

## 5 Data, Fissuring, and Consolidation

### Introduction

In the early 1940s, vendors who sold papers on the streets of Los Angeles sought to unionize under the recently passed National Labor Relations Act (NLRA or “the Act”), which raised the legal question of whether they were employees with rights under the Act or independent businesspeople with no such rights. That dispute generated a landmark 1944 Supreme Court case, *National Labor Relations Board v. Hearst Publications*.<sup>1</sup> Almost seventy-five years later, ride-share drivers sued Uber and Lyft for unpaid wages and other work-related expenses, posing the same legal question under California law and again generating important judicial opinions.<sup>2</sup> The facts of the cases were remarkably similar. Both involved business models in which workers perform tasks alone, scattered over a wide geographical territory, without the sort of in-person supervision that is standard in factories or offices. The cases nevertheless differed in one major respect: the newspaper vendors were never subject to electronic monitoring, which did not exist at the time. Uber and Lyft, in contrast, are among the most technologically advanced companies on the planet, whose entire business model depends on pervasive surveillance of their drivers and passengers.

Through the litigation process, the newspapers and the gig-economy companies argued that they simply provided workers with opportunities to sell goods and services, and as a result, the workers were more like businesspeople than employees. The companies in *Hearst* pointed out that they did not pay the vendors a salary or track their sales; instead, they sold them newspapers each day, which the vendors would in turn sell to customers.<sup>3</sup> The companies also noted that the vendors sold items other than the

newspapers at issue, including newspapers by other publishers; they could “hire assistants and relief men”; and they could sell their “spots,” the sites where they sold papers, to other vendors.<sup>4</sup> Uber and Lyft, for their part, argued that their applications simply matched drivers with passengers so they could ply their trade, and the drivers had the right to accept or decline ride requests. The drivers then provided their own vehicles, worked when and where they chose, were paid based on individual rides rather than on a salary basis, and had minimal contact with supervisors.<sup>5</sup>

The courts were not wholly convinced by such arguments. In *Hearst*, the Supreme Court held that the vendors were employees.<sup>6</sup> The Court noted that the companies effectively controlled wages by determining how many papers each vendor would receive, gave them “explicit instructions” regarding hours of work and sales strategies, and had terminated vendors for failing to follow such directions.<sup>7</sup> This made the vendors an “integral part of the publishers’ distribution system.”<sup>8</sup> The Court in *Hearst* also established a new (but short-lived) legal test for employment, which is discussed further in section 5.1 of this chapter. In the Uber and Lyft cases, meanwhile, the judges held that neither company could establish that their drivers were independent contractors, and therefore that the issue had to be resolved by a jury. (The cases later settled before trial.) In support of that holding, the judge in the Uber case noted that the “contracts seem to allow Uber to fire its drivers for any reason and at any time,” that drivers needed to accept a high number of rides or be deactivated, and that Uber had set many standards around drivers’ dress, music choice, and car cleanliness.<sup>9</sup>

More important, the judge in Uber’s case reasoned that the company’s technological capacities gave it substantial control over the drivers. Uber had argued that since its managers had little or no contact with drivers, it was unlike FedEx in an important precedent case, where FedEx supervisors would ride along with drivers four times a year.<sup>10</sup> But as the judge observed, Uber drivers were in fact subject to near-constant surveillance by customers since drivers who fell below a particular rating could be deactivated. What’s more, the judge reasoned, “Uber’s application data can . . . be used to constantly monitor certain aspects of a driver’s behavior . . . arguably [giving] Uber a tremendous amount of control over the manner and means of its drivers’ performance.”<sup>11</sup> While the judge did not clarify which “application data” he was referring to, the opinion had earlier discussed Uber’s monitoring of drivers’ acceptance rates, which would be visible to the company in

real time.<sup>12</sup> Remarkably, the opinion then quoted Michel Foucault's observation in *Discipline and Punish* that a "state of conscious and permanent visibility . . . assures the automatic functioning of power."<sup>13</sup> Subsequent disclosures have shown that Uber uses its app to monitor drivers' speed and to require them to follow algorithmically generated driving routes.<sup>14</sup>

Uber, Lyft, and other gig-economy companies exemplify a business model that has become common in recent years, which this chapter discusses. In that model, companies are using new data-driven technologies for two interrelated purposes. First, companies are purchasing labor without hiring workers as legal employees, even as they surveil and manage those workers as closely as traditional employees. The phenomenon of purchasing labor without hiring workers—which, again, dates back to well before *Hearst*—has become more widespread in recent decades, and has become known as the "fissuring" of employment.<sup>15</sup> As noted in chapter 2 of this book, the analogy is to the cracks or fissures that open in boulders, much as companies have opened up legal gaps between themselves and their labor forces. Second, companies are exploiting advanced information technologies to build substantial market power. For example, Uber, Lyft, Amazon, and many other companies operate as *platforms* through which parties exchange goods and services. Successful platforms often grow rapidly and come to dominate their sectors. In other cases—including in retail, fast food, and hospitality—companies have gained market power by purchasing rivals, and/or by developing technologically advanced logistics systems for their enormous global production and distribution networks. As discussed later in this chapter, the growth of platform firms and the consolidation of other service sectors overlap with broader trends toward market concentration in recent decades that were enabled by our antitrust laws.

In a sense, these developments are in tension with one another. Fissuring leads to smaller payrolls and disaggregated production as line-level workers are shunted outside a company's legal boundaries. In contrast, platform firms tend to be very large, generating and exploiting concentrated knowledge regarding production and distribution. But both developments undermine workers' associational power. Fissuring forces workers and outside suppliers to compete with one another, driving down wages and enabling lead firms and their investors to capture a greater share of profits. Consolidation can undermine workers' power in several ways. It can leave them with fewer exit options from their current employment, enable

companies to dominate political decision-making, and make unionization extremely difficult. In that sense, fissuring and consolidation reflect the same underlying politics of work and technology: Both force less-skilled workers to compete with one another while protecting companies' core innovations against competition.

Section 5.1 discusses fissuring. It first outlines some basic facts about fissuring and its incidence, discusses how our labor laws encourage fissuring, and finally suggests some potential policy responses. Section 5.2 then addresses the growth of platform firms. It first summarizes more general trends toward industrial consolidation and the legal backdrop to those developments, then discusses platform firms and their effects on work, and finally suggests that policymakers consider leveraging platform and other companies' surveillance capacities to protect workers' rights.

