rules [to] dictate[] to employers what they can and cannot do with their employees" that represents a sea change from the mid-century.[77]

To be sure, the development of this employment law regime was largely compatible with the then-extant labor law regime.[78] The core promises of both labor and employment law are largely complementary, seeking to create greater social equity by promoting equal bargaining power and undermining race- and sex-based inequality in the workplace.[79] Employment law filled critical gaps in labor law, setting "a floor in the workplace above which unions can negotiate."[80] However, to the extent that "[g]overnment has had to step in to fill the vacuum" of organized labor's decline with employment law, employment law has failed.[81] The shift from labor law to employment law represented an institutional and organizational shift from collective regulation of the workplace through unions to regulation and litigation around individual rights.[82]

71. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 21–27 (2016) [hereinafter Andrias, *New Labor Law*].

72. Galvin, *supra* note 63, at 52–53 (emphasis omitted).

73. *See id.* at 53.

74. *See* Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 495, 512, 515, 519–23 (2004).

75. *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 51 (2010).

76. Andrias, *New Labor Law*, *supra* note 71, at 37.

77. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 23 (1990).

78. Andrias, *New Labor Law*, *supra* note 71, at 38. However, some scholars have argued that the focus on individual rights under employment law has come at the expense of labor law's collective rights focus. *See, e.g.*, NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 209–11 (rev. and expanded ed. 2013); Andrias, *An American Approach to Social Democracy*, *supra* note 4, at 632–33.

79. *See* Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1065–66 (2017); Andrias, *New Labor Law*, *supra* note 71, at 38.

80. Andrias, *New Labor Law*, *supra* note 71, at 38.

81. St. Antoine, *supra* note 74, at 495–96.

82. Galvin, *supra* note 63, at 53.

Employment law's minimum wage mandates have proved largely "[d]istinct and [i]nsufficient" to achieve labor law's goal of boosting workers' pay through collective action, in part because the mandates leave bargaining processes and outcomes untouched, and in part because they largely fail to facilitate workers' collective action.[83]

With labor law ineffectual and employment law insufficient, law has failed to counteract the structural power asymmetry between workers and employers that characterizes the labor relationship.[84] Employment law broadly preserves "freedom of contract" between the parties, which, against this backdrop of unequal power, means that the bargains reached will typically favor the employer.[85] Employment law's scheme of minimum mandates and individual rights "fails to confront capital with demands that cannot be defined as a judicially protected mandate," nor has individual employment law "generated conditions that produce[] strong unions."[86] As Professor Deborah Dinner argues, courts constructed Title VII's promise of "sex equality to mean equal market opportunity rather than heightened labor protection."[87] Even on its own terms, antidiscrimination law has often proved unable to grapple with the structural conditions that produce gender and racial inequality, such as workplace norms[88] and occupational segregation.[89]

Perhaps, however, the problem is not employment law per se, but the way in which it has been traditionally conceived and implemented. Put another way, while policymakers have traditionally used employment law to impose minimum substantive mandates on employers, a more ambitious formulation might seek to alter the bargaining power of the parties[90] and channel collective action[91]—in other words, to put employment law means to labor law ends. True, employment law may not be able to directly facilitate unionization as labor law does, but perhaps *part* of employment law's failure to fill labor law's void is a problem of policy design and imagination. Section III

83. Andrias, *New Labor Law*, *supra* note 71, at 37–38.

84. Lawrence Mishel, *The Persistent Absence of Full Employment: A Critical Flaw in the Legal "Freedom of Contract" Framework*, 3 J.L. & POL. ECON. 72, 72–74 (2022); Samuel Bagenstos, *Lochner Lives On: Lochner Presumption of Equal Power Lives in Labor Law and Undermines Constitutional, Statutory, and Common Law Workplace Protections*, ECON. POL'Y INST. (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/ [https://perma.cc/4C6V-V4HZ]; Racabi, *supra* note 40, at 98; Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 586; Benjamin Bental & Dominique Demougin, *Declining Labor Shares and Bargaining Power: An Institutional Explanation*, 32 J. MACROECONOMICS 443, 445–46 (2010).

85. Marietta Auer, *Bargaining with Giants and Immortals: Bargaining Power as the Core of Theorizing Inequality*, L. & CONTEMP. PROBS., 2024, at 53, 64, 66–68.

86. LICHTENSTEIN, *supra* note 78, at 210–11.

87. Dinner, *supra* note 79, at 1083.

88. Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1098–99 (arguing that employment discrimination law has proven ineffectual in challenging the taken-for-granted workplace norms that produce gender inequality).

89. *See infra* notes 110–14 and accompanying text.

90. *See* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 330 (1991) (arguing that legal rules affect bargaining strength by governing the conduct of parties during bargaining and by structuring the alternatives to remaining in the bargaining situation).

91. *See* Sachs, *supra* note 4, at 2687.

attempts to sketch one element of employment law—regulation of information—as a second-best to labor law.

2. Whither Vertical Equity?

By almost every account, the decline of unionization has proved disastrous for workers and work law's vertical equity goal, notwithstanding the broadened scope of employment law regulation. Consider several stylized facts.

First, the share of U.S. national income that accrues to labor has fallen significantly in the postwar period. While there is extensive debate about accounting assumptions and how to attribute income to either labor or capital,[92] the majority of evidence suggests that the labor share has fallen since the 1980s.[93] The Federal Reserve Bank of St. Louis reports that the share of labor compensation in gross domestic product (GDP) has declined from around 65% in 1970 to less than 60% today.[94] Similarly, the share of gross domestic income accruing to wages and salaries has declined from over 50% in the 1960s and 1970s to 42% today.[95] Although the labor share has fallen across many industrialized democracies, its decline in the business sector appears to be particularly concentrated in the United States and Canada.[96] Additionally, worker compensation appears to have not kept pace with increases in labor productivity, suggesting that "factors not associated with productivity growth have acted to push workers' pay *down*."[97] Because labor and capital are considered two main factors of production, a decline in the labor share often represents an increase in the capital share. Whereas the corporate profit share has historically hovered between 4% to 6% of gross domestic income, corporate profits have increased in recent years to around 9% of gross domestic income, the highest level since before the Great Depression.[98]

92. The debate primarily concerned how to treat self-employment income and the role of housing in calculating labor and capital shares, which, if accounted for differently, would show a much smaller decline in the labor share. German Gutierrez & Sophie Piton, *Revisiting the Global Decline of the (Non-Housing) Labor Share*, AM. ECON. REV.: INSIGHTS, Sep. 2020, at 321, 322–23. However, analyses of the corporate sector that excluded self-employed workers and housing assets also showed a decline in the labor share. *Id.*

93. Sangmin Aum & Yongseok Shin, *Why Is the Labor Share Declining?*, 102 FED. RSRV. BANK ST. LOUIS REV. 413, 413 (2020), https://www.stlouisfed.org/-/media/project/frbstl/stlouisfed/publications/review/pdfs/2020/10/22/why-is-the-labor-share-declining.pdf [https://perma.cc/5DGY-8UKM]; *see* Drago Bergholt, Francesco Furlanetto & Nicolò Maffei-Faccioli, *The Decline of the Labor Share*, AM. ECON. J.: MACROECONOMICS, July 2022, at 163, 163–64 ("While estimates of their long-run trends depend heavily on accounting assumptions and, thus, are subject to debate, they have all gone through a clear fall in the last 20 years." (footnote omitted)).

94. *Share of Labour Compensation in GDP at Current National Prices for United States*, FED. RSRV. BANK OF ST. LOUIS (Jan. 21, 2021, at 13:28 CT), https://fred.stlouisfed.org/series/LABSHPUSA156NRUG [https://perma.cc/77KN-CDQ9].

95. *Shares of Gross Domestic Income: Compensation of Employees*, FED. RSRV. BANK OF ST. LOUIS (Oct. 2, 2024, at 13:09 CT), https://fred.stlouisfed.org/series/W270RE1A156NBEA [https://perma.cc/LJ45-CYH4].

96. Gutierrez & Piton, *supra* note 92, at 322–23.

97. Lawrence Summers & Anna Stansbury, *On the Link Between US Pay and Productivity*, CTR. FOR ECON. POL'Y RSCH. (Feb. 20, 2018), https://cepr.org/voxeu/columns/link-between-us-pay-and-productivity [https://perma.cc/G7SN-E3XP].

98. *Shares of Gross Domestic Income: Corporate Profits with Inventory Valuation and Capital Consumption Adjustments*, FED. RSRV. BANK OF ST. LOUIS (Oct. 2, 2024, at 13:09 CT), https://fred.stlouisfed.org/series/W273RE1A156NBEA [https://perma.cc/BFX5-4WM7].

Second—and more uncontroverted—intra-labor income inequality has skyrocketed. This trend is significant because the labor share alone does not capture the distribution of labor income between, for instance, low-paid workers and hedge fund partners, and therefore tends to elide important compensation disparities between groups of workers, broadly defined.[99] By breaking the labor share of income down between groups of workers, an even more dismal picture emerges. Whereas income gains between the twentieth, median, and ninety-fifth percentiles of earners largely kept pace from 1945 to 1975, higher earners' income has exploded relative to the lower earners: The top one percent saw an increase in wages of 181.7% since 1979, while the bottom ninety percent's wages have increased just 43.7%.[100] Since 1979, the top one percent's share of wages increased from 7.3% to 12.4%, while the bottom ninety percent saw a decrease from 69.8% to 60.7%.[101]

An agenda to promote vertical equity, then, has two distinct components. First, because the labor share of income has decreased, workers ought to bargain for higher shares of joint product to accrue to labor, rather than to capital in the form of profits. Second, to combat increasing labor income inequality, lower-income workers must be able to capture larger shares of labor income at the expense of elite, highly paid workers. This latter element has admittedly become more difficult to address through firm-based bargaining alone: The labor market has witnessed the rise of "superstar firms,"[102] increased "sorting" of high-wage workers into high-wage firms, and "segregation" of high earners working with one another,[103] underpinned by fissuring, outsourcing, and (mis)classification of workers as independent contractors.[104] As one important study found, changes in within-firm earnings explain about one-third of the rise in earnings inequality from 1978 to 2013, and changes in between-firm earnings may account for the remaining two-thirds, which suggests that compositional changes in firms have driven inequality.[105] This problem indicates a role for policy other than compressing pay within firms in addressing labor income inequality.

---

99. DANIEL MARKOVITS, THE MERITOCRACY TRAP 93 (2019) (arguing that only about a 25% increase in the top one percent's share of overall national income can be attributed to capital's rising share of income, with over 75% attributed to rising labor income inequality; meaning, elite "workers" are capturing increasing shares of national income as labor income).

100. Arloc Sherman, Danilo Trisi & Josephine Cureton, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 11, 2024), https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf [https://perma.cc/3XCD-FBZ9].

101. Elise Gould & Jori Kandra, *Wage Inequality Fell in 2023 Amid a Strong Labor Market, Bucking Long-Term Trends*, ECON. POL'Y INST. (Dec. 11, 2024, at 09:54 ET), https://www.epi.org/blog/wage-inequality-fell-in-2023-amid-a-strong-labor-market-bucking-long-term-trends-but-top-1-wages-have-skyrocketed-182-since-1979-while-bottom-90-wages-have-seen-just-44-growth/ [https://perma.cc/C38E-WETU].

102. David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 648–49 (2020), https://economics.mit.edu/sites/default/files/publications/Autor%20et%20al_2020_The%20Fall%20of%20the%20Labor%20Share%20and%20t.pdf [https://perma.cc/HE2W-CZ6N].

103. Jae Song, David J. Price, Fatih Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1, 3–4 (2019).

104. *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (charting the rise of misclassification).

105. *See* Song et al., *supra* note 103, at 1.

Consistent with this Article's emphasis on the legal-institutional shift from collective bargaining to individual bargaining, economists Anna Stansbury and Larry Summers posit that "declining worker power"—defined as workers' power "to increase their pay above the level that would prevail in the absence of such bargaining power"—underpins the trends of rising business profitability, sluggish wage growth, and a declining labor share of income.[106] They argue that three shifts have redistributed economic rents from labor to capital owners: an institutional shift in the policy environment, changes within firms, and changes in economic conditions.[107] Other evidence suggests a strong role for deunionization in explaining these trends.[108] This analysis suggests that legal and policy change can counteract declining worker power, an assumption that animates this Article's policy proposal.

The decline of worker power has also stalled progress on reducing racial and gender inequality. The gender wage gap narrowed in the 1980s and 1990s from women receiving 65% of median hourly earnings in 1982 to 80% by 2002, but the gap has flatlined since then, hovering at around 82% in 2022.[109] Indeed, the portion of the pay gap for which qualifications cannot account has remained at around 10% of male earnings since the 1980s.[110] While the median wage for Black earners compared to white earners has narrowed in recent years, as of 2023 it stood at about 79%, roughly the same figure as in the mid-1970s.[111] One reason for this stagnation is the decline of unions, which, for the reasons discussed above, reduces gender and racial wage gaps.[112]

C. *Making Work Law Relevant for Vertical Equity*

With the decline of collective bargaining, individual bargaining, regulated by employment law, has failed to secure for workers an adequate share of the economic pie. Work law is thus faced with a crisis: how to create legal rules to ensure that workers secure a fair share of their product. While labor law reform remains the ideal solution, it

106. Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [https://perma.cc/RL8N-BY9M].

107. *Id.* at 2–3.

108. Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, ECON. POL'Y INST. (Apr. 8, 2021), https://www.epi.org/publication/eroded-collective-bargaining/ [https://perma.cc/3X3N-5FVH] (finding that wages would be almost $3,000 higher for nonunion men had unionization remained at 1979 levels).

109. Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (Mar. 1, 2023), https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/ [https://perma.cc/B3NE-8M3A].

110. Nina Roussille, *The Role of the Ask Gap in Gender Pay Inequality*, 139 Q.J. ECON. 1557, 1558 (2024).

111. David Leonhardt, *The Racial Wage Gap Is Shrinking*, N.Y. TIMES (June 19, 2023), https://www.nytimes.com/2023/06/19/briefing/juneteenth-racial-wage-gap.html (on file with the Temple Law Review).

112. Jake Rosenfeld & Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AM. J. SOCIO. 1460, 1467–68 (2012), https://cooperative-individualism.org/rosenfeld-jake_organized-labor-and-racial-wage-inequality-2012-mar.pdf [https://perma.cc/HFT8-EQF8].

has "ossified" in the face of barriers at both the federal and state levels.[113] At the federal level, labor-law reform has reached political impasse, unable to surmount the filibuster, dooming efforts under Presidents Jimmy Carter, Barack Obama, and Joe Biden.[114] Although Congress has been more willing to expand employment law—such as the Pregnant Workers Fairness Act in 2022[115]—it seems unlikely it would pass legislation to which employers would be hostile. At the state level, federal labor law's "extraordinarily broad" preemption scheme precludes much innovation,[116] notwithstanding creative workarounds and policy proposals,[117] such as workers' boards to set minimum wages and standards.[118] Consequently, labor law reform that might facilitate unionization faces significant constraints. The policy choice confronting policymakers concerned with work law's vertical equity problem is confronted with the dilemma visualized in the table below.

As the table below illustrates, the likeliest avenue for policy to promote vertical equity, then, is state-level employment reform, which has an "accommodating approach to state law" compared to labor law.[119] To be sure, employment law as traditionally conceived is an unnatural fit for this role; however, without state-level employment law innovation, work law risks abdicating its historical responsibility for advancing vertical equity. For better or (more likely) for worse, work law reform to address the trends detailed above will likely have to come through the pragmatic choice of state-law regulation of individual bargaining, even if it remains second-best to labor law reform.

Table 1: Work Law Regimes and Reform

	Federal	State and Local
Collective Bargaining (Labor Law)	Political impasse	Preemption
Individual Bargaining (Employment Law)	Political impasse	Promising

113. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31, 1569–79 (2002) [hereinafter Estlund, *Ossification of American Labor Law*].

114. Barry Eidlin, *To Pass the PRO Act, We Need To Examine Past Labor Law Reform Failures*, JACOBIN (June 24, 2021), https://jacobin.com/2021/06/pro-act-collective-bargaining-labor-law-legislation [https://perma.cc/7WJT-WKJ9].

115. *See generally* Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 6084 (2022) (requiring covered employers to provide reasonable accommodations for pregnant workers and prohibiting employer retaliation against employees seeking accommodations).

116. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

117. *See* Kyle Bigley, Note, *Between Public and Private: Care Workers, Fissuring, and Labor Law*, 132 YALE L.J. 250, 257–58 (2022).

118. CLJE:Lab, *Building Worker Power in Cities & States: Workers' Boards*, CTR. FOR LAB. & A JUST ECON. (Sep. 1, 2024), https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/workers-boards/ [https://perma.cc/ZNQ9-PHRD].

119. Estlund, *Ossification of American Labor Law*, *supra* note 113, at 1574 n.209.

A recent set of state- and local-level pay transparency laws represent an important shift in policymakers' willingness to use employment law to affect the bargaining processes and behavior of workers and employers and offer an opening for a broader intervention in individual bargaining. While the impetus for these policies has been largely to address horizontal equity concerns, transparency as a project has much to offer work law's vertical equity goals. The next Section evaluates these laws.

II. Two Cheers for Pay Transparency

As Section I argues, with the decline of collective bargaining and failure of labor-law reform, work law must look to state employment law to address widening inequality and shrinking labor shares of income, or what this Article calls vertical equity. Foregrounding vertical equity concerns would, however, require a shift in how policymakers view employment law, which has historically imposed minimum standards rather than regulating bargaining processes or outcomes above those minima. This dynamic has been particularly true of legal regulation of the information available to workers and employers: As Professor Michael Gottesman noted in 1993, federal law "contains no requirement that information be provided to [nonunion] employees . . . [n]or does any state mandate the provision of such information on a generic basis."[120]

Recently, however, states and localities have enacted "pay transparency" laws that generally permit coworkers to discuss salaries without fear of retaliation or require employers to post salaries in job postings. To date, much of the scholarship has focused on transparency's implications for reducing *horizontal inequity*, specifically by reducing the racial and gender pay gaps.[121] This scholarship is essential because of both the persistence of these gaps and the importance of gendered and racialized negotiating dynamics in contributing to these gaps.[122]

Less discussed in the legal scholarship, however, is the potential of workplace information transparency to promote *vertical equity* by increasing wages. To that end, this Section critically evaluates the vertical equity implications posed by both extant law and the broader pay transparency project. This intervention is critical because preliminary research suggests certain forms of pay transparency—specifically, state laws that protect workers' right to discuss wages with one another—may reduce the gender pay gap, but at the expense of lower overall wages.[123]

This Section proceeds in three parts. First, it situates the problem of asymmetrical and imperfect information in economics. Although imperfect information is simply assumed away in textbook models of perfect competition, two strands of economics scholarship, so-called information economics and labor monopsony models, have begun to explore the implications of imperfect information actually existing in labor markets, although it has not yet been fully incorporated into monopsony models. Still, the literature suggests that imperfect and asymmetrical information may increase employer market power, suppress wages, and contribute to gender and racial pay gaps.

---

120. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 76 (1993).

121. See *supra* note 7 for a list of extant proposals.

122. See *supra* note 10 for the horizontal implications of pay transparency.

123. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154.

Second, it evaluates extant pay transparency law's implications for both horizontal and vertical equity. Pay transparency laws may be grouped into three categories: (1) horizontal pay transparency laws, such as the "right-to-talk laws," which inform employees as to the pay of their coworkers to varying extents; (2) cross-firm pay transparency laws, which inform workers as to pay information for competing firms; and (3) vertical pay transparency laws, which inform workers about the pay across different layers of seniority within a firm.[124] Because pay transparency is a relatively recent phenomenon, the literature on its effects is still developing, but preliminary research suggests that horizontal transparency may reduce gender pay gaps at the expense of overall pay, which presents policymakers with an uncomfortable tradeoff.

Third, animated by the concern that transparency might reduce pay, this Section provides a more fulsome critique of the transparency project's implications for vertical equity. Specifically, transparency as currently constructed suffers from several limitations: Employers may change their behavior in response to transparency (either by negotiating more aggressively or not at all) or by engaging in tacit wage-suppressing collusion. Transparency is also currently limited to pay information, which does not fully address informational asymmetries in bargaining, and transparency's focus on information may obscure other sources of employer labor market power, which, if unaddressed, may either produce the unintended consequence of wage-suppression discussed above or fail to boost wages above market averages, which are themselves the product of employer labor market power. In order for transparency to fully realize its vertical equity promise, this discussion signals the need for more comprehensive transparency that also builds workers' collective power, which frames Section III's policy proposal.

A. Information in Labor Markets

Although largely unaddressed in the economics literature, imperfect and asymmetrical information is theoretically a source of employer market power over workers, which would reduce wages and increase gender and racial pay gaps. Before delving into pay transparency laws and their effects, this Section situates the informational problem in the economics literature.

1. Imperfect Information in Economics

In the textbook perfect competition model of labor markets (PCLM), imperfect information does not exist because the problem is simply assumed away: All market participants are assumed to have perfect information about offers and wages,[125] which in turn "conveys all the information a firm or workers needs to know about the labor market."[126] Perfect information helps ensure that all similar workers are paid equally across firms ("the law of one price"), and that this wage is equal to workers' marginal

124. *Id.*

125. Carmen Sanchez Cumming, *Understanding the Economics of Monopsony*, WASH. CTR. EQUITABLE GROWTH (Apr. 6, 2022), https://equitablegrowth.org/understanding-the-economics-of-monopsony-how-labor-markets-work-under-imperfect-competition/ [https://perma.cc/C7GE-8AJZ].

126. Alan Manning, *Imperfect Competition in the Labor Market*, *in* 4B HANDBOOK OF LABOR ECONOMICS 973, 1028 (David Card & Orley Ashenfelter eds., 2011).

product (the marginal productivity theory (MPT) of wages).[127] If workers are relatively underpaid, they know of more lucrative employment offers, which they can freely accept; for this reason, economist Milton Friedman famously argued that "[t]he most reliable and effective protection for most workers is provided by the existence of many employers."[128] Of course, as even the most ardent neoclassical economist will admit, no market, including labor markets, has perfect information.[129] However, many economists and law and economics scholars do believe, however, that assuming away imperfect information in equilibrium models of perfect competition is useful for their predictive ability.[130] But as a growing body of economics scholarship has recognized, the assumptions of the PCLM often lead to incorrect predictions, such as the effect (or lack thereof) of increases in minimum wages on employment.[131]

First, "information economic[s]" demonstrated that imperfect information can cause markets to collapse,[132] an insight that Nobel laureate Professor Joseph Stiglitz applied to show that even small amounts of imperfect information can cause labor markets to fail to clear or reach equilibrium.[133] Significantly, Professor Stiglitz's work demonstrated that market actors may not only *exploit* informational asymmetries but also *create* them by withholding important information from their other participants.[134]

Second, and largely in parallel, economists have developed "modern monopsony models" to demonstrate how imperfect competition in labor markets generates employers' wage-setting power over workers, resulting in workers being paid less than their marginal product.[135] More traditional "classical monopsony" models saw such power emerging only where there was a single employer in a labor market (such as the

---

127. Suresh Naidu & Arindrajit Dube, *Monopsony Power in Labor Markets*, NAT'L BUREAU OF ECON. RSCH.: THE REP. (Apr. 24, 2024), https://www.nber.org/reporter/2024number1/monopsony-power-labor-markets [https://perma.cc/D4XA-WSYC].

128. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 246 (1980).

129. *See* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 220 (1961) [hereinafter Stigler, *Economics of Information*]; George J. Stigler, *Information in the Labor Market*, *in* INVESTMENT IN HUMAN BEINGS 94, 97 (1962) [hereinafter Stigler, *Information in the Labor Market*], https://www.nber.org/books-and-chapters/investment-human-beings/information-labor-market [https://perma.cc/ZL8B-9K7P].

130. *See* Michael L. Wachter, *Neoclassical Labor Economics: Its Implications for Labor and Employment Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 23, 26–28 (Cynthia L. Estlund & Michael L. Wachter eds., 2012); Stigler, *Information in the Labor Market*, *supra* note 129, at 104 ("It is doubtful that justice would be more closely approached by making exaggerated claims of the importance of the problem of information."). *See generally* MILTON FRIEDMAN, THE METHODOLOGY OF POSITIVE ECONOMICS (1953) (arguing that economics should be evaluated according to the accuracy of its predictions rather than the realism of its assumptions).

131. David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania* 31–35 (Nat'l Bureau Econ., Rsch. Working Paper No. 4509, 1993), https://www.nber.org/system/files/working_papers/w4509/w4509.pdf [https://perma.cc/72Z5-64HB].

132. *See* George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488–92 (1970) (analyzing the used car market).

133. Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 475 (2002).

134. *Id.* at 468–70.

135. Orley Ashenfelter, Henry S. Farber & Michael R. Ransom, *Modern Models of Monopsony in Labor Markets: A Brief Survey* 4–5 (Inst. for the Study of Lab., Discussion Paper No. 4915, 2010), https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1599013 [https://perma.cc/3VX9-KHQW].

classic company town) or where employers colluded.[136] More recent scholarship has developed so-called modern monopsony theories to show how labor markets are "thin" in more "subtle way[s] than [in] classical monopsony" in addition to the more traditional market concentration story.[137] One line of explanation, the "differentiated jobs model," posits that jobs are not identical, and workers' preferences are heterogeneous, which makes firms imperfect substitutes for one another and gives firms some degree of wage-setting power.[138] The "search-and-matching model," meanwhile, holds that search costs make it costly for workers to move between jobs, which results in "an upward-sloping" labor supply curve for employers, implying that a firm will not lose all of its workers by paying less than other employers.[139] Evidence for monopsony includes nonemployment effects of minimum wage increases, the inelasticity of labor supply curves, and the existence of significant markdowns, or the gap between workers' marginal product of labor (MPL) and the wages they are actually paid.[140]

Despite the common interest of information and monopsony economics in how market imperfections lead to market failure, the two bodies of scholarship have yet to be fully integrated. To date, monopsony models have primarily not incorporated imperfect information in their models, instead assuming perfect information[141] such that workers "have accurate beliefs about the differences in wages across firms."[142] As two economists describe in a leading review of the monopsony literature, the "main theoretical frameworks . . . all assume symmetric information and do not explicitly model how information may affect monopsony power"; for that reason, this "area is not well developed from a theoretical perspective."[143] Nonetheless, the existence of imperfect and asymmetric information could "act as a source of monopsony power," as empirical work is beginning to suggest.[144]

2. The Existence of Imperfect and Asymmetrical Information

Notwithstanding the assumptions of many economic models, information between workers and employers is decidedly asymmetric. While many employers "know precisely where their workers fall in the distribution of wages," "[e]mployees frequently do not know how their pay compares to comparable workers, either within or outside their firm, and are reluctant to seek this knowledge out of fear of retaliation, social norms,

136. Alan Manning, *The Real Thin Theory: Monopsony in Modern Labour Markets*, 10 LABOUR ECON. 105, 106 (2003).

137. *Id.* at 108.

138. José Azar & Ioana Marinescu, *Monopsony Power in the Labor Market: From Theory to Policy*, 16 ANN. REV. ECON. 491, 495–96 (2024).

139. *Id.* at 497–98.

140. Chen Yeh, Claudia Macaluso & Brad Hershbein, *Monopsony in the US Labor Market*, 112 AM. ECON. REV. 2099, 2099–100 (2022).

141. Azar & Marinescu, *supra* note 138, at 504 ("The theoretical frameworks we discussed above cannot be straightforwardly applied to study information sharing. This is because these models assume firms are perfectly informed."); Simon Jäger, Christopher Roth, Nina Roussille & Benjamin Schoefer, *Worker Beliefs About Outside Options*, 139 Q.J. ECON. 1505, 1505 (2024).

142. Jäger et al., *supra* note 141, at 1506.

143. Azar & Marinescu, *supra* note 138, at 508.

144. Jäger et al., *supra* note 141, at 1506.

or general inertia."[145] Because workers' outside options and beliefs about such options are an important determinant of their wages,[146] their incomplete or inaccurate information about their outside options enables employers to suppress wages.[147] This asymmetrical information places the worker at a severe disadvantage in wage bargaining: While the employer may reasonably estimate the worker's reservation wage, workers do not know the maximum wage that an employer can profitably offer. As economist Paul Douglas argued:

> [W]orkers do not, of course, know the value which the marginal worker adds. They seldom know with any exactness the financial condition of the enterprise or industry. It is on the whole indisputable that the average worker does not possess the knowledge of market conditions and of his economic worth to his prospective employer that the latter possesses. He stands, therefore, at a distinct disadvantage in bargaining . . . .[148]

The advantage that the holder of asymmetrical information possesses generates strong incentives for employers to safeguard that information; accordingly, it should be little surprise that employers have attempted to stem workplace transparency. In the historical absence of generalized disclosure laws,[149] firms have not only largely chosen to *not disclose* information but have also created policies and norms *undermining* information-sharing among workers.[150] One study of 141 million job postings between 2012 and 2017 found that only 10.7% of private sector postings had any wage information and 4.9% had an exact point wage.[151] About one-third of workers knew precise pay information prior to an interview.[152] Among incumbent workers, employers have also either prohibited or discouraged employees from discussing pay with one another, often in outright violation of the NLRA: One survey found that nearly half of workers reported that they were "either discouraged or prohibited from discussing wages

145. Harris, *supra* note 18, at 4.

146. Sydnee Caldwell, Ingrid Haegele & Jörg Heining, *Bargaining and Inequality in the Labor Market* 3–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 33396, 2025) [hereinafter Caldwell et al., *Bargaining in the Labor Market*], https://www.nber.org/system/files/working_papers/w33396/w33396.pdf [https://perma.cc/E6XD-V5L6]; *see* Jäger et al., *supra* note 141, at 1540.

147. COUNCIL ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [https://perma.cc/BL2T-KNKQ] ("[E]mployers may be less constrained by equity concerns when workers lack good information about the wages of their coworkers."); Ana Rute Cardoso, Annalisa Loviglio & Lavinia Piemontese, *Misperceptions of Unemployment and Individual Labor Market Outcomes*, 5 IZA J. LAB. POL'Y, 2016, at 1, 9–10 (noting that misperceptions about labor market opportunities can lead people to accept lower wages).

148. PAUL H. DOUGLAS, THE THEORY OF WAGES 78 (1934).

149. Gottesman, *supra* note 120, at 77–78.

150. Honey Batra, Amanda Michaud & Simon Mongey, *Online Job Posts Contain Very Little Wage Information* 16 (Nat'l Bureau Econ. Rsch., Working Paper No. 31984, 2023), https://www.nber.org/system/files/working_papers/w31984/w31984.pdf [https://perma.cc/9ED2-J5AL] ("Wage information in job posts is exceedingly scarce, both to job searchers and researchers.").

151. *Id.* at 1, 6–7; *cf.* Wolfgang Frimmel, Bernhard Schmidpeter, Rene Wiesinger & Rudolf Winter-Ebmer, *External Pay Transparency and the Gender Wage Gap* 2 n.2 (Rockwool Found. Berlin, Discussion Paper No. 07/24, 2024), https://www.econstor.eu/bitstream/10419/295722/1/cream-dp2407.pdf [https://perma.cc/BT7T-HSET] (noting that between 20% and 40% of U.S. job postings contain pay information).