### 5.1 Data-Driven Fissuring

As noted in chapter 2, Congress and other legislatures have passed a wide array of labor laws over the last century to promote social goods such as economic equality, workplace safety, workplace democracy, and equal opportunity. While those laws are central to the modern regulatory state and social contract, the scope of those laws is limited in two important respects. First, nearly all of our labor laws define *some but not all* work relationships as employment, and then give employees *but not non-employees* certain legal rights. The most important group of non-employees today are independent contractors, or individuals who are operating their own businesses. A classic example of an independent contractor is a plumber who has their own company and is hired by a business or homeowner to repair a faucet. Second, with important exceptions, our labor laws regulate only the immediate employer/employee relationship, as legally defined. Employees therefore have rights against their employers—but *only* against their employers, not against companies who have business relationships with those employers. If worker A is legally employed by company B—which is a supplier, subcontractor, or franchisee of company C—then worker A usually has no labor law rights against company C.<sup>16</sup>

Complying with labor laws can be costly. When a company hires workers as employees, it must pay minimum wages and overtime, must respect those workers' rights to unionize, must ensure its managers do not engage

in illicit discrimination, must pay premiums for unemployment insurance and workers' compensation, and must withhold payroll taxes.<sup>17</sup> In contrast, when a company hires workers as independent contractors or through a subcontractor, it only needs to pay a fee for services provided. Employers may also promise their legal employees some due process prior to discipline or termination, which restricts their capacity to terminate workers and to reorganize operations at will. Purchasing labor from nonemployees, therefore, can both save money and give companies more freedom to manage their workforces.

Given these costs, companies have long sought to fissure away workers and avoid legal employment relationships. But they have done so more and more in recent decades, especially in the wake of the service transition and the decline of unions. An important "push" factor has been pressure from investors to maximize returns by shedding tasks and operations that are not profit centers.<sup>18</sup> An important "pull" factor has been new technologies of legibility, which have made it easier to ensure quality and sound performance even among nonemployees.<sup>19</sup> Those trends have developed to the point that fissuring has put pressure on our entire system of labor regulation—and will almost certainly continue to do so in the absence of legal reforms.

**The political economy of fissuring** There are three key fissuring strategies today. The first involves classifying (or misclassifying) individual workers as independent contractors rather than employees.<sup>20</sup> This is common in the gig economy and among taxi companies, delivery firms including FedEx, and elsewhere in the logistics sector.<sup>21</sup> Such workers may in reality have little or none of the independence enjoyed by a classic independent contractor—few specialized skills, no ability to negotiate with the companies that use their labor, and no capacity to sell their services to a competing company. Yet those workers may struggle to prove that they are employees under the law, as discussed later in this section. A second fissuring strategy is subcontracting, in which user firms hire labor through a temporary agency or a third-party contractor.<sup>22</sup> Unlike independent contractors, subcontracted workers usually have a legal employer—the agency or subcontractor—but the user firm may have more power to set wages and working conditions. Subcontracting is especially common in building services, agriculture, logistics, hotels, and warehouses.<sup>23</sup> The third strategy is franchising, where core firms, especially in fast food and retail, license

their trademarks and product lines to independent businesses, who in turn employ line-level workers.<sup>24</sup> There again, the franchisor may be the party with the most economic power, and may exert substantial control over franchisees' operations and business decisions—but it may have no duties toward the franchisees' workers.

A neoclassical economic model suggests that workers' wages should track their skills or productivity, and therefore that fissuring should not generally save money. But this is not how things work out in practice. Workers classified as independent contractors are not eligible for basic labor protections, which can drive down their pay. Similarly, a large study of franchisees found substantially lower rates of compliance with wage/hour laws in franchise locations that were independently owned compared to those owned by the franchisor.<sup>25</sup> Other studies have found that subcontracted janitors and security guards can make 15 percent less than in-house workers doing the same jobs, and that workers at outsourced call centers tend to make less than call center workers employed by the companies they're serving.<sup>26</sup>

The lower pay earned by fissured workers makes sense under a model of labor standards that takes power disparities seriously. Fissuring helps to ensure that reliable profit centers—such as proprietary technologies, product design and management functions, and aspects of production that require rare skills—are held within one legal entity, while workers who perform less profitable functions are excluded from that entity.<sup>27</sup> In that context, fissuring can reduce or suppress workers' associational power—and therefore labor costs—in two ways. First, fissured workers may struggle to place moral demands on a user firm for decent treatment.<sup>28</sup> For example, where fissuring leads to workers being outside a company's physical plant or having little to no contact with that company's staff, they will have a harder time getting to know the company's other employees or managers. Second, as discussed in more detail in the next subsection, fissuring functions as a liability shield, even when workers may have sound arguments that they meet the legal definition of employment.

Why a company would *ever* accept the costs that go along with employment regulations if they can be avoided through fissuring? There are several reasons. The workers involved may have skills that are sufficiently rare that the company needs to pay well to recruit and retain them, and the company can remain profitable while following all legal obligations. Conversely, workers with few particularized skills, who are basically just selling their

labor power, will be disproportionately fissured away. The company may also need to be able to schedule workers for regular shifts, supervise them closely, and require them to work as part of a team. That helps explain, for example, why McDonald's franchisees classify their workers as employees rather than independent contractors, while many gig-economy companies have resisted having their workers classified as employees—though in the former case, McDonald's corporate has pushed labor costs down to the franchisees. That being said, digital Taylorism is eroding the need for teamwork in many cases. As discussed in chapter 3, Amazon has designed warehouses so that workers labor alone and can be trained quickly, which should facilitate hiring warehouse workers as temps or through labor agencies. Finally, the law surrounding employment status may simply make it impossible for companies to avoid having any responsibilities for their workers. In such cases, however, labor law duties impose costs but few benefits on companies, which has encouraged companies to continually test the law's boundaries, as discussed in the next subsection.

**Fissuring and the law** Fissuring's liability-blocking effects are almost entirely a function of how our laws define employment. This issue has bedeviled courts, agencies, and legislatures since well before *Hearst*.<sup>29</sup> As the Supreme Court observed in that case, "few problems in the law" have led to as many inconsistent results as "cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."<sup>30</sup> Chapter 2 gave a brief overview of the law in this area, but a more detailed summary is now appropriate.

Prior to the New Deal, the question of whether a worker was a legal employee arose most often where a worker caused a physical injury to a third party, such as in a traffic or construction accident. The injured parties often sued in tort—the law governing liability for accidental and intentional physical injuries—and argued that the worker was acting on behalf of the company that had hired them, and therefore that the company was financially responsible. In addressing such questions, the courts developed a multifactor test to distinguish between employees and independent contractors. That test centered on whether the hiring party had the right to control the performance of the work at issue—and to this day, it is often known as the "control test"—but it also looked at related factors, such as whether the worker was in a "distinct occupation or business," the worker's skill level, the length of the relationship, and the method of payment.<sup>31</sup> In

*Hearst* itself, the companies argued that the NLRA incorporated this definition of employment.<sup>32</sup> As discussed later in this subsection, the Supreme Court ended up applying a different test in *Hearst*, but Congress overruled that opinion, and a version of the “control test” has governed the question of employment under the NLRA for decades now.

There are several problems with utilizing the control test to determine who has rights under worker-protective statutes. First, that test does not necessarily generate predictable results even in tort cases due to the wide variety of work relationships in our economy, the malleability of various factors, and the challenges that courts face when trying to weigh competing factors against one another. As the Court observed in *Hearst*, the test’s focus on the right to control delivered more “simplicity of formulation than of application.”<sup>33</sup> Second, while the right to control bore a straightforward relationship to the issue in tort cases—which party was best able to prevent the harm—that policy goal is not obviously relevant in the employment context. In a case like *Hearst*, the control test would direct attention to whether vendors posed a physical risk to customers or other third parties. But the NLRA itself is focused on a very different issue: altering economic power relations between workers and companies. As another scholar has put it, the difficulty of accounting for economic power under the control test “invite[s] employers to structure their relationships with employees in whatever manner best evades liability.”<sup>34</sup> Third, the very complexity of the control test creates barriers to justice. Lower-wage workers may struggle to find counsel to take on such cases, given the low damages at stake and the high cost of developing a factual record around numerous disparate factors. Delays in litigation also structurally favor employers in such cases by generating pressure on workers to settle claims.

Those problems pre-dated *Hearst*, and led the Court there to hold that employment should be defined “broadly, in doubtful situations” through reference to “underlying economic facts” rather than common law technicalities.<sup>35</sup> In the case at hand, it reasoned, the vendors were vulnerable and lacked economic power in their individual negotiations, so they were employees under the NLRA.<sup>36</sup> In a sense, then, the *Hearst* court treated the legal definition of employment as a test for class position, even if it did not use the term “working class.”<sup>37</sup> Similarly, in an early case arising under the Fair Labor Standards Act (FLSA), *Rutherford Food Corp. v. McComb*, the Supreme Court held that a slaughterhouse legally employed a group of



workers who had been hired and supervised by an independent foreman to debone carcasses. The Court reasoned that the workers were employees of the slaughterhouse, notwithstanding the common law, because they were working on the company's premises and providing a service that was integral to the company's overall operations.<sup>38</sup> By defining employment broadly and purposively, Congress and the Court sought not just to protect individual workers in those cases, but also to deter similar practices going forward, since their widespread use undermined the statutory goals of workplace democracy and income equality.

The Court's purposive test for employment was short-lived under the NLRA. Congress responded to *Hearst* by specifying in 1947's Taft-Hartley Act that the NLRA did not cover independent contractors,<sup>39</sup> and the Supreme Court later interpreted that provision to require that the common law control test governed under the NLRA.<sup>40</sup> Subsequent cases established that the control test applies under most federal worker-protective statutes.<sup>41</sup> The definition of employment under the FLSA is somewhat broader, incorporating multiple, sometimes conflicting factors but focusing on the "economic realities" of the parties' relationship.<sup>42</sup> State wage-and-hour laws have also defined employment somewhat more broadly. For example, although the test under California law that applied to Uber and Lyft drew from the common law,<sup>43</sup> the court in the Lyft case observed that that test should be "liberally construed" to protect vulnerable workers.<sup>44</sup>

Regardless of the specific test, however, courts and agencies in recent years have often focused on a putative employer's contractually specified rights rather than on indicia of economic power.<sup>45</sup> This is especially true in the NLRA context, reflecting the general trend toward contractualism and formalism in recent decades. The discussion that follows will focus on that statute because, of all employment regulations, it does the most to shape workers' associational power. In a 2009 case arising under the NLRA, the US Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reasoned that "evidence of unequal bargaining power" between a company and a putative independent contractor does not give rise to an inference of an employment relationship.<sup>46</sup> Neither, the court continued, does evidence showing "the economic controls which many corporations are able to exercise over independent contractors."<sup>47</sup> That case also held that the National Labor Relations Board (NLRB) should focus, in such cases, on whether a putative independent contractor enjoyed "the opportunities

and risks inherent in entrepreneurialism.”<sup>48</sup> On its face, a focus on entrepreneurialism seems to give courts and the NLRB a helpful lens through which to interpret the multiple, often-conflicting factors at issue, by posing the question of whether individuals are more like wage workers or more like businesspeople. But that approach can have a perverse effect: when companies shift risks or costs to workers via a contractual agreement, those workers’ very vulnerability to manipulation and exploitation can make courts and agencies *less* likely to view them as individuals in need of protection.<sup>49</sup>

Meanwhile, regardless of the merits of “entrepreneurialism” as a focal point, the NLRB has interpreted it in ways that disregard economic and social realities. Entrepreneurship typically involves the development of new business models and methods, and especially of new technologies that give a company a competitive advantage.<sup>50</sup> Yet in a recent case, the NLRB found that drivers for the airport transportation service SuperShuttle were independent contractors, even though they were required to use SuperShuttle’s proprietary technology to receive all assignments.<sup>51</sup> Similarly, the NLRB under President Donald Trump adopted a new rule for joint employment—a doctrine under which two companies can share employment duties toward particular workers—which also disregarded economic power. Joint employment can arise both in horizontal relationships between firms that share employees, and in vertical relations between user firms and subcontractors, or franchisors and franchisees. Under the Trump-era test, a putative joint employer had to actually exercise “substantial direct and immediate control,”<sup>52</sup> not just reserve the *right* to exercise control, as the common law control test has traditionally required. That standard further specified that one entity does not jointly set wages for another’s workers even if the two enter into a cost-plus contract—again, disregarding the economic realities of the relationship.<sup>53</sup>