152. Hall & Krueger, *supra* note 1, at 1.

and salaries."[153] Even without formal policies in place, a powerful "salary taboo" often dissuades workers from discussing their wages with one another.[154]

Without adequate information, workers often underestimate the pay offered both at their firm and among other firms within their sector.[155] Workers tend to "anchor their beliefs about wages with other employers on their current wage," believing that their outside options are "closer to their current wage than it actually is."[156] Consequently, employees often have significant misperceptions about the wages for workers occupying similar positions at other firms, and even at their own firm.[157] These findings are consistent with Professor Pauline Kim's important work demonstrating that workers tend to "systematically overestimate the protections afforded by law."[158]

3. Imperfect Information's Implications for Labor Markets

Notwithstanding that the implications of imperfect information have yet to be fully incorporated into labor-market models, imperfect information carries significant implications for monopsony power,[159] as an earlier generation of economists recognized,[160] and as scholars are increasingly recognizing and rediscovering.[161]

Imperfect information has clear vertical equity implications because it gives employers the ability to suppress wages. To give a simple example, if a worker does not know that the "market wage" is $16 or that other workers at the same firm are paid $16, she might accept a $15 wage.[162] In economics verbiage, imperfect information lowers a worker's reservation wage, or decreases the elasticity of labor supply, which the

153. SHENGWEI SUN, JAKE ROSENFELD & PATRICK DENICE, INST. FOR WOMEN'S POL'Y RSCH., ON THE BOOKS, OFF THE RECORD: EXAMINING THE EFFECTIVENESS OF PAY SECRECY LAWS IN THE U.S. 1 (2021), https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf [https://perma.cc/AV8Q-X5WL].

154. Zoë B. Cullen & Ricardo Perez-Truglia, *The Salary Taboo: Privacy Norms and the Diffusion of Information*, 222 J. PUB. ECON. art. no. 104890, at 1 (2023).

155. Jäger et al., *supra* note 141, at 1507; Kristoffer B. Hvidberg, Claus T. Kreiner & Stefanie Stantcheva, *Social Positions and Fairness Views on Inequality*, 90 REV. ECON. STUD. 3083, 3085 (2023) (finding that people especially tend to underestimate the extent of inequality in the same sector or firm).

156. Jäger et al., *supra* note 141, at 1507; Hvidberg et al., *supra* note 155, at 3085.

157. Zoë B. Cullen, Shengwu Li & Ricardo Perez-Truglia, *What's My Employee Worth? The Effects of Salary Benchmarking* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30570, 2022), https://www.nber.org/system/files/working_papers/w30570/w30570.pdf [https://perma.cc/Q7EE-DPCC].

158. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997).

159. Imperfect information might be folded into the search-and-matching model because imperfect information increases search costs, although Jäger argues that imperfect information generates a distinct source of monopsony power. Jäger et al., *supra* note 141, at 1542–43.

160. *See, e.g.*, JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 296 (1933) ("[I]gnorance may prevent workers from moving from one to another in response to differences in the wages offered by the different firms."); Martin Bronfenbrenner, *Potential Monopsony in Labor Markets*, 9 INDUS. & LAB. RELS. REV. 577, 577–78 (1956) ("The typical employer in an unorganized labor market is by no means a pure competitor facing market wages which he cannot alter. The mobility of the labor force, even between firms located close together, is low by reason of the inability of workers to wait for employment or risk unemployment, plus the inadequacy of the information usually available to them regarding alternative employment opportunities.").

161. Racabi, *supra* note 40, at 98–100; Harris, *supra* note 11, at 4.

162. *See* Harris, *supra* note 18, at 7.

employer can exploit by paying lower wages.[163] Competition for workers between employers is then blunted when firms do not post wages.[164] This is an application of the general principle that in markets "characterized by asymmetric information, the entity with more complete information maintains a distinct advantage."[165] Imperfect information, then, generates a "monopsony source distinct from the standard frictions" that reduces wages.[166]

Also significant is asymmetrical information's effect on horizontal equity.[167] An employer with wage-setting power will rationally seek to engage in "price discrimination" by paying different workers different wages.[168] While price discrimination need not be nefarious if not based on protected categories—consider an airline that sells tickets at different prices—an employer's wage-setting power in actually existing labor markets interacts with, and may reproduce, social inequalities. As economist Joan Robinson recognized in her pioneering work coining the term "monopsony," "a type of discrimination may arise when men and women of the same efficiency are paid at different rates," especially where male and female workers have different labor supply elasticities.[169] Because of lower levels of wealth and gendered divisions of labor in the home, women and workers of color tend to have more inelastic labor supply curves, meaning that workers have lower reservation wages and employers have more wage-setting power.[170] Estimates of the reservation wage suggest that women are willing to take wages between 3.6% to 8.3% lower than men.[171]

Imperfect information exacerbates these dynamics. If women or workers of color are less likely to know wage information from coworker networks, they may be at relative disadvantage.[172] And even if information is *equally imperfect* between men and women, women and workers of color may lose out because of the gendered and racialized dynamics of wage bargaining, or the "ask gap," which refers to the difference between

---

163. Jäger et al., *supra* note 141, at 1533–35.

164. Azar & Marinescu, *supra* note 138, at 495.

165. Harris, *supra* note 18, at 4.

166. Jäger et al., *supra* note 141, at 1542.

167. The neoclassical explanation for such wage inequality is "human capital theory," which posits that wage differences emerge from differential levels of human capital that workers bring to the job; however, this theory "does not seem to well fit with empirical data." Mark Stelzner & Kate Bahn, *Discrimination and Monopsony Power*, 49 REV. BLACK POL. ECON. 152, 154 (2022). Of course, even if one could explain gender and racial inequality by reference to differences in human capital, that does not rule out the fact that differential human capital is *itself* the product of gender and racial inequality.

168. David Weil, *Why We Should Worry About Monopsony*, INST. FOR NEW ECON. THINKING (Sep. 2, 2018), https://www.ineteconomics.org/perspectives/blog/why-we-should-worry-about-monopsony [https://perma.cc/55QK-89CT].

169. ROBINSON, *supra* note 160, at 301.

170. Erling Barth & Harald Dale-Olsen, *Monopsonistic Discrimination, Worker Turnover, and the Gender Wage Gap*, 16 LABOUR ECON. 589, 589 (2009); Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 INDUS. & LAB. RELS. REV. 27, 48 (2021) (noting that "monopsony wage markdowns are larger for women" than for men); Garima Sharma, Monopsony and Gender 34 (Jan. 22, 2023) (unpublished manuscript) (on file with the Temple Law Review).

171. Nina Roussille, Essays in Labor and Gender Economics 14 (Spring 2021) (Ph.D. dissertation, University of California, Berkeley) (on file with the Temple Law Review).

172. Sydnee Caldwell & Nikolaj Harmon, Outside Options, Bargaining, and Wages: Evidence from Coworker Networks 24 (Jan. 19, 2019) (unpublished manuscript) (on file with the Temple Law Review).

groups in asking for pay.[173] Because of diminished expectations about pay driven by a history of inequality[174] and fears that bargaining aggressively will prompt backlash—"nice girls don't ask"[175]—women and people of color tend to negotiate less frequently, ask for less, and be less successful in negotiations with employers.[176] Studies find that women may be up to eight times less likely than men to bargain for wages[177] and ask for 2.9% less, representing $3,830 in annual salary,[178] which may account for "virtually all of the gender difference in actual salaries."[179] Thus, employers may take advantage of lower asks by reducing their subsequent bids and offers.[180]

By contrast, information disclosure may significantly erode this source of horizontal inequity. The ask gap is largely explained by "women having different beliefs than men on what constitutes a reasonable wage request for an ideal candidate applying for the same job."[181] In economist Nina Roussille's important study, providing the median bid salary to women eradicated the ask gap.[182]

B. *Pay Transparency Laws*

Responding to these concerns about imperfect and asymmetrical information in labor markets, states and localities have enacted a broad array of laws regulating the information available to workers and employers over the past decade, primarily to address horizontal equity concerns about gender and racial pay gaps.[183] Of course, these laws also implicate vertical equity, as discussed below. In economist Dr. Zoë Cullen's formulation, transparency laws span several broad categories, which I discuss in turn:

---

173. *See* Roussille, *supra* note 110, at 1559.

174. James Bessen, Chen Meng & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* 2 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory, Working Paper No. 20-19, 2021), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2137&context=faculty_scholarship [https://perma.cc/4STK-RVSB] ("[J]ob applicants currently suffering from discrimination or other disadvantages may be willing to accept a lower wage offer than other workers with comparable capabilities.").

175. *See generally* Linda Babcock, Sara Laschever, Michele Gelfand & Deborah Small, *Nice Girls Don't Ask*, HARV. BUS. REV., Oct. 2003, at 1 (explaining how gendered norms often discourage women to negotiate pay).

176. Morela Hernandez, Derek R Avery, Sabrina D Volpone & Cheryl R Kaiser, *Bargaining While Black: The Role of Race in Salary Negotiations*, 104 J. APPLIED PSYCH. 581, 584 (2019).

177. Babcock et al., *supra* note 175, at 1; Hall & Krueger, *supra* note 1, at 23 (finding that women are less likely than men to bargain for wages); Maria Recalde & Lise Vesterlund, *Gender Differences in Negotiation and Policy for Improvement* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28183, 2020), https://www.nber.org/system/files/working_papers/w28183/w28183.pdf [https://perma.cc/V8YC-M58H].

178. Roussille, *supra* note 110, at 1559.

179. Anna Dreber, Emma Heikensten & Jenny Säve-Söderbergh, *Why Do Women Ask for Less?*, 78 LABOUR ECON. 1, at 2 (2022).

180. *See id.*

181. *Id.* at 6.

182. Roussille, *supra* note 110, at 1560.

183. DA HAE KIM, NAT'L WOMEN'S L. CTR., PAY RANGE TRANSPARENCY HELPS REDUCE GENDER WAGE GAPS 4 (2023), https://nwlc.org/wp-content/uploads/2023/01/NWLC-Pay-Range-Transparency-Factsheet_2023-1.pdf [https://perma.cc/VFL6-KFV3]; Organisation for Economic Co-operation and Development [OECD], *Pay Transparency Tools To Close the Gender Wage Gap*, at 55 (Nov. 30, 2021), https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/11/pay-transparency-tools-to-close-the-gender-wage-gap_38af4a31/eba5b91d-en.pdf [https://perma.cc/3RR5-J4GQ].

(1) horizontal pay transparency laws, which inform employees as to the pay of their coworkers to varying extents; (2) cross-firm pay transparency laws, which inform workers as to pay information for competing firms; and (3) vertical pay transparency laws, which inform workers about the pay across different layers of seniority within a firm.[184]

1. Horizontal Pay Transparency Laws

Horizontal pay transparency laws aim to inform workers of the pay of their coworkers occupying the same or similar job positions. In the United States, around twenty states, the District of Columbia, and localities have enacted right-to-talk laws protecting the right of workers to talk with one another about their wages.[185] Additionally, some U.S. public universities and states have begun posting individual salaries publicly.[186] Outside of the United States, a number of Organization for Economic Co-operation and Development (OECD) nations have enacted more comprehensive laws requiring employers to report gender wage gap statistics to employee representatives or the broader public.[187] For example, the United Kingdom requires employers with more than 250 employees to publicly publish mean and median pay for men and women.[188]

As to horizontal equity, it appears that these laws are largely effective in reducing the gender pay gap. In Dr. Cullen's review of existing studies of horizontal pay transparency laws, six of the eight studies found reductions in the gender gap.[189] Among the important studies in the international context, studies have found that the 2018 U.K. law led to a 19% reduction in the gender pay gap,[190] a 2006 Danish law requiring employers to provide to employee representatives gender-segregated wage statistics reduced the gender wage gap by about 2%;[191] and a Canadian law requiring public sector universities to publish employees' salaries found that disclosure led to a statistically significant 1.2% to 2% reduction in the gender gap.[192] In the United States, a requirement

184. *See* Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154.

185. *Id.* at 158 tbl. 1. These laws are a limited form of horizontal transparency, which, unlike international laws, do not require employers to disclose pay information. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 768. The NLRA also prohibits retaliation against workers who discuss pay with coworkers. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 157.

186. Alexandre Mas, *Does Transparency Lead to Pay Compression?*, 125 J. POL. ECON. 1683, 1685 (2017) [hereinafter Mas, *Pay Compression*]; Obloj & Zenger, *supra* note 50, at 646.

187. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 158 tbl. 1.

188. Organisation for Economic Co-operation and Development [OECD], *supra* note 183, at 60.

189. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154–55, 163 tbl. 1; *see also* Morten Bennedsen, Birthe Larsen & Jiayi Wei, *Gender Wage Transparency and the Gender Pay Gap: A Survey*, 37 J. ECON. SURVS. 1743, 1766 (2023) ("[A] majority group of papers that find transparency reduces the [gender pay gap] GPG and a minority group based on the Austrian transparency reform that find no effects of transparency on the GPG.").

190. Jack Blundell, Emma Duchini, Ştefania Simion & Arthur Turrell, *Pay Transparency and Gender Equality*, AM. ECON. J.: ECON. POL'Y, May 2025, at 418, 419.

191. Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura & Daniel Wolfenzon, *Do Firms Respond to Gender Pay Gap Transparency?*, 77 J. FIN. 2051, 2055, 2062 (2022) [hereinafter Bennedsen et al., *Do Firms Respond to Gender Pay Gap Transparency?*].

192. Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas & Derek Messacar, *Pay Transparency and the Gender Gap*, AM. ECON. J.: APPLIED ECON., April 2023, at 157, 161, 174.

that universities publicly post individual salaries found a reduction in the gender pay gap from 7.7% to 2.6%.[193]

However, it appears that these laws pose a trade-off for policymakers: While they reduce the gender pay gap, they appear to do so primarily by reducing both male workers' wages and wages overall. In Dr. Cullen's and Professor Bobak Pakzad-Hurson's important study of the effects of right-to-talk laws in thirteen U.S. states, wages fell by a statistically significant 2.2% in the first year and 2.7% by the third year.[194] Similarly, the aforementioned scholarship indicates that the primary channel through which the gender pay gap was reduced was by lowering male workers' wages, rather than by increasing female workers' wages.[195] To be sure, not all research has found that horizontal pay transparency decreases the gender pay gap by reducing men's pay: A study of right-to-talk laws for *managers* found a 3.5% increase in managers' wages without an effect on the gender pay gap.[196] Nonetheless, the significant evidence finding a wage-reduction effect suggests the need to take seriously the channels through which transparency might reduce wages. The reason why transparency might counterintuitively lower overall pay is discussed below.

Thus, achieving more equal but lower pay presents a challenging trade-off for policymakers, one that this Article will not attempt to resolve. But workers might be able to have their cake and eat it, too. Depending on the design of the law, it may be possible to achieve more equal and higher pay for all workers, which would satisfy the demands of both vertical and horizontal equity. In fact, this line of scholarship finds that in unionized firms, horizontal transparency reduces the gender pay gap without the negative wage effects, which suggests that worker collective bargaining strength mitigates this trade-off.[197] This finding is critical for understanding the promise and limits of pay transparency and informs Section III's proposal.

2. Vertical Pay Transparency Laws

Vertical pay transparency laws inform workers as to the overall distribution of wages across seniority levels in a firm.[198] Because few jurisdictions have enacted such

---

193. Obloj & Zenger, *supra* note 50, at 646, 648.

194. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 767. Cullen notes elsewhere that "between 2010 and 2018, the share of private sector workers reporting their employer prevents them from discussing pay fell from 33 percent to 10 percent during this window, while other states experienced a modest decline." Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 160.

195. Blundell et al., *supra* note 190, at 419 (finding that, for the U.K. law, a 2.9% decrease in men's real hourly pay drove the 19% reduction in the gender pay gap, with no significant effect on women's pay); Bennedsen et al., *Do Firms Respond to Gender Pay Gap Transparency?*, *supra* note 191, at 2051 (finding that Danish law reduces the gender pay gap "primarily by slowing wage growth for male employees"); Baker et al., *supra* note 192, at 159 (finding that among Canadian universities, slower relative growth in men's salaries contributed to the 25% to 40% overall reduction in the gender pay gap).

196. Ian Burn & Kyle Kettler, *The More You Know, the Better You're Paid? Evidence from Pay Secrecy Bans for Managers*, 59 LABOUR ECON. 92, 97 (2019).

197. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 766 ("In markets . . . where wages are set by a collective or union, transparency will not affect [overall] wages in equilibrium."); Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 164 (finding that "highly unionized occupations experienced negligible wage changes" from horizontal transparency).

198. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154.

laws, the topic is much less studied, and its effects on vertical equity are theoretically ambiguous.[199] Workers who know the size of a raise given to their boss might negotiate more aggressively, either for a year-over-year increase or upon promotion.[200] Additionally, larger than expected income gains for positions above workers provide an incentive for workers to work harder in the hopes that they receive a promotion.[201]

Perhaps the most prominent and studied form of vertical transparency in the United States is a highly limited form, the legal requirement that publicly traded companies disclose the compensation of CEOs in Securities and Exchange Commission (SEC) filings. Studies have primarily focused on the effects on CEO pay, rather than on non-CEO pay, and the historical evidence is decidedly ambiguous.[202] More recently, in response to concerns about vertical equity, the SEC promulgated a rule in 2015 requiring publicly traded companies to disclose CEO compensation, median worker pay, and the pay ratio between the two.[203] Again, while it is unclear whether the rule produced its intended effect of reducing the CEO-median worker pay ratio overall,[204] proxies for employee strength at the firm drove larger decreases in the ratio following disclosure, suggesting that disclosure could be effective for promoting vertical equity if paired with sufficient worker bargaining strength.[205]

Several limitations constrain CEO pay disclosure rules' usefulness for promoting vertical equity. Most obviously, the legal rules require only disclosure of CEO and median worker pay, which fails to meaningfully inform workers about the firm's pay structure and may enable firms to manipulate accounting metrics without changing overall pay levels.[206] Another challenge is that CEO-pay disclosure does not necessarily aid workers in their negotiations with management because different stakeholders are

---

199. *Id.* at 167 ("Currently, we lack direct evidence on the causal effects of implementing these policies.").

200. *Id.*

201. *See id.*

202. For example, CEO pay rose following the enactment of the Securities and Exchange Act of 1934. Alexandre Mas, *Does Disclosure Affect CEO Pay Setting?: Evidence from the Passage of the 1934 Securities and Exchange Act* 5 (Indus. Rels. Section, Princeton Univ., Working Paper No. 632, 2019), https://www.princeton.edu/~amas/papers/CEODisclosureMandate.pdf [https://perma.cc/TJP7-MSCG] (suggesting a "ratchet effect," as lower-paid CEOs bargain up their pay and higher-paid CEO pay remains high); *see* Andrea Carosi & José Guedes, *Can Compensation Disclosure Cause CEO Pay Escalation?*, 95 INTL. REV. FIN. ANALYSIS art. no. 103430, at 2 (2024). In contrast, following the creation of the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) platform in 1993, which increased access to SEC filings, CEO pay decreased by 7% to 15%, with stronger effects in unionized firms and in firms with highly skilled employees. Ilona Babenko, Benjamin Bennett & Zexi Wang, Does Better Access to Disclosure Curb CEO Pay? Evidence from a Modern Information Technology Improvement 3–4 (July 8, 2025) (unpublished manuscript) (on file with the Temple Law Review).

203. 17 C.F.R. § 229.402(u).

204. *See* Audra Boone, Austin Starkweather & Joshua T. White, Spinning the CEO Pay Ratio Disclosure 1–2 (Feb. 15, 2022) (unpublished manuscript) (on file with the Temple Law Review); Steven S. Crawford, Karen K. Nelson & Brian R. Rountree, *Mind the Gap: CEO–Employee Pay Ratios and Shareholder Say-on-Pay Votes*, 48 J. BUS. FIN. ACCT. 308, 314, 333–34 (2020).

205. Mei Cheng & Yuan Zhang, *Corporate Stakeholders and CEO-Worker Pay Gap: Evidence from CEO Pay Ratio Disclosure*, 29 REV. ACCT. STUD. 3713, 3716–17 (2023).

206. Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1192–97 (2019).

involved: the company's board generally determines CEO compensation, while its management determines median worker compensation.[207] Accordingly, "relative pay depends on the bargaining power of top executives vis-à-vis the board and of lower-level employees relative to management."[208] Still, investors might be averse to pay inequality, which might create pressure on firms to reduce the CEO-median worker pay ratio.[209] Disclosure may also aid workers at unionized firms: Boards appear to curtail CEO pay when they face a union contract negotiation, perhaps to avoid labor unrest, as "high CEO pay and recent increases in CEO pay raise the likelihood of a strike."[210] Notwithstanding the limitations of CEO pay disclosure, broader vertical transparency may aid non-elite workers in their bargaining efforts.[211]

3. Cross-Firm Pay Transparency Laws

Finally, as of 2023, eight states had enacted cross-firm pay transparency laws that require employers to post wage information in postings for new jobs to varying degrees.[212] While these laws generally require disclosure of the salary or hourly wage range, they vary in scope and content: Some require employers to provide the information upon request, while others must provide it in job postings (Colorado, Washington, California, and New York) or after an interview (Nevada).[213] Cross-firm transparency appears to be most successful in promoting vertical equity, while also reducing gender wage gaps. Theoretically, these laws would force low-paying employers to increase wages to match higher-paying employers, lest they lose applicants or incumbent workers. Alternatively, incumbent workers armed with the information might be able to bargain up wages.

While empirical research remains limited because of the recency of these laws, the available evidence is promising. A key study of a 2021 Colorado law requiring job postings to include expected compensation online found that posted salaries increased by about 3.6%.[214] These effects may be greater if states are able to increase compliance—the study found that 30% of online postings did not include the required salary range.[215] Significantly, there was a positive wage increase even among firms that already included pay information, suggesting that those firms increased salaries to match

207. Olubunmi Faleye, Ebru Reis & Anand Venkateswaran, *The Determinants and Effects of CEO-Employee Pay Ratios*, 37 J. BANK. FIN. 3258, 3258–60 (2013).

208. *Id.*

209. Yihui Pan, Elena S. Pikulina, Stephan Siegel & Tracy Yue Wang, *Do Equity Markets Care About Income Inequality? Evidence from Pay Ratio Disclosure*, 77 J. FIN. 1371, 1405 (2022).

210. Qianqian Huang, Feng Jiang, Erik Lie & Tingting Que, *The Effect of Labor Unions on CEO Compensation*, 52 J. FIN. QUANT. ANALYSIS 553, 555 (2017).

211. See *infra* Part III.A for a discussion on how vertical transparency may aid in "claims-making."

212. Becca Damante, Lauren Hoffman & Rose Khattar, *Quick Facts About State Salary Transparency Laws*, CTR. FOR AM. PROG. (Mar. 9, 2023), https://www.americanprogress.org/article/quick-facts-about-state-salary-range-transparency-laws/ [https://perma.cc/776A-VWNC].

213. *Id.*

214. David Arnold, Simon Quach & Bledi Taska, The Impact of Pay Transparency in Job Postings on the Labor Market 2, 12 (August 12, 2022) (unpublished manuscript) (on file with the Temple Law Review).

215. *Id.* at 6.

competitors.[216] A study of a Slovak law requiring firms to include an expected salary found that wages increased by 3%.[217] Unpublished survey data indicates that 33.1% of employers expect wages to increase and 65.1% expect them to stay the same because of these laws.[218] With the benefit of more time and data to study the effects of these laws, we will have a better idea as to whether these findings are replicated across states.

These laws may also promote horizontal equity by correcting workers' underestimates about available pay rates, which may help women and low-paid workers the most.[219] A study of an Austrian cross-firm pay transparency law found a small decline in the gender wage gap—with little effect on men's wages—but significant compositional heterogeneity, with much larger reductions in the gender pay gap for lower-income women workers.[220] The scholars interpreted the positive impact on women's earnings as being caused by the "reduction of information asymmetries about pay and jobs."[221] Similarly, as discussed above, a study in which U.S. engineers were informed of the median bid salary for similar candidates—which functions similarly to cross-firm transparency—found that this information eradicated the gender ask gap.[222]

C. *The Limits of Transparency*

As surveyed above, pay transparency laws have made progress in promoting horizontal equity by reducing the gender wage gap. While horizontal transparency may achieve this reduction in the gender pay gap by also reducing wages, other forms of transparency, especially cross-firm, may create an upward pressure on wages. To be sure, the evidence is still preliminary, both because of the recency of the legislation and the limited disclosure duties that much of extant law imposes.

This Part offers a sympathetic but critical evaluation of both transparency as currently implemented and transparency as a broader legal-economic project. Two concerns animate this discussion. First, the potential tensions between horizontal and vertical equity warrant a better understanding of the channels through which transparency operates so that policy design can harmonize vertical and horizontal equity. Second, even if cross-firm pay transparency has *some* upward effect on wages, its wage-increasing effects may be limited by policy design and the character of labor markets. These concerns require a more critical look at the key assumption of the transparency project: that correcting market imperfections such as asymmetrical information will make labor markets function more competitively.

1. Employer Responses to Information Disclosure

One central problem with pay transparency as a policy intervention is that the informational shock that transparency induces affects not only workers but also

216. *Id.* at 3–4.

217. Samuel Škoda, Directing Job Search in Practice: Mandating Pay Information in Job Ads 20–24 (Nov. 22, 2022) (unpublished manuscript) (on file with the Temple Law Review).

218. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 168.

219. Frimmel et al., *supra* note 151, at 2–3.

220. *Id.* at 4–5.

221. *Id.* at 5.

222. Roussille, *supra* note 110, at 1560.

employers. In other words, while pay transparency might increase the total mix of information available to workers, it also may increase employers' information or otherwise change how employers act. Consider two potential employer responses.

a. Employer Collusion

First, pay transparency might facilitate wage-suppressing collusion between employers. As Adam Smith observed, employers are "always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual rate."[223] Tacit agreements among employers to not raise wages deprive workers of higher-paying alternative positions and reap higher profits in return, which in turn causes social welfare losses that harm workers, consumers, and suppliers.[224] Labor market power also facilitates collusion.[225]

Although employers have strong incentives to collude, collusion is notoriously prone to "cheat[ing]" by participants, which leads to the unraveling of collusive schemes.[226] However, labor markets have several features distinct from product markets that make successful collusion more likely, such as high switching costs for workers, pay equity norms, and downward wage rigidity.[227] Traditionally, pay secrecy in labor markets undermined potential collusion because it made monitoring other participants more difficult; however, "pay[-]transparency laws and new hiring platforms like Glassdoor may result in lower rather than higher wages because the increase in transparency facilitates collusion among employers."[228] Moreover, transparency may also deter cheating—offering a higher wage than the collusive wage—which becomes costlier when the employer must offer the same wage to all its workers.[229]

Identifying and studying collusion is difficult in part because such schemes remain largely hidden and in part because, until recently, "no[] [economist] has thought it worthwhile to investigate in detail."[230] Still, the limited evidence suggests that collusion can be quite costly. A series of "no-poaching agreements" between Silicon Valley firms from 2005 to 2009 that prohibited firms from recruiting each other's employees reduced wages by 5.6% and reallocated at least $3.1 billion away from labor.[231] One historical study of the Belgian coal industry found that collusion increased employer markdowns

223. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 100–01 (6th ed. 1791).

224. Tirza Angerhofer & Roger D. Blair, *Collusion in the Labor Market: Intended and Unintended Consequences*, COMPETITION POL'Y INT'L: ANTITRUST CHRON., June 12, 2020, at 5; Michele Bisceglia, Labor Market Power and Collusive Behavior 2 (Jan. 15, 2025) (unpublished manuscript) (on file with the Temple Law Review).

225. Bisceglia, *supra* note 224, at 14, 21, 29.

226. Jonathan Masur & Eric A. Posner, *Horizontal Collusion and Parallel Wage Setting in Labor Markets*, 90 U. CHI. L. REV. 545, 552–53 (2023).

227. *Id.* at 560–61.

228. *Id.* at 565.

229. Bisceglia, *supra* note 224, at 13–16.

230. Manning, *supra* note 126, at 980.

231. Matthew Gibson, *Employer Market Power in Silicon Valley* 2–5 (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 24-398, 2024), https://research.upjohn.org/cgi/viewcontent.cgi?article=1417&context=up_workingpapers [https://perma.cc/4ZM4-CVDD].

from about 60% of workers' marginal product to less than 50% of their marginal product, thereby decreasing wages and employment by about 6% to 17% of pre-cartel labor market conduct and 10% to 25% compared to a counterfactual world without any collusion.[232] Prominent examples of publicized pay having potentially collusive effects include the "Cravath scale" for law firm associates, Amazon's $15 minimum wage that many firms quickly followed, and nonbinding minimum wage increases that facilitate focal point collusion.[233]

b. Spillover Effects

A second potential effect of pay transparency is that transparency creates costly "spillovers" that make it less likely that employers raise wages. Specifically, if employers know that other workers will learn of pay increases from their colleagues, employers might bargain more aggressively and be more reluctant to grant wage increases.[234] Under these circumstances, the employer can credibly refuse to grant the worker a raise by telling her that it will then have to give her coworkers a raise, which it cannot afford to do.[235] Dr. Cullen and Professor Pakzad-Hurson posit that this channel explains their finding that wages fell by around 2% following the enactment of right-to-talk laws, as transparency decreased workers' "de facto bargaining power."[236]

While this effect is independent of employer collusion, it might buttress collusion. If employers can collude on below-competitive wages, an individual employer can point to the fact that it pays the same wages as competing firms as a reason to not grant a wage increase.[237] But note that even if an employer *is* paying the same wage as other employers, it does not follow that the employer cannot profitably pay a higher wage—the wage rate may be shared among competing firms but nonetheless be below workers' MPL if the rate reflects collusion or the "wage markdown of pervasive monopsony power."[238]

A related effect is that employers might be less likely to engage in wage bargaining at all under conditions of transparency.[239] This is a problem for vertical equity reasons because wage bargaining generally leads to higher wages than when employers simply post wages on a take-it-or-leave-it basis.[240] Although scholars Maria Recalde and Lise

232. Vincent Delabastita & Michael Rubens, Colluding Against Workers 2–3 (Aug. 27, 2024) (unpublished manuscript) (on file with the Temple Law Review).

233. Masur & Posner, *supra* note 226, at 570–71; Ellora Derenoncourt, Clemens Noelke, David Weil & Bledi Taska, *Spillover Effects from Voluntary Employer Minimum Wages* 4–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29425, 2022), https://www.nber.org/system/files/working_papers/w29425/w29425.pdf [https://perma.cc/28XH-4TGG] (finding that Amazon's wage increase precipitated increases in other retailers' wages).

234. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154.

235. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 772.

236. *Id.* at 773–74, 791.

237. Masur & Posner, *supra* note 226, at 565 n.67.

238. Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. 319, 391 (2025).

239. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 767.

240. *Id.* at 772 n.5; Elaine S. Povich, *Pay Transparency Laws Raise Women's Salaries (And Slightly Lower Men's)*, STATELINE (May 26, 2022, at 00:00 ET), https://stateline.org/2022/05/26/pay-transparency-laws-raise-womens-salaries-and-slightly-lower-mens/ [https://perma.cc/7ZDA-H473].