In still other cases, the NLRB and courts have drawn bright-line rules between business entities that disregard power relations between or among them. For example, the NLRB has held that a company does not necessarily violate the NLRA by terminating a subcontractor because its employees have unionized,<sup>54</sup> a ruling that creates powerful disincentives for such workers to organize.<sup>55</sup> Similarly, the NLRB has held that subcontracted workers have limited rights to picket user firms, on the ground that the user firms are separate entities from the workers’ employers.<sup>56</sup> This sort of logic can generate borderline-absurd results in the franchising context. There, franchisees and franchisors may be treated as separate businesses for the purposes of

labor laws, so franchisors avoid duties to workers—even as they are treated as a single entity for the purposes of antitrust laws, enabling franchisors to exert substantial control over franchisees' activities.<sup>57</sup>

The effect of such strategies is that the real parties in interest have few or no duties toward the workers whose labor they purchase through intermediaries. A company relentlessly focused on cost-saving, then, may use judgment-proof contractors or franchisees—or require contractors and suppliers to compete on price until it is not possible to profit without violating labor laws—safe in the knowledge that the costs of labor law violations are unlikely to be passed on to them.<sup>58</sup>

**Examples of data-driven fissuring** Again, while fissuring has been a long-standing feature of the employment landscape, new technologies of legibility have made it much easier for companies to monitor and exert power over suppliers, contractors, and individual workers. In the industrial context, those technologies have enabled companies to formalize what had previously been tacit knowledge and then outsource it. As a study sponsored by the US Census Bureau put it, “the act of collecting data [on manufacturing processes] serves to codify information, which makes it more explicit and less tacit.” This involves a move “from ‘art’ to ‘science’, whereby managerial efforts focus on greater standardization, mechanization, and instrumentation of the process.”<sup>59</sup> Using such techniques, companies can break production into discrete tasks, farm some of them out to suppliers, and use advanced technologies to monitor those suppliers' performance.<sup>60</sup>

Such close oversight of contractual partners marks a significant change from the past. The “putting-out” system in textile manufacturing, where early capitalists gave materials to individuals for weaving in their homes, often led to low quality and a slow pace of work.<sup>61</sup> More recently, firms that outsourced labor often did so under the table, using an intermediary but not engaging in active supervision. The newspaper-vendor relationship is *Hearst* is one example. Similarly, in what became known as the “sweating system” in garment production in the early twentieth century, companies hired contractors who would in turn hire subcontractors, or even let out work to individual sewers in their houses, to keep labor costs to an absolute minimum. Companies could ensure discipline through product specifications, piece rates, and ex post inspections, but they had little or no real-time information about work performance.<sup>62</sup> Today, in contrast, firms can use advanced information technologies to gain some of the benefits of

employment—close supervision and coordination of work to ensure high quality—without the legal obligations that come with it.

Walmart is a paradigm case here in the service context. Over the course of the 1980s and 1990s, as networked information technologies matured, Walmart used them to grow into a retailing behemoth.<sup>63</sup> The company's "retail link" system, for example, uses data on store-level inventory, sometimes gathered through point-of-sale systems, to optimize its sourcing and distribution systems.<sup>64</sup> Decisions about store inventories are made in the corporate office in Bentonville, Arkansas, rather than locally, and the company delivers cereal, paper towels, and other basic goods before local managers are even aware that they are running low.<sup>65</sup> While Walmart directly employs the workers in its stores, its economic footprint extends around the globe to incorporate a vast network of suppliers—and Walmart has used both its leverage as a major purchaser and its extensive data on market trends and supply networks to exert power over those suppliers.<sup>66</sup> For example, it may push suppliers to keep prices to an absolute minimum, even as it dictates specific terms to them, such as requesting that they alter package sizes and shapes to make shipping and shelf stocking easier.<sup>67</sup> Recent economic studies have strongly suggested that these efforts drive down wages among Walmart suppliers,<sup>68</sup> even as Walmart bears no legal duties toward those workers.

Like Walmart before it, Amazon's labor footprint extends well beyond its own corporate boundaries. As discussed in section 5.2 later in this chapter, Amazon also uses data on consumer demand and past purchases to determine sales prices, which gives it power over suppliers similar to that enjoyed by Walmart. Meanwhile, Amazon has outsourced delivery both to independent contractors for Amazon Flex, and to various outside companies it terms "Delivery Service Partners" (DSPs). As one article explained, Amazon's contracts require DSPs to "provide Amazon physical access to their premises and all sorts of data the retailer wants, such as geo-locations, speed and movement of drivers—information the company says it has the power to use however it wants."<sup>69</sup> Such monitoring efforts can give Amazon the best of both worlds: the powers traditionally associated with employment without the duties and costs.

Similar trends are apparent in fast food. Here Starbucks is an outlier: rather than using a franchising model, it directly owns and operates most of its locations in the US. That has likely made it easier for Starbucks workers to organize, because they do not have to establish that Starbucks is their

employer. In contrast, McDonald's is not a single legal enterprise, but an amalgamation of tens of thousands formally distinct entities. At the center is McDonald's corporate. At the edges are the McDonald's locations that the company itself runs, along with the many McDonald's franchises that are independently owned and operated as separate corporations.<sup>70</sup> The franchise business model pushes many start-up costs and risks onto individual franchise owners. Yet McDonald's has standardized how work is performed across franchisees by training managers and other staff,<sup>71</sup> and it has set specifications for the performance of specific tasks, sometimes down to the second.<sup>72</sup>

Unions and regulators have also argued that point-of-sale and payroll management systems are integrated between franchisees and McDonald's corporate. For example, during the Barack Obama administration, the NLRB's then-general counsel Richard Griffin filed an amicus brief in a case where the Board was reconsidering its joint employer doctrine. While that case arose out of a recycling facility, it had obvious relevance for McDonald's and other franchise businesses. Part of the brief summarized the evidence on franchisors' use of technology to manage their relationships with franchisees as follows:

Some franchisors even keep track of data on sales, inventory, and labor costs; calculate the labor needs of the franchisees; set and police employee work schedules; track franchisee wage reviews; track how long it takes for employees to fill customer orders, accept employment applications through the franchisor's system; and screen applicants through that system. Thus, current technological advances have permitted franchisors to exert significant control over franchisees, e.g., through scheduling and labor management programs that go beyond the protection of the franchisor's product or brand.<sup>73</sup>

Many major hotel chains also use a franchise model, in which the brand leases operating rights to independent businesses that own particular properties. Indeed, by 2011, Marriott "owned and managed only 1 of the 356 properties operating under one of its brands."<sup>74</sup> At the same time, Marriott has integrated systems for reservations and supply chain management to serve its global network of hotels. As a recent article put it, the company has a single platform for both sourcing and accounts payable, which "ensures data that can be analysed and be transparent, enabling Marriott to better determine where commodities are needed, in real-time."<sup>75</sup> In that sense, Marriott is also acting as a platform toward its franchisees. Hotel franchisees may then utilize contractors to ensure "clean rooms, cheery front desk staff,

or prompt curbside service.<sup>76</sup> Cleaning staff and front desk staff, therefore, can be two or more contractual degrees removed from the company with real power over their working conditions.

There are many other examples, especially in the low-wage economy.<sup>77</sup> In an illustration of how automation, algorithmic management, and fissuring are interrelated, medical transcriptionists at the University of Pittsburgh Medical Center learned during a unionization drive that their jobs were being outsourced, since the task of transcribing records could be performed anywhere, on an on-demand basis.<sup>78</sup> The maturation of natural language recognition technologies is creating similar opportunities among customer service companies and contractors. As customers increasingly experience, companies are using natural language processing via chat windows or verbal interfaces to answer some questions previously answered by workers. Human workers may be brought in to address more complex questions. But if it is not economically beneficial for those workers to be colocated, the company using their services will find it easier to classify them as independent contractors, or to subcontract their work. Gig-economy companies and others have also been developing temporary-services apps for other sorts of jobs, including hotel cleaners, janitors, dishwashers, cooks, and warehouse workers.<sup>79</sup> At some companies and locations, those sorts of jobs require teamwork and a stable workforce with company-specific knowledge, making them somewhat less amenable to fissuring. But in many other cases, workers can be plugged in and out of companies relatively quickly with little training. As a result, the law is all that prevents companies from fissuring away work in many enterprises today.

**Potential policy responses to fissuring** Addressing fissuring under existing law is quite difficult since existing law positively encourages the practice. Notably, the US is becoming an outlier on this issue, at least at the federal level. During the Trump administration companies pushed for and obtained broader legal rights to fissure away workers under the NLRA, including gig economy workers,<sup>80</sup> even as courts in various other nations and some US states had held that Uber and Lyft drivers were employees for some purposes.<sup>81</sup> In late 2021, the European Commission also issued a set of proposals to improve working conditions on labor platforms, which would require member-states to establish more worker-friendly tests for employment on digital platforms. Notably, under the directive, workers on platforms would be presumed to be employees so long as the platform met

two of the following five criteria of control: setting pay, setting specific work rules, surveilling the performance of work, restricting workers' ability to choose working hours or reject assignments, and restricting workers' outside opportunities.<sup>82</sup>

Legislatures in the US have sought to respond to fissuring as well. A common proposal to address independent contractor misclassification would replace the "control" and/or "economic reality" tests that now predominate with the so-called ABC test for employment. Under the ABC test, individuals hired to perform work for pay are presumed to be employees, and the employer can rebut that presumption only by showing that (A) it does not exert control over its workers, (B) the work performed is outside the usual scope of the employer's business, and (C) the worker is engaged in an independent trade, occupation, or business. California has now adopted that test for its state labor code, though gig-economy companies obtained an exemption in 2020 via a ballot measure known as Proposition 22.<sup>83</sup> That test has also appeared in some versions of the PRO Act, an omnibus labor law reform proposal at the federal level.<sup>84</sup> In addition to such reforms or as an alternative, Congress could specify that certain individual workers classified as independent contractors still have the right to organize and bargain collectively, as well as the right to a minimum wage and overtime pay.<sup>85</sup>

Companies surely would resist such moves, of course. Through 2021, the gig-economy companies pressed for exemptions from employment duties in various states.<sup>86</sup> And even when companies lose legislative or court battles, they may be able to leverage new technologies to avoid liability. For example, when Uber and Lyft were faced with the possibility of ramped-up enforcement in California, they floated the idea of reorganizing: instead of their current independent contractor model, they would utilize a franchisee or subcontractor model.<sup>87</sup> There is precedent for that move. After losing a set of wage and hour lawsuits, FedEx required its drivers in some states to set up corporations and to hire staff, to help ensure that they would be treated as contractors in the future.<sup>88</sup> Using electronically signed contracts and user agreements, Uber and Lyft could do the same thing today with *no* physical reorganization of their or their drivers' operations at all. Companies' capacity to rearrange operations so easily—especially when layered atop their broad legal powers to set up their enterprises using fissured labor in the first place—suggests that legislatures may need to think more aggressively about how to allocate employment duties.

One option here would be to statutorily define work relationships in certain sectors as legal employment for the purposes of particular statutes. Legislatures could declare, for example, that gig-economy and logistics companies employ their drivers or could adopt a version of the European Commission's proposed factor-based analysis. Legislatures could take a similar approach to joint employment, declaring for example that fast food and hotel franchisors jointly employ their franchisees' workers, that general contractors on construction sites jointly employ their subcontractors' workers, and that janitors in large commercial office buildings are jointly employed by the companies who own or manage the properties. California has taken steps in that direction.<sup>89</sup> Such legislation could also instruct enforcement agencies to identify other sectors or types of relationships where employment or joint employment will be presumed. Another option would be for legislatures to instruct enforcement agencies to develop economic models that capture power differences between companies that can be expected to reduce wages for workers at contractors or vendors.<sup>90</sup> When Amazon and Walmart more or less dictate prices to suppliers, or hotel brands dictate prices to cleaning contractors, that fact could be taken into account in determining those companies' responsibilities.<sup>91</sup> Chapter 6 explores a related idea—namely, that legislatures should take companies' surveillance capacities into account when assigning legal responsibility for working conditions, on the theory that such surveillance is an exercise of class power. Finally, reforms to make it easier for workers to unionize would also help address fissuring, because unionized workers could protest fissuring efforts, take wages out of competition across sectors, or both.<sup>92</sup> That idea is also explored in chapter 6.