Vesterlund note that an outright prohibition on salary negotiations may be effective in reducing gender wage gaps,[241] prohibiting negotiations is not necessary to reduce the gender wage gap where workers are informed of standard pay.[242] Cross-firm pay transparency laws may also reduce an employer's willingness to negotiate wages because employers can point to the wages paid by competitors.

A further problem with horizontal transparency's "spillover effects" is what this Article calls "asymmetrical collectivization": While transparency may collectivize the *costs* of individual bargaining—a wage raise given to one worker becomes a wage raise for many workers—it does not collectivize *individual bargaining itself*.[243] In other words, like collective bargaining, transparency standardizes and ties wage rates to each other; but unlike collective bargaining, nonunion workers continue to bargain individually, without the collective strength that only collective action can wield. Indeed, Dr. Cullen finds that the negative wage effects were reduced in unionized firms,[244] and unions generally reduce gender pay gaps without negatively impacting overall wages.[245] Accordingly, pay transparency is not enough—it must also facilitate workers' abilities to collectively bring wage demands, either informally or through a union.

In addition to facilitating collective action, another promising policy avenue is to provide more information so that workers can assess how credible an employer's refusal to grant a wage demand is—an employer might refuse, but if the firm's financial status information reveals high profits, workers are armed with an informed rebuttal.[246] This line of argument is elaborated in Part III.A below. Additionally, horizontal transparency could be paired with vertical and cross-firm transparency, which increase wages and productivity by reducing "information frictions in the labor market."[247] Vertical transparency increases worker effort to achieve promotions and higher pay, while cross-firm transparency increases competition and may put upward pressure on wages.[248] A unified approach to both vertical and horizontal equity can promote individual bargaining that is both horizontally equitable and vertically effective.

2. Which Information?

A second broader problem with extant pay transparency laws is the type of information they seek to furnish. The laws, and the scholarship surrounding them, have focused on pay information.[249] To be sure, pay information is essential to better inform workers about outside options, labor market conditions, and wages paid to similar

241. Recalde & Vesterlund, *supra* note 177.

242. *See* Roussille, *supra* note 171, at 39–40.

243. *See* Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 164.

244. *See id.* at 164 (citing evidence that the negative wage effects from transparency are diminished under unionization).

245. *See Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/ [https://perma.cc/NE4U-753X] (surveying evidence that unions increase wages and decrease horizontal inequality).

246. Rosenfeld & Denice, *supra* note 22, at 1047.

247. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 154.

248. *Id.*

249. Estlund, *Extending the Case*, *supra* note 19, at 782–83; Harris, *supra* note 18, at 47.

workers. However, pay information alone does not erode the informational asymmetries in worker-employer bargaining. Labor law provides a cautionary tale of this dynamic.

a. Informational Asymmetries in Wage Bargaining

Consider a simple bargaining model between a worker and firm. The worker has a "reservation wage," the lowest wage they are willing to accept and that forms the floor for a potential agreement.[250] The ceiling for negotiation is the highest wage the employer can profitably pay, which, for simplicity, we will assume to be the worker's MPL.[251] Within this range, the exact agreement will be the product of bargaining.[252] The difference between the agreed-upon wage and the worker's MPL represents employer profits and constitutes "exploitation" in a Pigou-Robinson model.[253]

Consider next the information available to each of the parties under conditions of pay transparency. The worker knows her own reservation wage; while the employer does not know *that* worker's precise reservation wage, it likely has a reasonable approximation based on the wages paid to similar workers and may know, because of pay transparency, an estimate of what she earned in her previous employment. To be sure, pay transparency might boost the worker's reservation wage compared to no transparency because she knows her outside options and may know what her would-be coworkers are paid.[254]

While both parties may have similar information about the worker's reservation wage, information about the wage the employer *can* pay is decidedly more asymmetric.[255] While the employer does not know a priori the worker's MPL—which depends, in part, on the worker's skill, effort, and complementary nature of production—the employer is armed with much more information—such as its revenues, costs, profitability, and productivity of similar workers—that generate a firm's ability to pay.[256] The worker, by contrast, is in the dark about these features and, therefore, the employer's reservation wage. One might respond that the worker may have a general idea as to the employer's ceiling based on the wages that it or other firms pay to similar workers. But there is no reason a priori to suppose that actually paid or offered wages approximate the firm's MPL; to the contrary, the evidence suggests that nonunion wages

---

250. U.S. DEP'T OF THE TREASURY, *supra* note 16, at 6.

251. *Id.*

252. *Id.*; Kennedy, *supra* note 90, at 328 ("Nothing tells us a priori how the value of the joint product will be divided.").

253. Paul Flatau, *Some Reflections on the 'Pigou-Robinson' Theory of Exploitation*, 33 HIST. ECON. REV. 1, 2–3 (2001).

254. This assumption is weak under current transparency law, which requires employers to post wages in job postings but does not require employers to disclose wages of incumbent workers. *See supra* Part II.B.

255. DOUGLAS, *supra* note 148, at 78.

256. In rejecting neoclassical marginal productivity theory, institutionalist economists have argued that firms lack a well-defined labor demand function, in part because production depends on workers' effort. Bruce E. Kaufman, *Richard Lester's Institutional-Industrial Relations Model of Labor Markets and the Near-Zero Minimum Wage Employment Effect: The Model Card and Krueger Ignored but Shouldn't Have*, 54 J. ECON. ISSUES 1002, 1010–11 (2020) [hereinafter Kaufman, *The Model Card*]. Instead, they posit that the MPL schedule is a band rather than a defined line. *Id.* For simplicity, I assume that employers have a rough idea of MPL.

are marked down and therefore lower than the firm's MPL.[257] The information that pay transparency laws furnish does not, therefore, inform the worker as to the employer's ability to pay.[258]

In the absence of information as to the employer's reservation wage—an "aspect critical to reaching agreement"[259]—the worker is structurally disadvantaged, and the outcome will favor the employer.[260] Under conditions of imperfect information, bargaining may form around a customary point or around a focal point, such as a fifty-fifty split in sports leagues revenue sharing.[261] Behavioral studies in nonlabor markets indicate that participants often split the difference, which may satisfy the participants' notions of fairness but would likely mean a compromise between the posted wage and the worker's counteroffer—that is, not at the worker's MPL.[262]

Dr. Cullen's exposition on spillover effects further illustrates the problem. Suppose that the employer "credibly" rejects a demanded wage by responding that it will have to grant other workers the same wage, which makes the increase too costly.[263] Armed only with pay information, the worker cannot assess the credibility of the employer's explanation because she does not know the employer's ability to pay. Pushing the envelope may be costly for the worker because of social norms and fear of retaliation. In the absence of more complete transparency, the worker may accept the employer's explanation or accept a compromise wage, without knowing the relationship between that wage and the highest wage the employer could offer. Under conditions of information asymmetry that pay transparency fails to address, we would expect employers to continue to pay workers below their MPL.[264]

b. The NLRA: A Cautionary Tale

Labor law offers a cautionary tale as to the importance of nonwage financial information, such as revenue and expenses.[265] Section 8(a)(5) of the NLRA requires unions and employers to bargain in good faith, which the Supreme Court has interpreted as requiring the parties to furnish relevant information to one another during collective

257. *See* Sokolova & Sorensen, *supra* note 170, at 27, 50–52 (surveying monopsony literature and finding "sizable markdowns in wages").

258. Kaufman, *The Model Card*, *supra* note 256, at 1023 (explaining that wages depend on factors such as "ability to pay, rent-sharing, HR strategy, and union threat").

259. Lawrence M. Ausubel, Peter Cramton & Raymond J. Deneckere, *Bargaining with Incomplete Information*, *in* 3 HANDBOOK OF GAME THEORY WITH ECONOMIC APPLICATIONS 1899 (Robert Aumann & Sergiu Hart eds., 2002).

260. *See* Caldwell et al., *Bargaining in the Labor Market*, *supra* note 146, at 41; Harris, *supra* note 18, at 9 (collecting studies); Thomas Sadler & Shane Sanders, *The 2011–2021 NBA Collective Bargaining Agreement: Asymmetric Information, Bargaining Power and the Principal Agency Problem*, 42 MANAGERIAL FIN. 891, 894–95 (2016) (concluding that NBA owners' superior knowledge advantaged their bargaining strength during the lockout).

261. Sadler & Sanders, *supra* note 260, at 894–95.

262. Matthew Backus, Thomas Blake, Brad Larsen & Steven Tadelis, *Sequential Bargaining in the Field: Evidence from Millions of Online Bargaining Interactions*, 135 Q.J. ECON. 1319, 1319 (2020).

263. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 791.

264. *See* Rosenfeld & Denice, *supra* note 22, at 1047–48.

265. *See* Fairhaven Props., Inc., 314 N.L.R.B. 763, 764 (1994).

bargaining,[266] on the theory that "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiation cannot occur."[267] Generally, unions must affirmatively request or demand the information, although wage information for bargaining-unit employees is presumptively relevant, which instantiates a form of pay transparency.[268]

However, the doctrine governing financial status information relevant to the employer's ability to pay has presented a special challenge for unions. For this information, there is no presumption of relevance; rather, because "the employer's ability to pay must be brought into issue before a refusal to furnish information relating thereto can be found to be violative of the Act," unions may not access nonwage financial information unless the employer affirmatively makes it an issue in collective bargaining.[269] The leading Supreme Court case on the issue, *NLRB v. Truitt Manufacturing Co.*, held that the employer violated Section 8(a)(5) by refusing to provide its financial information to the union after the employer responded that it could not grant the union's demand wage increase of 10 cents per hour because anything more than 2.5 cents per hour would put it out of business, a so-called plea of poverty.[270] While holding that the employer was required to furnish the information to substantiate its claim that it could not pay, the Supreme Court stated that it "do[es] not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts."[271]

Courts and the NLRB interpreted *Truitt* narrowly, distinguishing between instances where an employer is simply "unwilling[]" to pay, which does not trigger a union's entitlement to financial information, and instances where the employer asserts its "inability" to pay, which does.[272] The justification for this distinction is that while unwillingness to pay is not "legitimately subject to verification," inability is.[273]

Scholars have roundly criticized this rule.[274] A firm's financial status information is relevant to unions to the extent it affects the firm's ability to pay wages, but

266. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979).

267. Loc. 13, Detroit Newspaper Printing & Graphic Commc'ns Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979).

268. *See* NLRB v. F.W. Woolworth Co., 235 F.2d 319, 320–21 (9th Cir. 1956), *rev'd per curiam*, 352 U.S. 938 (1956) (reversing the lower court and finding that an employer's failure to furnish wage information requested by a union—even after the end of negotiations in which the union received the entire increase it sought—was an unfair labor practice (citing NLRB v. Truitt Mfg. Co., 351 U.S. 149, 149–50 (1956))).

269. Pine Indus. Rels. Comm., Inc., 118 N.L.R.B. 1055, 1061 (1957).

270. 351 U.S. at 150–51, 153–54 (1956).

271. *Id.* at 153.

272. United Steelworkers, Loc. Union 14534 v. NLRB, 983 F.2d 240, 244 (D.C. Cir. 1993); Nielsen Lithographing Co., 305 N.L.R.B. 697, 699–700 (1991).

273. *United Steelworkers*, 983 F.2d at 244.

274. *E.g.*, Kenneth G. Dau-Schmidt, *The Duty To Bargain in Good Faith:* NLRB v. Truitt Manufacturing Co. *and* NLRB v. Insurance Agents' International Union 33 (Bepress Legal Series, Working Paper No. 1318, 2005), https://law.bepress.com/cgi/viewcontent.cgi?article=3395&context=expresso [https://perma.cc/B4HT-Z5LA].

management-side lawyers can easily dodge the duty to disclose.[275] Access to financial data enables the union to bargain intelligently, and the law's constraints impede the union's duty to act as a responsible bargaining agent.[276] Indeed, contrary to the NLRA's goal of promoting "industrial peace," the rule may cause industrial unrest as unions may resort to strikes in conditions of uncertainty.[277] Strikes themselves are a means of compelling the disclosure of information, such as the employer's willingness to pay, which implies that "dispute activity increases with uncertainty about private information."[278] Alternatively, the union may leave wage gains on the table if it cannot substantiate but accepts an employer's unwillingness-to-pay defense.[279] The union is left, in Judge Posner's colorful phrasing, with the choice of whether to "knuckle under to the company's demands or call a strike."[280] While, in 2022, the NLRB General Counsel proposed overruling NLRB precedent to require disclosure of an employer's general finances whenever "it puts at issue its ability to afford the union's demands or asserts those demands would cause injury to its business,"[281] such a change is unlikely to occur under the current administration and would not aid nonunion employees.

In sum, while unionized employees under the NLRA enjoy a form of horizontal pay transparency, that information is not enough—unions often require financial information, which shifts bargaining power between the parties.[282] If financial information is critical to unions, which wield collective strength, it stands to reason that financial information would also be essential to individually bargaining workers who lack the organizational support of a union.

3. From Information to Collective Action

A final limitation to consider is transparency's relationship to collective action. For the reasons discussed above, transparency does not, ipso facto, boost wages. As an OECD report explains in surveying the transparency evidence, "while pay transparency laws may give workers more information, workers must also have sufficient bargaining power to negotiate for the policies to be effective."[283] This limitation requires that we more closely examine what transparency purports to do.

The dominant theoretical underpinning for information disclosure is the imperfect competition monopsony model.[284] Under this theory, imperfect and asymmetrical

---

275. Brent Robbins, *Rethinking Financial Information Disclosure Under the National Labor Relations Act*, 47 VAND. L. REV. 1905, 1928–29 (1994).

276. Robert P. Duvin, *The Duty To Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 282 (1964).

277. Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 461–62, 466 (1992) ("[U]nder the [traditional] monopoly model strikes are the result of imperfect information . . . .").

278. Ausubel et al., *supra* note 259, at 1939.

279. Robbins, *supra* note 275, at 1907.

280. Graphic Commc'ns Int'l Union, Loc. 508 v. NLRB, 977 F.2d 1168, 1171 (7th Cir. 1992).

281. PacifiCorp, NLRB Advice Memorandum, No. 19-CA-277632, at 8–9 (Apr. 20, 2022) (emphasis omitted).

282. See *infra* note 340 for evidence that access to information improves a union's bargaining positions.

283. Organisation for Economic Co-operation and Development [OECD], *supra* note 183, at 63.

284. *See* HARRIS, *supra* note 18, at 4.

information—as a negation of the core assumption of perfect information—distorts labor markets from how they *ought* to function in the perfect competition model. Perfectly competitive labor markets, then, serve as the normative benchmark against which actually existing labor markets may be judged. It follows, at least from this framework, that information disclosure corrects labor markets by bringing them closer to the perfectly competitive ideal. Once armed with perfect information, workers and employers will reach agreements that more closely approximate the desired competitive outcome, such as the law of one price, wages equal to MPL, and allocative efficiency. To be sure, as this Article argues, imperfect information is a problem for workers that policymakers should address. But this framing suffers from two related theoretical and practical problems.

As a theoretical matter, the imperfect-competition diagnosis risks reproducing, even unintentionally, the perfect-competition ideal and its analytical deficiencies, which are discussed further in Part III.A.[285] The reliance on perfect competition as a normative ideal is not only a theoretical concern but also carries policy implications. Suppose we compare actually existing labor markets to perfect competition and identify various deviations in practice, such as asymmetrical information, from the normative ideal. If, as in the neoclassical frame, these various negations of the assumptions of perfect competition—"asymmetric information, uncertainty, historical time, bounded rationality, or other imperfections"[286]—are the sources of power and thus imperfection in labor markets, then it follows that eliminating these sources of power would also cause power relations in labor markets to disappear and correct the markets.[287] At a glance, the transparency project fits neatly into this orthodox framework, which may explain policymakers' willingness to adopt these policies: If perfect information is required for competition to work its miracles, then *of course* information disclosure is warranted.

The problem, however, is that single-minded focus on imperfect information risks obscuring other sources of employer market power, which may undermine the effectiveness of information disclosure in the first place. That is not to suggest that monopsony economists are unconcerned with other labor market problems or posit information disclosure as a panacea. However, when transparency fails to alter *other* sources of asymmetrical bargaining power between the parties—including those alien to the neoclassical tradition—it may introduce the discussed unintended consequences or fail to boost pay. Put another way, focusing solely on the problem of information is inadequate because information is not a standalone problem in labor markets but interacts with other, central labor market features. The perfect competition framing risks misdiagnosing the key sources of employer market power over workers: The problem is not information per se, but information *and* its interaction with parties' asymmetric abilities to act on that information.[288]

Indeed, imperfect information is a social fact that transcends capitalist labor markets, which means that it, and other negations of the assumptions of perfect

285. Tankus & Herrine, *supra* note 20, at 73; Paul, *supra* note 20, at 1278–79.

286. Giulio Palermo, *The Economic Debate on Power: A Marxist Critique*, 21 J. ECON. METHODOLOGY 123, 132 (2014).

287. *Id.*; Tankus & Herrine, *supra* note 20, at 73.

288. *See* Organisation for Economic Co-operation and Development [OECD], *supra* note 183, at 63.

competition (for example, uncertainty and bounded rationality) do not explain with specificity the unique power relations that constitute those labor markets.[289] Instead, the peculiar feature of capitalist labor markets is what Karl Marx called double freedom: the worker's and employer's legal right to freely contract as equals, on one hand, and the worker's freedom from the means of production, on the other.[290] From there, various conditions, even outside imperfect information, systematically disadvantage labor relative to capital. Labor markets are characterized by unemployment, which means that there is a kind of reserve army of labor for most job positions.[291] If a worker's reservation wage is too high—and, significantly, even if that reservation wage is not above the worker's MPL—the employer may simply choose to fill the position with another worker willing to work for less because workers' reservation wages are not uniform. Relatedly, as Professor Marietta Auer argues, bargaining in capitalist labor markets occurs against a backdrop of unequal holdout power, which benefits capital.[292] By virtue of their status as workers, workers typically need labor market income to self-reproduce, which disadvantages them vis-à-vis employers.[293] Note that these features of labor markets are generally not cognizable in the neoclassical frame.[294] On this view, although imperfections such as asymmetrical information modify power relations and further unequal bargaining power,[295] such informational asymmetries do not create the power relations between worker and employer—rather, the social structure in which one group of people must sell its labor and the other group buys labor power creates the constitutive power relations.[296] Indeed, Sraffian economic models demonstrate that even with perfect information, workers are still paid less than their MPL.[297]

Without attention to these other features of labor markets, mere disclosure may not only fail to work its vertical equity ends but may even make matters worse. The spillover effect's problem illustrates this problem concretely: If workers have insufficient bargaining power, then information disclosure may decrease wages.[298] Similarly, "salary history bans"—laws that prohibit employers from requesting a job searcher's past salary, intended to reduce the gender pay gap—may reduce wages for new hires by 3%, as

---

289. *See* Palermo, *supra* note 286, at 136–37.

290. *Id.*

291. *See* John F. Henry, *Classical Political Economy: The Subsistence Wage, and Job Guarantee Reserves*, 38 J. POST KEYNESIAN ECON. 280, 298 (2015) ("[U]nemployment serves as a disciplining mechanism, reducing the hopes of workers to realize their wage-increasing objectives.").

292. Auer, *supra* note 85, at 69; Matthew Backus, Thomas Blake, Brad Larsen & Steven Tadelis, *Sequential Bargaining in the Field*, 135 Q.J. ECON. 1319, 1321–22 (2020) (collecting sources).

293. Auer, *supra* note 85, at 69.

294. *See* Palermo, *supra* note 287, at 187–90.

295. Daphne T. Greenwood, *Institutionalist Theories of the Wage Bargain: Beyond Demand and Supply*, 50 J. ECON. ISSUES 406, 410 (2016).

296. Palermo, *supra* note 287, at 187–90.

297. Giulio Palermo, *Economic Power and the Firm in New Institutional Economics: Two Conflicting Problems*, 34 J. ECON. ISSUES 573, 592 (2000); *see also* Joan Robinson, *Piero Sraffa and the Rate of Exploitation*, 31 NEW LEFT REV., MAY–JUNE 1965, at 28, 30, 33 (explaining that, in Sraffa's framework, prices—and thus wages—are set by the profit rate rather than marginal productivity, with exploitation driven by worker bargaining power).

298. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 168–70; Organisation for Economic Co-operation and Development [OECD], *supra* note 183, at 63.

employers lose "an informative signal of worker productivity" and reduce wages.[299] Another example is the widespread adoption of the internet in job searches, which reduces search costs and increases information but has little effect on wage growth.[300] These examples suggest that unless transparency works to raise workers' bargaining power, employers may use *their* superior bargaining power to undermine the purpose of transparency in the first place.

The compression effects of transparency raise this problem as well, albeit from a different slant, since compression is generally salutary. Compression from transparency takes several forms: (1) pay compression between workers at the same firm, thereby reducing the gender wage gap;[301] (2) (possible) compression of wages between highly paid and lowly paid workers;[302] and (3) market-wide compression, as low-paying firms must increase their wages.[303] This latter form of pay compression, facilitated by cross-firm transparency, may well mean that transparency increases wages by "sharpening competition between firms."[304] Low-paying firms increase their pay to compete with other firms,[305] while high-paying firms are unlikely to cut pay because of downward wage rigidity,[306] although they may reduce future wage growth. These effects, taken together, may increase overall wages. To be sure, compression is generally desirable: As the labor movement has long recognized, interfirm wage compression, or taking wages out of competition, functions as a sort of industrial policy by forcing employers to compete on production efficiency and product quality and price, rather than on low wages.[307]

However, there are reasons to be skeptical about the extent to which wage compression in nonunion labor markets can increase wages. Compression supposes that wages will coalesce around a given level in the market, which may be higher than the uncompressed average. But if that compression point itself is the product of "markdowns" below workers' MPL—for which there is extensive evidence[308]—then transparency will not significantly increase workers' wages. Put another way, if, even

---

299. Jesse Davis, Paige Ouimet & Xinxin Wang, *Hidden Performance: Salary History Bans and the Gender Pay Gap*, 11 REV. CORP. FIN. STUD. 511, 511 (2022).

300. Peter Kuhn & Hani Mansour, *Is Internet Job Search Still Ineffective?* 18 (Inst. for the Study of Lab., Discussion Paper No. 5955, 2011), https://www.econstor.eu/bitstream/10419/55102/1/675947200.pdf [https://perma.cc/R8HY-EVDC].

301. Baker et al., *supra* note 192, at 159.

302. Mas, *Pay Compression*, *supra* note 186, at 1684.

303. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 168–70; Zoë B. Cullen, Shengwu Li & Ricardo Perez-Truglia, *What's My Employee Worth? The Effects of Salary Benchmarking* 6–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30570, 2022), https://www.nber.org/system/files/working_papers/w30570/w30570.pdf [https://perma.cc/N978-XLE2] (finding that salary benchmarking significantly reduces dispersion and raises wages for low-skill positions).

304. Cullen, *Is Pay Transparency Good?*, *supra* note 12, at 170.

305. *Id.* at 168; *see* Cullen et al., *supra* note 303, at 40.

306. Jonathon Hazell & Bledi Taska, Downward Rigidity in the Wage for New Hires 41 (Nov. 10, 2024) (unpublished manuscript) (on file with the Temple Law Review).

307. *See* Callaci, *supra* note 4.

308. Sokolova & Sorensen, *supra* note 170, at 27.

under transparency, nonunion labor markets continue to be characterized by employer market power, wage gains from transparency will be narrowly circumscribed.[309]

The scholarship suggests that wage gains will be small. As economists Jose Azar and Ioana Marinescu note in their comprehensive review of the monopsony literature, while there is "limited empirical work on information sharing across employers," it appears that the average effect of salary benchmarking on wages is close to zero, as high wages are reduced to the benchmark, and low wages raised to that point.[310] Indeed, even where wages become uniform across a market and appear governed by "the law of one price," it may be "due to the effect of social norms and convention rather than competition," that is, wages being equal to MPL.[311] This concern is particularly acute in nonunion labor markets, where unions cannot countervail employer power and union premium wages cannot serve as "better proxies for workers' value to production as compared to 'competitive' wage rates."[312] Thus, from the perspective of vertical equity, wage compression is not enough—wages need to be compressed *and* at higher levels.

In sum, because the transparency project often rests on the implicit assumption derived from imperfect competition theory that information disclosure "corrects" markets by moving them closer to the conditions required for perfect competition, it risks overlooking other sources of labor market power, which in turn limits the effectiveness of disclosure. Unless transparency itself works to more fundamentally alter bargaining power dynamics between workers and employers—or is paired with other policies to achieve that—its potential for increasing vertical equity will be limited. Section III takes up this challenge.

III. TRANSFORMING INDIVIDUAL BARGAINING

Section I identifies work law's failure to promote vertical equity and argues that state employment law is the likeliest avenue to address the problem. Section II critically evaluates the promise and limits of pay transparency laws. While these laws appear to be promising in promoting horizontal equity, several elements limit their effectiveness in creating higher wages: Employers may respond to the information by lowering wages, the scope of information does not inform workers as to the employer's reservation wage, and the laws fail to build sufficient power among workers that would compel higher wage levels. These shortcomings are emblematic of a broader theoretical tendency to normalize the textbook ideal of perfectly competitive labor markets, even in monopsony models.

Section III proposes a broader transparency policy to mitigate those shortcomings and proceeds in several parts. First, it presents a new normative justification for workers'

309. Hafiz, *supra* note 238, at 399.

310. Azar & Marinescu, *supra* note 138, at 504.

311. Suresh Naidu & Eric Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. S284, S295 (2022).

312. Hafiz, *supra* note 238, at 391; *see also* Samuel Dodini, Kjell G. Salvanes & Alexander Willén, *The Dynamics of Power in Labor Markets: Monopolistic Unions Versus Monopsonistic Employers* 5 (Inst. of Lab. Econ., Discussion Paper No. 15635, 2022), https://docs.iza.org/dp15635.pdf [https://perma.cc/ENQ2-EGAF] (finding that "unions may offset the market failure induced by imperfect competition"); Christopher L. Erickson & Daniel J.B. Mitchell, *Monopsony as a Metaphor for the Emerging Post-Union Labour Market*, 146 INT'L LAB. REV. 163, 163 (2007).

broad right to information regarding their firm, grounded in both the necessity of monitoring employers' wages and a relational egalitarian ideal in which labor is treated as the necessary partner in joint production that it is. Second, it sketches the proposal, which would require employers to affirmatively disclose detailed wage and financial information, including year-over-year changes, to its employees annually. Third, because of the limitations of information disclosure, it argues that more comprehensive transparency can facilitate worker union organizing. To that end, it draws on the social-scientific scholarship on why workers choose to organize and a case study of how museum and art professionals used transparency as a union organizing tool.

A. *The Case for Opening the Books*

Before turning to the proposal, this Section first provides the normative justification for a broader right to information for workers. Significantly, this justification does not rely on a market-failure appeal but on the actual and necessary functioning of labor markets.

A narrowly economic justification for information disclosure might view it as necessary to correct perceived market failures.[313] In arguing for a regime of mandatory disclosure, Professor Cynthia Estlund makes the compelling case for requiring employers to disclose information to "make . . . labor markets more efficient" or "competitive" by reducing employers' bargaining power conferred by informational asymmetries as a form of market failure.[314] To be sure, reducing informational asymmetries to correct market failure and undermine employer monopsony power is an important goal, as discussed in Part II.A. However, this justification unnecessarily limits the horizon for the transparency project.

Indeed, there are compelling, deeper justifications for transparency beyond market failure, which are necessary for several reasons. First, as Professor Sanjukta Paul argues, the problem with appeals to monopsony or market failures is that (notwithstanding the significant evidence of monopsony) numerous economists, judges, and policymakers would object to the proposition that labor markets are *always* characterized by monopsony.[315] If some labor markets are not monopsonies or, more likely, it is difficult to show monopsony power, the case for information disclosure may wither.[316] Second, as Part III.C discusses, market-failure justifications risk the (even unintentional) reproduction of the many objectionable elements of the neoclassical framework. including the marginal productivity theory (MPT) of wages, which rests on erroneous premises about the attributability of the "contribution" of various inputs to output.[317] In the absence of a clear mechanism for determining output attributable to an input, transparency permits workers to monitor a firm's distribution of payments and make claims. Additionally, even if imperfect information is cognizable within the neoclassical frame, reliance on that frame may undermine the case for forms of worker empowerment beyond disclosure because of orthodox economics' traditional hostility to

313. Estlund, *Just the Facts*, *supra* note 10, at 369–72.

314. *Id.* at 369, 372 n.67.

315. Paul, *supra* note 20, at 1279.

316. *Id.*

317. *See infra* notes 319–28 and accompanying text.

unionization.[318] And third, limiting our focus to market failure obscures other features of what is objectionable about hierarchical workplaces. From the orthodox economist's perspective, there is no labor market problem when workers are paid marginal product. But even if workers were paid their full marginal product, workplace informational asymmetries create and reproduce status-based categories where workers are treated as second-class citizens of the firm, despite their essential contributions to production.[319] For these reasons, a broader normative ground for transparency is required.

1. Monitoring and Claims-Making

First, broad transparency is necessary because it enables workers to (1) *monitor* the distribution of the firm's joint product, and (2) *make claims* on that product. These two related functions are essential for workers because of the difficulty of attributing contribution to factors of production.

The standard, neoclassical account of wage determination is MPT, which posits that each input receives the marginal contribution attributed to it.[320] MPT aims to attribute individual contribution to an additional input holding *all other* inputs constant. But consider the difficulties: An additional baker a bakery hires cannot produce more output while holding other inputs, such as flour and yeast, constant,[321] nor can an additional unit of capital produce another shirt while holding labor constant. Nor can MPT tell us to whom profits—which are assumed out of consideration in perfect competition—should accrue: While it might be assumed that profits accrue to the firm as the residual claimant, firms are not factors of production—labor and capital are.[322] While one might equate "capital" and the "firm," microeconomics assumes that firms do not own but rather rent their capital, so profits accruing to capital would not necessarily mean that the firm receives profits.[323]

These issues underscore the broader problem with what Nobel laureate Professor Amartya Sen describes as attributing "personal production" under conditions of "interdependent production."[324] Professor Sen argued that although marginal accounting might be useful for determining how to employ additional resources to maximize profit, it fails to "'show' which resource has 'produced' how much of the total output."[325] Where production is interdependent between workers and capital, "it is not in general possible

318. *Id.* at 1278–79 (critiquing the idea that unions are "second best" to perfect competition).

319. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228–29, 245 (2013) (arguing that "the social equality project seeks to ensure that hierarchies of work do not harden into class-type hierarchies of person").

320. Bruce Kaufman, *Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives* 11 (Ursery Workplace Rsch. Grp., Working Paper No. 24, 2008) [hereinafter Kaufman, *Neoclassical and Institutional Perspectives Working Paper*], https://www.scispace.com/pdf/labor-law-and-employment-regulation-neoclassical-and-1vp2ahh6ce.pdf [https://perma.cc/DK4C-TJ2M].

321. Fred Moseley, *Mankiw's Attempted Resurrection of Marginal Productivity Theory*, REAL-WORLD ECON. REV., Sep. 2012, at 115, 116–18.

322. *Id.* at 119.

323. *See id.* at 119–20.