## 5.2 Inductive Knowledge, Consolidation, and Platforms

A notable fact about many of the companies discussed in this book is that they are quite large, enjoying substantial shares of their respective product markets, despite the fact that they have fissured away many workers. Uber is again a helpful example. Before it arrived in many cities, the taxi sector was characterized by intense competition among many small companies and independent operations. Today, Uber and Lyft are by far the largest players.<sup>93</sup> These developments reflect a broader and longer-running trend: various industrial sectors have become more concentrated at the national



level in recent decades, with a smaller number of companies controlling a greater share of the market.<sup>94</sup> Companies have often pursued market dominance for a simple reason: it can generate outsized profits since companies that face less competition can “create a relatively wide margin between the costs of production and the sales price.”<sup>95</sup> These developments have also generated widespread academic and political concern and have led scholars to rejuvenate an earlier tradition of antitrust thinking that was suspicious of concentrated corporate power given its tendency to thwart innovation and to give leading firms excessive political-economic power.<sup>96</sup> This section first addresses the causal factors behind consolidation and explores how consolidation may affect workers. It then discusses the rise of platform firms like Uber, Lyft, and Amazon and the additional challenges they pose for workers.

**Market consolidation** Trends toward consolidation have been driven by numerous factors, including both legal and technological developments. Legally, a key factor was the reshaping of antitrust law in the 1980s around a consumer welfare standard, under which a company’s size alone typically will not trigger antitrust scrutiny unless the company also increases consumer prices.<sup>97</sup> Regulators then took a more permissive attitude toward mergers and megafirms, which enabled more industrial consolidation over time. Regarding technology, several forces were especially important. In the tech sector, firms like Google and Facebook established first-mover advantages in search and social networking that compounded over time, fueled in part by those companies’ exclusive control over user data. Like other companies that traffic in information goods, Google and Facebook also could scale up very quickly since they did not require the investments in machinery, storefronts, or other physical capital that are required of manufacturers, for example.<sup>98</sup> But the trend was not limited to pure technology companies. Walmart, fast food companies, and hotels scaled up in part by leveraging supply-chain management technologies. More recently, Amazon’s explosive growth helped to consolidate online retail.<sup>99</sup> Hospital and long-term-care markets have also become more concentrated, due in large part to mergers.<sup>100</sup>

In analyzing these trends, a number of leading economists and legal scholars have argued that growing market concentration is harming workers.<sup>101</sup> Now, in assessing those arguments, it is important not to assume that workers and employers had equal power in a prior era, or that market share

is the only important form of employer power. As discussed in chapter 1, power imbalances are a structural feature of most labor markets and labor relations regardless of employer concentration. At the most basic level, the firm itself aggregates capital so that investors can bargain collectively with individual workers who may face a stark choice between working and destitution, so that employment contracts are entered on an uneven playing field.

Market concentration therefore does not create power imbalances, but it can exacerbate them. Most starkly, where a single employer dominates a particular labor market, it will enjoy *monopsony power*, here meaning the power to set prices for the purchase of labor. Since that company's employees will have few outside options, they will not be able to threaten to leave in order to get their employer to increase their wages.<sup>102</sup> The classic case is a company town, in which there is literally one employer, but recent empirical studies have suggested that monopsony and wage suppression are also common outside that context. One study found that hospital mergers that led to substantial increases in market concentration reduced wage growth among workers with health care-specific skills.<sup>103</sup> After the mergers, those workers presumably enjoyed less competition for their services. Concentration can also augment employers' power by facilitating coordination among employers to suppress worker mobility. McDonald's and various other fast food chains, for example, included provisions in their franchise agreements for years that prohibited franchisees from poaching staff from corporate-owned restaurants. The companies agreed to rescind those provisions in 2018, under pressure from the Washington State attorney general.<sup>104</sup> Finally, unionization may be nearly impossible at very large companies today, due to the enormous expense that a union would have to assume to organize those companies' workers. As discussed in chapters 2 and 4, such a union would need to organize site by site and then merge the organized sites into larger bargaining units—all against well-funded and technologically sophisticated employer resistance.

The empirical evidence on the relationship between firm size and working conditions is nevertheless complicated. For one thing, while wages have stagnated alongside greater market concentration in recent decades, other institutional shifts clearly played a role in wage stagnation, including deunionization, fissuring, and the various labor discipline strategies discussed in prior chapters. Indeed, unions may be able to mitigate some of

the negative effects of consolidation: one recent empirical study found that mergers in health care had less of a negative effect on wages when workers were unionized.<sup>105</sup> Moreover, employees of larger firms have historically earned *higher* wages than workers at smaller firms in the same industry.<sup>106</sup> That may be because larger firms can extract monopoly rents from consumers, or because those firms enjoy economies of scale or greater productivity due to their investments in technology. Or it might be because workers and the public think that larger and more profitable firms should share the wealth by paying higher wages.<sup>107</sup> The large-firm wage premium does seem to have declined in recent years, however, perhaps due to a combination of deunionization and the service transition.<sup>108</sup> In any event, the complex relationship between monopsony and working conditions suggests that policy responses should include not just new antitrust strategies, but also reforms that bolster workers' own countervailing power. Some such strategies are discussed below and in chapter 6. But first, it is necessary to discuss the growth of platform firms in the low-wage service economy.

**The rise of platforms** In addition to the factors discussed previously, consolidation has been driven by the greater availability of data on consumer and worker behavior, and by new means of utilizing that data. As noted in chapters 3 and 4, data analytics work best at scale, where companies can profit from the sorts of statistical judgments they generate. That is one reason why leading companies both in and beyond the tech sector have gathered and exploited ever-greater quantities of data on production, distribution, and consumer behavior.<sup>109</sup> As discussed in chapter 2, their capacities to do so have been shaped and facilitated by law, including the expansion of intellectual property (IP) rights and courts' acquiescence in companies' use of trade secrets and contract doctrines to claim property-like entitlements in data. As just noted, these developments also encourage consolidation because companies that are best able to exploit data can leverage first-mover advantages into market dominance.