324. Amartya Sen, *Just Deserts*, N.Y. REV. BOOKS (Mar. 4, 1982), https://www.nybooks.com/articles/1982/03/04/just-deserts [https://perma.cc/9PF5-323S] (reviewing EQUALITY, THE THIRD WORLD, AND ECONOMIC DELUSION (1981)); *see also* Paul, *supra* note 20, at 1273 (summarizing Sen's argument).

325. Paul, *supra* note 20, at 1273 (quoting Sen, *supra* note 324).

to separate out who—or even which resource—produced how much of the total output."[326] Indeed, in Adam Smith's famous exposition of the division of labor in a pin factory, many workers, at various stages of production, each contribute to the production of one pin.[327] An individual worker's contribution depends on others' contribution, and one's productivity depends on others' productivity.[328] Separating out individual contribution where factors of production are complementary proves difficult, if not impossible. And notwithstanding these *theoretical* issues, the scholarship suggests that, as an *empirical* matter, firm managers neither attempt to calculate marginal product nor actually set wages on that basis.[329]

With no lawlike means of determining contribution a priori, a firm's wage determination is the product of a complicated interplay between market and firm conditions, the relative bargaining power of the parties, and norms of custom and fairness.[330] In this analysis, firms have a degree of discretion in wage setting, which is nothing new to empirical economists, who have found that firms set wage levels based on internal firm dynamics and to encourage productivity.[331]

To that end, economic sociologists have conceptualized wage negotiations as a process of "claims-making over organizational resources."[332] In this model, wage setting is described as "a process of actors within organizations interacting and negotiating over the socially appropriate distribution of organizational revenue."[333] Accordingly, (1) actors within the firm claim that they deserve some portion of the revenue stream, and (2) influential actors either legitimate those claims and channel resources to them or do not.[334] Of course, if actors fail to make claims at step one of this process, the firm may

326. *Id.*

327. *See* Jonathan Weinstein, *Fairness and Tax Policy: A Response to Mankiw's Proposed Just Deserts*, 37 E. ECON. J. 313, 316 (2011).

328. Alexandre Mas & Enrico Moretti, *Peers at Work*, AM. ECON. REV., Mar. 2009, at 112, 112–13 (finding that introducing higher-productivity workers increases the productivity of other workers); *see* Weinstein, *supra* note 327, at 316.

329. *See* Tae-Hee Jo, *What If There Are No Conventional Price Mechanisms?*, 50 J. ECON. ISSUES 327, 338–39 (2016); Frederic S. Lee, *What If There Are No Conventional Price Mechanisms?*, NEW ECON. PERSPS. (Nov. 26, 2013), https://neweconomicperspectives.org/2013/11/conventional-price-mechanisms.html [https://perma.cc/LA94-8ZSN]; Bruce E. Kaufman, *The Institutional Economics of John R. Commons: Complement and Substitute for Neoclassical Economic Theory*, 5 SOCIO-ECON. REV. 3, 30 (2007).

330. Greenwood, *supra* note 295, at 414 tbl. 2A.

331. *See* Marianne Bertrand & Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 J. POL. ECON. 1043, 1043 (2003) (explaining that entrenched managers pay workers more); Darin Acemoglu, Alex He & Daniel Le Mair, *Eclipse of Rent-Sharing: The Effects of Managers' Business Education on Wages and the Labor Share in the United States and Denmark* 1–2 (Nat'l Bureau of Econ. Rev., Working Paper No. 29874, 2022), https://www.nber.org/system/files/working_papers/w29874/w29874.pdf [https://perma.cc/FB35-VXV8] (finding that managers with MBAs pay workers less).

332. Carsten Sauer, Peter Valet, Safi Shams & Donald Tomaskovic-Devey, *Categorical Distinctions and Claims-Making: Opportunity, Agency, and Returns from Wage Negotiations*, 86 AM. SOCIO. REV. 934, 935 (2021).

333. Dustin Avent-Holt & Donald Tomaskovic-Devey, *A Relational Theory of Earnings Inequality*, 58 AM. BEHAV. SCI. 379, 384 (2014).

334. *Id.* at 384–85 ("The supply–demand mechanism does not disappear, but rather becomes a potential environmental influence on within-organization wage-setting process.").

simply unilaterally allocate revenue.[335] Actors require: (1) opportunity—that is, to be in positions where negotiation is possible; (2) agency, an ability to make claims; and (3) returns, or the ability of actors to translate claims into wages.[336] In this analysis, the actor's power, as well as the "available resources for [the actor's] claims, including characteristics of the organization's environment," are critical factors in wage determination.[337]

Information is a key resource for claims-making. In an important article on workplace information transparency, Professors Jake Rosenfeld and Patrick Denice argue that imperfect and asymmetrical information impedes workers' claim-making abilities.[338] As they argue, "Workers without access to relevant financial information lack a framework to understand whether their actual or potential wage demands are plausible; they have no way of judging whether a manager's contention that 'we cannot afford higher pay right now' is accurate."[339] Conversely, where firms do share with workers information on the firm's "financial condition, productivity, and relative standing in the labor market," wages appear to generally be higher.[340] As Professors Rosenfeld and Denice argue, "[S]imply, learning the size of the potential pie (1) provides an important resource for a worker or group of workers to bargain with, (2) increases the likelihood of bargaining, and (3) increases the chance of success."[341] Because information sharing may equalize bargaining power between workers and employers, it is little wonder that in nonunion firms "the employees usually have little knowledge of the economic condition of the organization."[342] Transparency makes it challenging for employers to justify pay differences that, if observed, would undermine worker morale.[343]

To summarize, because of the difficulties of compensating workers according to marginal productivity, financial transparency is necessary to perform both (1) a monitoring function, such that workers can observe the distribution of joint product; and (2) a claims-making function, such that workers can be informed in making claims and assess the credibility of employers' responses. Again, this justification for financial transparency does not depend on market failure, such as monopsony, but derives from the functioning of wage determination under modern conditions of production. Significantly, this justification for transparency encompasses a much broader set of information than merely wage information. Instead, workers must know the firm's ability

335. *Id.* at 394 n.3.

336. Sauer et al., *supra* note 332, at 935.

337. Rosenfeld & Denice, *supra* note 22, at 1047.

338. *Id.* at 1047–48.

339. *Id.* at 1047.

340. Morris M. Kleiner & Marvin L. Bouillon, *Providing Business Information to Production Workers: Correlates of Compensation and Profitability*, 41 INDUS. LAB. REL. REV. 605, 616 (1988) [hereinafter Kleiner & Bouillon, *Production Workers*]; *see* Morris M. Kleiner & Marvin L. Bouillon, *Information Sharing of Sensitive Business Data with Employees*, 30 INDUS. LAB. REL. REV. 480, 481 (1991) (finding that employers providing a variety of information are associated with higher compensation); Rosenfeld & Denice, *supra* note 22, at 1060 (finding that "financial transparency has strong, positive effects on hourly pay").

341. Rosenfeld & Denice, *supra* note 22, at 1047–48.

342. Kleiner & Bouillon, *Production Workers*, *supra* note 340, at 606.

343. *See* Emily Breza, Supreet Kaur & Yogita Shamdasani, *The Morale Effects of Pay Inequality*, 113 Q.J. ECON. 611, 653–54 (2018).

to pay. In other words, workers must know the size of the pie to be allocated according to various actors' claims as well as the extant distribution of that pie.

2. Relational Equality

The above discussion leads into a related reason for transparency. Even if one accepts that workers require information to effectively make claims on a firm's joint product, one might object that workers are not entitled to this information because "management has a responsibility to manage and employees have a responsibility to work."[344] Of course, for policymakers concerned about low wages this response is unavailing, but it does raise the central normative question about labor's status in a firm. For that reason, we require a theory as to why, as a factor of production, labor should be entitled to information about the firm. The answer emerges from labor's role in production, the unique character of labor power as a commodity, and the requirements of relational egalitarianism.

The standard economics treatment of the firm posits that labor and capital are the two inputs to production and that the firm (or its managers, more specifically) allocate the joint product produced by labor and capital according to their respective marginal contribution.[345] This account, however, ignores two critical aspects of the labor process: (1) the difficulty of attributing marginal production, for the reasons explained above;[346] and (2) the nature of labor as a commodity.

Labor is a necessary, co-constitutive element of a multi-person firm's production because human activity is needed to transform resources into goods and services. As political theorist Professor Isabelle Ferreras argues, the firm would simply not exist without labor, as the "living embodiment of the firm," which "constitute[s] the firm at least as much as those who invest their capital."[347] Professor Ferreras offers a useful metaphor: Workers are "labor investors" who invest their work, effort, and skill into the firm.[348] And unlike capital investors, who invest external property, labor power is embodied in the worker.[349]

Indeed, labor is a unique "factor of production" because of its embodied *character*, meaning that the labor power that an employer buys from a worker is necessarily embodied in the worker, who is self-conscious.[350] When a worker works at a particular workplace, they invest not only their labor power but also hours of their lives during which they construct meaning through "lived experience, values, and ultimately, conceptions about justice"—what Professor Ferreras calls "expressive rationality."[351]

---

344. Rosenfeld & Denice, *supra* note 22, at 1048 (quoting DAVID LEWIN, OPENING THE BOOKS: CORPORATE INFORMATION-SHARING WITH EMPLOYEES 12–13 (1984)).

345. Kaufman, *Neoclassical and Institutional Perspectives Working Paper*, *supra* note 320, at 62.

346. *See supra* notes 321–29 and accompanying text.

347. ISABELLE FERRERAS, FIRMS AS POLITICAL ENTITIES: SAVING DEMOCRACY THROUGH ECONOMIC BICAMERALISM 13 (Miranda Richmond Mouillot ed. & trans., 2017).

348. *Id.* at 1–2.

349. *See id.* at 12–13.

350. Robert E. Prasch, *How Is Labor Distinct from Broccoli?: Some Unique Characteristics of Labor*, *in* THE INSTITUTIONALIST TRADITION IN LABOR ECONOMICS 146, 148–51 (Dell P. Champlin & Janet T. Knoedler eds., 2004).

351. FERRERAS, *supra* note 347, at 81–82.

Consequently, when a worker enters a workplace to fulfill a labor contract by selling her labor power, she necessarily carries with her subjective experience.[352] In other words, the employment of labor is not merely the employment of a factor of production but the employment of a human being, with expectations and norms of justice and fairness in her treatment. For the hours that the worker is in the workplace—which, for many workers, is the bulk of their waking time—it matters to the worker that they are treated fairly and with respect.[353]

These two building blocks—that labor is at least a coequal, co-constitutive part of the firm and that labor necessarily implies the investment of workers' lived experiences and expressive rationality—form the basis for applying norms of social equality to the workplace. A core precept of a democratic society is a form of social equality that "regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted."[354] Negatively, this relational equality is defined against domination, or the ability of a superior to "control an inferior's choices without the inferior being able to reciprocate."[355] Anti-egalitarian, hierarchical relations violate what philosopher Philip Pettit calls the "eyeball test," that "members of a society must be able to encounter each other 'on eye level,' as moral equals without fear or submissiveness."[356] Democracy and equality in these capacious meanings are not reducible to political democracy or procedures but demand broader social equality, including in workplaces and in work law.[357]

As critics of capitalist labor markets and workplaces have long recognized, the workplace is a place of inequality and hierarchy at odds with democratic-egalitarian ideals. In the formal governance of the capitalist workplace, only capital investors are empowered, while labor is disenfranchised.[358] Professor Elizabeth Anderson argues that this workplace is "dictatorial," as "[n]onexecutive workers have no voice in the governance of the firm, but must follow their bosses' orders, on pain of demotion or discharge."[359] These practices "demonstrate[—]and enact[—]social status hierarchies within the workplace," where workers are not treated as equals with firm managers or owners.[360]

Scholars and labor organizers have marshalled these arguments in favor of a robust right to workplace democracy, typically defined as some sort of worker participation in and control over workplace decisions.[361] This Article's argument is more modest, namely that workers should be entitled to information about the firm they constitute. This

352. *Id.* at 91–93.

353. Alex Gourevitch & Corey Robin, *Freedom Now*, 52 POLITY 384, 394–95 (2020).

354. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 313 (1999).

355. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 167 (2021).

356. Roberto Frega, Lisa Herzog & Christian Neuhäuser, *Workplace Democracy—The Recent Debate*, PHIL. COMPASS, Feb. 19, 2019, at 1, 5.

357. *See* Bowie, *supra* note 355, at 167–69.

358. FERRERAS, *supra* note 347, at 107.

359. Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, SOC. PHIL. & POL'Y, Spring 2015, at 48, 59; Bowie, *supra* note 355, at 176–78.

360. Bagenstos, *supra* note 319, at 245.

361. Frega et al., *supra* note 356, at 1.

argument derives from social equality concerns: Limiting workers' access to relevant information about the firm undermines the notion that workers should be treated as equals, entitled to equal respect and consideration with the owners of the firm. In effect, a firm's decision to withhold relevant information from workers about their shared, joint enterprise creates "status divisions such that one can place different people in hierarchically ranked categories," a violation of social equality.[362] It signifies that workers are less equal in what they have the right to know than others in the firm, notwithstanding that the firm is possible only through workers' labor, which is the living embodiment of the firm. This inequality should not stand on social equality grounds.

Perhaps it might be more defensible to exclude from workers information that is not relevant to them. But information that either directly or indirectly bears on workers' wages or the longevity of their employment does not fall into this category. First, the firm's financial performance is directly relevant to workers: The firm's revenues and profits are attributable (at least in part) to labor, and the firm's financial status obviously matters to people whose means of subsistence depends on its continued longevity. Second, the distribution of a firm's joint production is relevant to workers' norms of fairness: Whether a worker is paid less than her male coworker or much less than a supervisor might violate the expressive rationality she invests in the firm. Third, and instrumentally, the firm's information can help workers secure a fair share of the fruits of their labor, which often represents the primary stream of revenue that makes possible their self-production, not to mention their interest in leisure activities and other goods and services that make life enjoyable. In sum, social equality demands that workers have access to critical information about the firm they constitute.

B. *The Proposal*

Having sketched the normative justification for a broad right to information in the firm, this Article turns to outlining the transparency proposal, with reference to extant pay transparency law. Broadly, the proposal encompasses horizontal, vertical, and cross-firm transparency and contemplates imposing an affirmative duty[363] on employers to furnish both wage and nonwage financial information annually to employees. This information would encompass the firm's anonymized (to the extent possible) wage structure, as well as revenues, broad cost categories, profitability, and productivity. Importantly, employers would be required to report year-over-year changes so that workers can monitor whether their wage gains are keeping pace with overall firm revenue and profit growth.

The annualized timing of the disclosure intends to instill in workers an expectation of bargaining over the firm's division of joint product between the firm's stakeholders. To further this objective, the disclosure would inform workers as to their right to discuss

---

362. *See* Rogers, *What Does Social Equality Require of Employers?*, *supra* note 28, at 85 (quoting David Miller, *Equality and Justice*, 10 RATIO 222, 224 (1997)).

363. The importance of the affirmative duty stems from substantial evidence indicating that merely giving workers a right to information, rather than imposing an obligation on employers, is far less effective in promoting transparency's goals. Katharina Brütt & Huaiping Yuan, Pitfalls of Pay Transparency: Evidence from the Lab and the Field 34 (Tinbergen Inst., Discussion Paper No. 055/I, 2022), https://papers.tinbergen.nl/22055.pdf [https://perma.cc/F7GD-7Q6S].

wages with coworkers and present wage demands, free from retaliation. The policy would provide workers with a private right of action to enforce their rights under the law as well as civil penalties for employer noncompliance.