Many companies have done this through a particular business model: the "platform" firm, in which a company sits between and establishes the basic terms of commerce for customers and sellers of goods and services.<sup>110</sup> Facebook and Google are the preeminent examples. While their labor footprints are not that large,<sup>111</sup> many large, low-wage employers have adopted elements of the model. Uber, Lyft, DoorDash, Instacart, and other gig

economy companies are all platforms that match consumers and workers for short-term tasks. Amazon, similarly, utilizes data on customer demand, supplier behavior, and supply chains to operate a two-sided platform for the sale and delivery of goods. It has been dominant in online retail for some time now, and is gaining market share in grocery delivery.<sup>112</sup> Some large retailers, franchised hotel chains, and fast food companies have also used elements of the model. McDonald's both licenses operating rights to franchisees and acts in some sense as a platform intermediary between them and suppliers by purchasing agricultural commodities like potatoes, pork, and beef and distributing them to stores. As discussed in chapter 4, employee recruitment is also increasingly carried out through online platforms. Those companies occupy a truly enviable position: they can obtain market share rapidly due to the low marginal costs of adding job listings and accepting applications, and they may also be able to gather and maintain data on particular candidates and clients over time.

In the labor context, platforms generate profits by establishing a choke point through which a huge volume of transactions must pass. Their control over exchange then gives them the power to charge a fee on those transactions. If Uber and Lyft someday generate sustainable profits, it will be because they have done this and effectively "taxed" most rides in major cities. Similarly, Amazon essentially taxes transactions on its platform, all while using its own market power to undercut or compete with vendors.<sup>113</sup> While the technologies here are novel, the strategy of establishing a choke point and taxing transactions is not new. Immanuel Wallerstein argues that it has been the favored strategy of mafias in many cases, because it enables the accumulation of capital in otherwise highly competitive markets where innovations are scarce.<sup>114</sup> That helps explain why the model has been especially successful in local delivery, taxis, and online retail.

Indeed, platforms may be profitable *only* if they have a degree of monopoly power, some of which is in fact baked into the platform model. Successful platforms often rely on network effects, where the addition of users actually increases the welfare of existing users rather than diminishing it, which generates "tendencies toward monopoly."<sup>115</sup> Uber's model again helps illustrate this point: in order to ensure that customers do not have to wait long for a car, the company needs to have many drivers on the street; and to keep those drivers on the street, it needs to have robust consumer demand—or to lead drivers to believe that there is robust demand.<sup>116</sup>

Similarly, social media platforms depend on a large user base that stays engaged, so they often promote content that is viral, polarizing, or both.<sup>117</sup> Those network effects, together with first-mover advantages and platforms' control over data, can generate monopoly power, along both horizontal and vertical dimensions. Horizontally, users become dependent on the platform and cease to utilize competitors' services, while vertically, buyers and sellers on such platforms are subject to the platform's terms and conditions.<sup>118</sup>

That has various negative consequences. Some platform firms (especially Google, Facebook, and Amazon) have near-monopoly power over essential resources, including search technologies and media and communications tools. Indeed, the technology giants today enjoy a sort of power that in the past was enjoyed only by sovereigns: the power to exclude citizens from essential resources and certain standard privileges and immunities of citizenship. Social media companies' exclusion of users for violating terms of service is one example.<sup>119</sup> Amazon enjoys a similar power over vendors on its platform. As argued in the prior section, gig-economy workers are vulnerable due to their platforms' power to change their policies or deactivate workers without cause, and franchisees and their workers are vulnerable due to franchisors' power to set performance standards. Meanwhile, platforms' control over data and technology gives them some capacities to avoid regulations. If regulators can neither access companies' data (due to trade secrets and constitutional protections) nor understand those companies' algorithms (due to their complexity), it may be nearly impossible to ensure that the companies are abiding by the law.<sup>120</sup>

Indeed, by consolidating data and inductive knowledge about economic behavior, platforms may be generating a historic shift in collective economic behavior. As a mode of business operation, they sit somewhere between market ordering and planning. In a sense, they are trying to solve what Hayek called the "knowledge problem" that plagued earlier generations of planned economies: no sovereign or entity could ever gather or grasp the widely diffuse knowledge that consumers bring to markets, and planners could not allocate goods effectively as a result. As Hayek put it, "The knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."<sup>121</sup> Markets, Hayek argued, brought together all consumers and reflected their preferences, generating price signals that

captured those preferences in the aggregate. Today, through their privileged access to and control over user data, platforms aspire to capture and exploit the signals that customers and sellers are sending. They aspire to become the sort of sovereign that Hayek thought was impossible: one with panoptic knowledge about market behavior and the power to steer it.<sup>122</sup> In other words, platforms are *constructing* new modes of and sites for competition and cooperation, but always in ways that serve their interests and augment their power.

**Legibility and conditions of possibility** At the same time, the increased legibility of work today—which has helped to drive fissuring, consolidation, and the growth of platforms—could create some opportunities to ensure better work in the future. As Rebecca Johnson and Tanina Rostain have argued in a related context, big data and related tools can “shin[e] a spotlight on inequality and subject[] powerful institutions to enhanced oversight.”<sup>123</sup> This may be occurring in the labor context, where in some sectors data-driven surveillance has encouraged greater formalization of work relationships. For example, prior to Uber’s and Lyft’s emergence, the taxi sector in many cities was highly fragmented and informal.<sup>124</sup> Individuals or companies would purchase medallions that gave them a license to operate and lease out the operating rights to another party, who would in turn lease out a cab to an individual. That system put workers several contractual degrees away from the investors who ultimately profited from their labor, which made enforcement of basic labor standards challenging. The industry’s lack of technological sophistication made enforcement still more difficult.<sup>125</sup> It is easy to forget that taxis operated on cash in many cities until quite recently.

The growth of Uber and Lyft greatly harmed incumbent drivers, especially those who owned their own cabs, but the companies also made drivers proximate to a very large and well-capitalized firm with extensive governance capacity.<sup>126</sup> That fact doesn’t necessarily help drivers much at this point—but it could. Those companies have data on drivers’ wages and performance that were not readily available to taxi companies or regulators in the past, which could be leveraged to ensure compliance with basic labor standards. Similar transformations have occurred elsewhere in the gig economy.<sup>127</sup> DoorDash and Instacart, for example, have quickly built power in their sectors of restaurant delivery and grocery delivery, respectively, where

in the past, delivery services were informal and delivery workers were often paid well below minimum wage.<sup>128</sup>

Regulators could require such companies to use their surveillance capabilities to ensure decent labor standards. This is not an entirely novel proposal: past labor and employment scholars have argued that large firms should have the duty to use their own internal governance processes—which they often develop to ensure high-quality goods or services—to enforce statutory mandates.<sup>129</sup> In fact, companies already must do this to some extent in the sexual harassment context, and the Supreme Court has suggested that large firms may need to have more detailed and sophisticated reporting practices than smaller firms, given their greater governance capacities.<sup>130</sup> (Whether such antiharassment policies work as currently designed is another question entirely.)<sup>131</sup> Large firms are also often better positioned than small ones to ensure equal employment opportunity, because they employ large numbers of workers. Compare a local restaurant sector with many small players to a sector dominated by a couple of large chains. In the former case, rooting out discriminatory hiring patterns (e.g., women as hosts and servers, men as bartenders, whites in front, Black and Latino workers in back) may require regulators to police many firms' behavior. In the latter case, the large chains can take on much of that burden, tracking applicant flow data, establishing effective affirmative action programs, and setting policies within the organization.

The same strategies could be applied to economic rights. For instance, virtually all companies are required to comply with wage and hour laws, but large companies often keep these records automatically, while in the informal economy such records are often on paper (if they even exist). Where a platform enters an informal labor market, it also generates and tracks data about that sector's workers into timekeeping and payment software. Similarly, some freelancer platforms automatically measure workers' hours and take screen grabs that document their work as they perform it, allowing remote clients to monitor their progress. While such a system raises privacy issues, some platforms have instituted the practice as part of a precommitment mechanism: workers who agree to such monitoring are guaranteed fast payment, from the platform if not the client.<sup>132</sup> The data gleaned through those efforts could be used to ensure legal compliance as well. Some large platform firms would also be natural collective bargaining

partners if they were defined as their workers' employers. A bargaining unit of Uber drivers could substantially raise standards in the sector, and such drivers make up a natural "community of interest," as required under US labor law, since they perform virtually identical work.<sup>133</sup> Indeed, where unions would need to establish a multiemployer bargaining unit to bargain with taxi companies in many cities, that is not the case for Uber since the company itself has direct relationships with its drivers. To reiterate, data-driven consolidation has had largely negative effects on workers so far. The point of the examples in this subsection is just that consolidation also creates some possibilities for more effective regulation in the future.

## Conclusion

Of all the developments discussed over the last three chapters, fissuring, consolidation, and the growth of platforms may reflect the closest connection among law, new technological affordances, and class relations. Relatively narrow definitions of employment have long incentivized fissuring, while changes in antitrust policy and information law have encouraged consolidation. The maturation of data-driven technologies has aggravated both tendencies. As a result, today's largest low-wage employers are truly massive and often focus their core operations around their own IP and trade secrets, which tend to be highly profitable since they are protected against external competition. Market dominance can also generate high profits, and in some sectors, companies' market dominance through platforms and their control over productive data reinforce one another in a cyclical fashion. Meanwhile, companies are using their operational and legal control over data to reconfigure labor practices in ways that force workers to compete with one another, keeping wages down and ensuring that investors and managers capture a greater share of profits.

Responding to fissuring and consolidation will likely require an anti-monopoly strategy and a worker power strategy that can operate hand-in-hand. In the franchise context, companies that are treated as one entity for antitrust purposes could be treated as one entity for labor law purposes. Amazon could be restricted from competing with other vendors on its platform and also could be held to some duties toward workers within its sphere of influence. Merger review could take more explicit account of a proposed merger's potential effects on workers as well as consumers.



Some platforms with monopoly power, like gig-economy companies, could potentially be broken into regional or even local operators and required to use their data to ensure compliance. Or, now that the capacities of market-mediating algorithms have been proven, policymakers could encourage their diffusion into smaller companies, at least for the purposes of ensuring legal compliance. Chapter 6 takes up related questions in detail, asking how data-driven technologies can be repurposed to enhance rather than undermine workplace democracy.



This is a section of [doi:10.7551/mitpress/11253.001.0001](https://doi.org/10.7551/mitpress/11253.001.0001)

# Data and Democracy at Work

## Advanced Information Technologies, Labor Law, and the New Working Class

By: Brishen Rogers

### Citation:

*Data and Democracy at Work: Advanced Information Technologies,  
Labor Law, and the New Working Class*

By: Brishen Rogers

DOI: 10.7551/mitpress/11253.001.0001

ISBN (electronic): 9780262373357

Publisher: The MIT Press

Published: 2023

The open access edition of this book was made possible by  
generous funding and support from MIT Press Direct to Open



The MIT Press

© 2023 Massachusetts Institute of Technology

This work is subject to a Creative Commons CC-BY-ND-NC license.  
Subject to such license, all rights are reserved.



The MIT Press would like to thank the anonymous peer reviewers who provided comments on drafts of this book. The generous work of academic experts is essential for establishing the authority and quality of our publications. We acknowledge with gratitude the contributions of these otherwise uncredited readers.

This book was set in Stone Serif and Stone Sans by Westchester Publishing Services.

Library of Congress Cataloging-in-Publication Data

Names: Rogers, Brishen, author.

Title: Data and democracy at work : advanced information technologies, labor law, and the new working class / Brishen Rogers.

Description: Cambridge, Massachusetts : The MIT Press, [2023] | Includes bibliographical references and index.

Identifiers: LCCN 2022015330 (print) | LCCN 2022015331 (ebook) | ISBN 9780262545136 (paperback) | ISBN 9780262373364 (epub) | ISBN 9780262373357 (pdf)

Subjects: LCSH: Labor laws and legislation—United States. | Employees—Effect of technological innovations on—United States.

Classification: LCC KF3319 .R64 2023 (print) | LCC KF3319 (ebook) | DDC 344.7301—dc23/eng/20220831

LC record available at <https://lcn.loc.gov/2022015330>

LC ebook record available at <https://lcn.loc.gov/2022015331>