1. Scope of Information

The proposal extends extant pay transparency law across the three dimensions outlined in Section II—horizontal, vertical, and cross-firm—and broadens the informational duty to include not only pay information but also financial information, defined as productivity, revenue, profits, and costs. The cost breakdown would disclose the payments made to various inputs such that a worker could determine the labor and capital shares of firm income.[364]

The pay transparency aspect would encompass both horizontal and vertical transparency by requiring the firm to fully disclose its wage structure. While some level of anonymity could be desirable, the pay information would include the average and median wages of each job position such that workers could determine whether they are underpaid relative to their most similar coworkers, thereby promoting horizontal equity. This aspect is most similar to initiatives in the European Union and the United Kingdom, rather than U.S. states, which have limited vertical transparency to right-to-talk laws.[365] The proposal also encompasses vertical transparency by requiring disclosure across seniorities and management structure, which would inform workers as to how much their managers and supervisors are receiving in compensation, which is relevant to the claims-making component discussed below. Again, this proposal is much more expansive than extant vertical transparency for public companies in the United States, which is limited to CEO and median worker pay; instead, workers would know how much "elite" workers in management make, outside of the CEO. These aspects are intended to facilitate the monitoring and claims-making functions identified above, as well as unionization efforts.[366]

The law would also require cross-firm transparency by requiring employers to include salaries in job postings. Consistent with the evidence and theory presented in Section II, this requirement is intended to promote both vertical and horizontal equity by mitigating gendered expectations and wage-bargaining norms and sharpening competition for workers between employers.[367] The timing of this disclosure would differ from the disclosure of wage distribution, since the duty would arise when employers post jobs. In line with the horizontal and vertical transparency aspects, employers would be required to share job postings with incumbent employees so that the firm's workers could monitor the employer's intended salary.

In light of the evidence above on the potential pay-suppressing effects of horizontal transparency, it might seem surprising that the proposal encompasses such a broad disclosure duty. Two responses: First, there is a possibility that those effects may be different under conditions of broader horizontal transparency, although admittedly this point is empirically unproven. Second, the policy design contains elements that have

364. Rosenfeld & Denice, *supra* note 22, at 1047–49.

365. *See supra* Part II.B.1.

366. *See supra* Part III.A.

367. *See supra* Part II.B.3.

wage-increasing effects, such as the cross-firm transparency requirement, the financial information duty, and the aspects intended to facilitate worker bargaining over wages.

Most significantly, the proposal extends beyond extant pay transparency by requiring the employer to disclose financial information beyond wages, such as overall revenue, profits, productivity, and cost breakdown. Broadly speaking, these metrics would inform workers as to the overall size of the "pie" and its division to various firm stakeholders.[368] This provision works in tandem with the wage information: The financial information would inform workers as to revenue, profits, and the breakdown between labor and capital; the wage-distribution information would inform workers as to the division of labor payments to various segments of workers. For example, if labor costs account for 52% of firm revenue, the wage-distribution disclosure would inform workers as to *that* division between various workers. If a segment of managers is taking home a disproportionate share of labor payments, that may be grounds for workers to ask for more.

Importantly, the proposal contemplates disclosure of year-over-year changes to the metrics. Consider a simple example: Suppose that profits increase by 5% from the previous year, but your salary increases by 2%. You might reasonably ask for a wage increase that keeps pace with profitability or at the very least closes the gap. Or suppose that C-suite level employee pay increases by 8% year-over-year. Again, you might reasonably suppose that your increase should be closer to keeping pace. This information is a valuable resource for monitoring and claims-making.

2. Regularized Disclosure

One of the potential problems with transparency is that it might reduce an employer's propensity to bargain over wages altogether, shifting from a wage-bargaining to a wage-posting model.[369] While this outcome would be useful in promoting horizontal equity, its implications for vertical equity are more troubling: Employers might be unwilling to grant wage increases because of the spillover effects that Dr. Cullen and Professor Pakzad-Hurson identify.[370]

Policy design may be able to counteract this possibility. First, to encourage workers to engage in wage bargaining—which generally leads to higher wages than when wages are not bargained for[371]—disclosure would inform workers of their right to discuss the firm's financial information with coworkers, free from retaliation, and their available remedies for violations of the law. Second, the annualized timing of the disclosures would hopefully engender in workers the expectation of bargaining, which they can prepare for and address with their coworkers. Sociology of law literature posits that the law plays a causal role in changing people's expectations and behavior. For instance, after the enactment of Title VII, "citizens' expectations about how they are entitled to be treated at work have clearly changed."[372] Indeed, law has a life of its own: As Professor

---

368. Rosenfeld & Denice, *supra* note 22, at 1047–49.

369. Cullen & Pakzad-Hurson, *Equilibrium Effects*, *supra* note 12, at 766–67, 773.

370. *Id.* at 773.

371. *Id.* at 776.

372. Kenworthey Bliz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIOR ECONOMICS AND THE LAW 241, 243 (2014).

Irving Bernstein recounts in his classic account of unions in the 1930s, the National Industrial Recovery Act (NIRA) stated that employees would have the right to organize and collectively bargain, but this language was mere "enabling legislation and nothing more."[373] Nonetheless, labor quickly seized on the aspirational language as a means to spark increased organizing and militant activity, to the surprise of President Franklin D. Roosevelt and Congress, who did not realize the implications of their legislation.[374] In just the first five months that followed the enactment of NIRA, 1.5 million workers organized into unions.[375]

Transparency may also change workers' expectations and behavior by inducing them to bargain more. One field study found that the tendency to negotiate increased by 34% to 132% among workers who learned that they were earning a below-average wage and by 38% to 88% among workers who made an average salary.[376] Cross-firm transparency appears to induce incumbent workers to bargain for higher salaries.[377]

C. *Information as an Organizing Tool*

As explained in Section II, a key limitation of the transparency project is the possibility that information alone will not translate into the collective power needed to raise wages. To be sure, this Article is optimistic that increased transparency that encompasses financial information will facilitate more effective claims-making than mere wage information allows, for the reasons Rosenfeld and Denice discuss.[378] Still, facilitating collective action is a key component of any wage-raising policymaking, including transparency. For that reason, this policy is intended to use the extensive scope of disclosure to further workers' collective organizing, whether through informal, collective presentation of wage demands, or through formal union organizing channels.

Consider what might happen under conditions of greater transparency. Suppose that workers present a wage demand (either collectively or individually) that the employer could profitably pay, but the employer refuses to grant the demand or even bargain with workers altogether—a scenario not unfamiliar to unions during collective bargaining. Unionized workers, then, might determine that collective action through a strike offers the best means to force the employer's hand by imposing costs on the employer. Through the architecture of a union, workers have an institutionalized means of coalescing around a course of collective action—frequently through a strike vote and potential sanction of members who cross a picket line[379]—and often have a strike fund to financially support

373. IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941, at 35 (1970).

374. *Id.*

375. Kate Andrias & Benjamin Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 582 (2021).

376. Carla Fried, *Wage Transparency Might Make Income Inequality Even Worse*, UCLA ANDERSON REV. (June 2, 2021), https://anderson-review.ucla.edu/wage-transparency-might-make-income-inequality-even-worse/ [https://perma.cc/LG2S-3622].

377. Arnold et al., *supra* note 214, at 14–15; Caldwell & Harmon, *supra* note 172, at 3–4.

378. Rosenfeld & Denice, *supra* note 22, at 1047–49.

379. *See* Int'l Union of Elevator Constructors Loc. Union No. 8 v. NLRB, 665 F.2d 376, 379 (D.C. Cir. 1981) ("[U]nions may discipline members who cross picket lines during a lawful strike.").

striking workers.[380] Although both nonunion and union employees have a "right" to strike under the NLRA (albeit a circumscribed one, as economic strikers may be permanently replaced)[381] nonunion workers lack the union's institutionalized support to bind other workers and provide financial support through a strike fund, which may explain why nonunion workers tend to strike at much lower rates than their unionized counterparts.[382] For that reason, scholars have emphasized the necessity of building "*organizations* that have the capacity to exercise sustained political power," rather than relying on mass protest or diffuse social movements.[383]

So, while our nonunion workers under transparency lack the institutional framework of a union to force the employer's hand, they have another option: to become unionized workers themselves. Here, the rights granted by the transparency proposal function to "[g]alvaniz[e] the [c]ollective" by creating a "collective understanding of the problems [workers] face at work."[384] As Professor Benjamin Sachs argues in surveying the sociology literature on collective action, a "collective action frame[]" helps workers diagnose a problem as an injustice and articulate a mechanism to solve that injustice.[385] Workers must then also develop a "collective identity," meaning "how individuals' sense of who they are becomes engaged with a definition shared by co-participants in some effort at social change."[386]

Although transparency does not confer on workers a *substantive right* to a given share of the firm's joint product, it performs a diagnostic function in revealing to workers potential injustices, such as a gap between compensation and what workers take to be their contribution to the firm. For this reason, expansive transparency is vital: While coworkers' pay is important for identifying potential horizontal inequities, the firm's pay structure and financial status are essential for understanding potential vertical inequities. In other words, workers cannot assess if they are unpaid—relative to superordinate workers or the firm's overall financial status—unless they first know where they stand in relation to other claims-makers on the firm's joint product.

Mandated financial disclosure, then, may be a powerful tool for union organizing.[387] In the social-scientific literature, it is "widely acknowledged that feelings of injustice can spark collective mobilisation among workers."[388] Collective action

380. *See, e.g.*, Sheldon H. Jacobson, *Who Wins When Union Workers Strike?*, The HILL (Sep. 26, 2023), https://thehill.com/opinion/finance/4221921-who-wins-when-union-workers-strike/ [https://perma.cc/9Q6J-7XZU] (noting that United Auto Workers' strike fund sat at $825 million in 2023).

381. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938).

382. Pablo Pérez-Ahumada & Charo Astorga-Pinto, *Why Are Union Members More Willing To Strike and Protest Than Nonunion Members?*, 67 J. INDUST. RELS. 56, 57–59 (2025).

383. Andrias & Sachs, *supra* note 11, at 780 n.10.

384. Sachs, *supra* note 4, at 2722.

385. *Id.* at 2724.

386. *Id.* at 2725 (quoting William A. Gamson, *The Social Psychology of Collective Action*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 55 (Adon D. Morris & Carol McClurg Mueller eds., 1992)).

387. *See* Estlund, *Extending the Case*, *supra* note 19, at 788–90 ("Most importantly, information about salaries—their overall level as well as the rationality and fairness of salary disparities—might be relevant to an employee's decision whether to support unionization.").

388. Andrea Borello, *Structural Unfairness or Disrespect and Misrecognition? Theorising the Pathway Between Feelings of Injustice and Collective Mobilisation Among Precarious Migrant Workers*, 63 BRIT. J.

construction relies on "individual perceptions of injustice (that something is 'wrong' or 'illegitimate') . . . [being] made explicit and framed by leaders," which opens the possibility for collective action.[389] Information disclosure is potentially potent because one of the most central reasons that workers seek union organization is their perception that they are paid low wages.[390] Indeed, full transparency is critical because although *absolute* pay levels have some effect on unionization decisions, more significant are "*relative*, or equity-based, wages" which only vertical pay and financial transparency can reveal.[391] In union certification votes, workers who are "not content with various aspects of their compensation were more likely to vote in favor of unionization."[392] Judgments about both distributive fairness, that is, evaluations about how resources are distributed, and procedural fairness, that is, how those outcomes are made, critically shape positions about unionization.[393] If transparency reveals to workers that they are being paid unfairly—and that the way firms determine pay, such as by refusing to bargain with workers, is unfair—it may prompt workers to engage in organizing.

A recent union organizing example powerfully illustrates this dynamic. In May 2019, in response to concerns about pay, art workers and museum professionals created a Google spreadsheet in which workers anonymously disclosed their pay and benefits, which one account described as the "most powerful tool for labor in 2019."[394] Based on publicly available information, the spreadsheet also disclosed pay packages for dozens of museum leaders of more than $1 million in some cases, which indicated "what organizers called [a] 'gulf' between executive and staff pay," who typically earned $30,000 to $40,000 in high-cost areas.[395] The spreadsheet helped catalyze a public push

---

INDUS. RELS. 413, 414 (2025); John A. McClendon, Hoyt N. Wheeler & Roger D. Weikle, *The Individual Decision To Unionize*, LAB. STUD. J., Sep. 1, 1998, at 34, 41.

389. Maurizio Atzeni, *Searching for Injustice and Finding Solidarity? A Contribution to the Mobilisation Theory Debate*, 40 INDUS. RELS. J. 5, 5 (2009).

390. Loree Miller, *Unionization Efforts: A Response to Growing Dissatisfaction*, LEGION (Aug. 15, 2024), https://legion.co/blog/2024/08/15/unionization-efforts-growing-dissatisfaction/ [https://perma.cc/WH7J-AGSM] (finding, in a survey of 1,500 hourly workers, that 68% cited low wages and 56% poor employees as the top reasons they wished there was a unionization effort); McClendon et al., *supra* note 388, at 49–51 (finding that U.S. workers choosing to organize and join unions emphasizes worker "dissatisfaction" with job characteristics).

391. Steven L. Premack & John E. Hunter, *Individual Unionization Decisions*, 103 PSYCH. BULL. 223, 233 (1988) (emphasis added); Henry S. Farber & Daniel H. Saks, *Why Workers Want Unions: The Role of Relative Wages and Job Characteristics*, 88 J. POL. ECON., 349, 352 (1980) (explaining that a worker's relative wage level within the firm's wage structure is a major determinant in unionization). *See generally* THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE (2d ed.1988) (arguing that perceptions of inequities in administration of compensation are strong predictors of unionization).

392. Steven L. Blader, *What Leads Organizational Members To Collectivize? Injustice and Identification as Precursors of Union Certification*, 18 ORG. SCI. 108, 109–11 (2007).

393. *Id.*

394. Juliana Feliciano Reyes, *Why a Google Spreadsheet Was the Most Powerful Tool for Labor in 2019*, PHILA. INQUIRER (Dec. 31, 2019, at 15:35 ET), https://www.inquirer.com/business/google-spreadsheet-salary-organizing-baristas-journalists-lawyers-20191231.html (on file with the Temple Law Review).

395. Elizabeth A. Harris & Robin Pogrebin, *Inside Hushed Museum Hallways, a Rumble over Pay Grows Louder*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/arts/museum-pay-unions.html (on file with the Temple Law Review).

for higher pay, and in several cases successful union drives—including at the Guggenheim Museum where workers voted to unionize in June of 2019.[396]

Thus, although information may not itself be power, information disclosure may catalyze efforts among workers to build collective power that can translate into higher wages. For workers to organize based on shared perceptions of injustice, they must first know *whether* an injustice is occurring. More comprehensive transparency can not only facilitate nonunion workers' bargaining efforts in the short term but also aid the long-term collective organization of workers.

CONCLUSION

Labor law's failure has presented policymakers concerned about stagnant wages, declining labor share of national income, and skyrocketing income inequality with what may seem like an intractable problem. But state policymakers are not helpless in the face of these trends, and, fortunately, they have begun to consider the potential of transparency law to affect the bargaining dynamics between employers and workers. While policymakers and scholars have rightfully focused on transparency's implications for the critical problems of the persistent gender and racial pay gaps, this Article has argued that transparency law also offers state policymakers a means of addressing vertical equity. In short, transparency represents a state employment law means to labor law ends—ensuring that workers receive a fair share of the product that they produce.

To do so, however, the transparency project requires careful attention to labor market dynamics, empirical evidence, and policy design to avoid potential unintended consequences and advance both vertical and horizontal equity together. To that end, this Article offers a diagnosis of the potential limitations of workplace transparency and a prognosis for more comprehensive transparency. Critically, transparency must enable workers to effectively make claims on the firm's joint product—and it must also facilitate the building of workers' collective power to countervail potential employer responses to transparency. In a word, then, transparency law must open the books.

396. *Id.*