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Collaborative Enforcement

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Collaborative Enforcement

*Andrew Elmore**

Abstract

Labor standards enforcement in the low-wage workplace has long suffered from a lack of capacity, expertise and remedies that blunt the impact of public and private enforcers alike. The question of how to address these pathologies in state and local workplace regulation has gained new urgency with the virtual explosion of regional labor lawmaking and the deregulatory impulses of the new federal administration.

This Article identifies collaboration between state and local agencies and private, public interest organizations (“PIOs”) as one pathway to address these enforcement gaps, by amplifying the deterrent effect of public and private enforcement and by improving legal remedies. This Article offers this form of public-private regulatory experimentation, which it calls “collaborative enforcement,” as a conceptual framework that can (a) effectively and efficiently address enforcement gaps by integrating a range of enforcement tools that public and private enforcers cannot access independently; (b) subject public agency enforcement priorities to political accountability; and (c) facilitate sophisticated types of tripartite regulation championed by earlier scholarship.

Private delegations in collaborative enforcement, however, can create a risk of PIO abuse of the delegation and of public agency cooptation of PIOs, which will require measures to protect public agency and PIO independence.

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National Labor Relations Act preemption and state nondelegation doctrine do not threaten the core requirements of collaborative enforcement, but do constrain the scope of its delegations and legislative aims. The techniques described in this Article may be applied to other areas of civil enforcement in which underdeterrence is a result of similar enforcement pathologies.

Table of Contents

I. Introduction75

II. Public and Private Enforcement Pathologies.....82

 A. *The Enforcement Pathologies of Independent Enforcement*83

 1. *Public Agency Enforcement* 84

 2. *Private Enforcement*88

 B. *The Limitations of Independently Addressing PIO and Public Agency Enforcement Pathologies*.....93

 C. *Tripartism to Deter Rather Than to Encourage Self-Regulation*.....96

III. Public-Private Regulatory Experimentation to Improve the Deterrent Effect of Enforcement.....101

 A. *Collaborative Enforcement*.....102

 1. *Remedial Enforcement*102

 2. *Grant-based Enforcement*107

 B. *Evaluation of Collaborative Enforcement*110

 1. *Collaborative Enforcement Can Effectively and Efficiently Address Enforcement Pathologies*110

 2. *Collaborative Enforcement Injects Political Accountability into Public Enforcement and Prevents Capture by the Regulated Entities*113

 3. *Collaborative Enforcement Improves Effectiveness and Governance of Public-Private Enforcement Through Tripartism*.....115

 C. *Proposal: Collaborative Enforcement to Amplify the Deterrent Effect of Enforcement*117

IV. The Risk of Eroding Public and Private Independence and Doctrinal Limitations to Collaborative Enforcement121

 A. *The Erosion of Independent Enforcement*.....122

 1. *Public Enforcement Independence*124

 2. *Harm to Private Enforcement*127

 B. *NLRA Preemption and State Nondelegation*.....129

 1. *NLRA Preemption*130

 2. *State Nondelegation Doctrine*135

V. Conclusion.....139

I. Introduction

Structural changes in the nature of work have made labor and safety and health violations in the low-wage workplace prevalent and difficult to detect and resolve. Declining unionization, the increasing use of temporary and contingent workers, and the “fissuring” of industries in which lead firms shed labor costs by outsourcing them to small, often fly-by-night companies, has led to the proliferation of small, decentralized and geographically dispersed workplaces where noncompliance with legal protections is an entrenched social norm.¹

Public agencies and private, public interest organizations (PIOs) often share the goal of strengthening labor standards through enforcement but lack the capacity, expertise or remedies to change entrenched norms of noncompliance in the informal economy. Adding to this challenge is the recent proliferation of state and local lawmaking to lift standards and enact newly-minted protections, such as mandatory paid sick leave and restrictions on on-call scheduling, that will only achieve their intended effects if they are effectively enforced.² With the retreat of federal agencies from labor standards enforcement,³ and the limited role of the private bar in sectors where

1 See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 54, 70–73, 245 (2014).

2 Nearly forty cities and states passed local minimum wage ordinances higher than the federal minimum wage since 2012. NAT'L EMP'T LAW PROJECT, *CITY MINIMUM WAGE LAWS: RECENT TRENDS AND ECONOMIC EVIDENCE* (2016), <http://www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf>. Seven states and twenty-eight local jurisdictions have passed legislation requiring paid sick leave, and many others restrict employers from requiring employees to call in the day of their shift to determine their daily hours. See Russ Wiles, *More States Adopt Tough Paid Sick-Leave Laws*, USA TODAY (July 5, 2017), <https://www.usatoday.com/story/money/business/2017/07/05/more-states-adopt-tough-paid-sick-leave-laws/103336610/>; Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 41–46 (2015).

3 Over the past year, the federal administration proposed slashing the United States Department of Labor (USDOL) budget by over 20%, rescinded guidance providing a broad definition of “joint employers” under wage-and-hour law, and has declined to advocate for the Obama-era salary basis threshold expanding overtime coverage for low-wage employees classified as managers. Bourree Lam, *The Jobs Programs Trump’s Budget Would Cut*, THE ATLANTIC (Mar. 17, 2017), <https://www.theatlantic.com/business/archive/2017/03/trump-budget-dol/519933/>; Daniel Wiessner, *U.S. Labor Department Rescinds Obama-Era Rule on ‘Joint Employment’*, REUTERS (June 7, 2017) <https://www.>

employers are often small and judgment proof,⁴ this enforcement burden will rest squarely on state and local public agencies and PIOs such as unions, worker centers and community-based organizations.

The thesis of this Article is that to address these new challenges, state and local agencies will need to address longstanding enforcement gaps that undermine the effectiveness of public enforcement. It identifies collaboration between state and local public agencies and PIOs as one pathway to do this, and offers collaborative enforcement a conceptual framework to (a) effectively and efficiently address enforcement gaps by integrating enforcement tools and creating new remedies; (b) strengthen the political accountability of public agency enforcement; and (c) facilitate sophisticated types of tripartite regulation championed by earlier scholarship.

While scholars of public-private regulatory experimentation have traditionally proposed delegating monitoring responsibilities to the regulated entities,⁵ this Article shows that public-private

reuters.com/article/us-usa-labor/u-s-labor-department-rescinds-obama-era-rule-on-joint-employment-idUSKBN18Y2PZl; Nevada v. U.S. Dep't of Labor, No. 16-41606, 2017 WL 3149309, at *17 (5th Cir. June 30, 2017).

- 4 Employment law noncompliance tends to be concentrated in small workplaces. Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 555 (2010) (finding that the industries "at greatest risk of FLSA violations are overwhelmingly composed of establishments of fewer than twenty employees"). Employers in small, low-wage workplaces are often judgment proof and more likely to respond to notice of enforcement by closing and reopening under a new name, or by disappearing altogether. Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY 47 (2006). Class-action suits by private attorneys can theoretically afford workers a relatively costless and anonymous means to challenge unlawful practices. *Id.* at 46. But they are unrealistic in small workplaces, and federal wage-and-hour lawsuits typically cannot be brought by class action. Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 383 (2008). Private, aggregate litigation in employment law, moreover, may soon be closed off entirely in workplaces that require employees to waive participation in class actions. See Transcript of Oral Argument, *N.L.R.B. v. Murphy Oil USA, Inc.*, WL 4882790 (U.S. argued Oct. 2, 2017) (Oral argument regarding whether required class action waivers violate the right for employees to engage in "concerted activities" in pursuit of their "mutual aid or protection" under the National Labor Relations Act.).
- 5 The best-known discussion of public-private collaboration in regulation is enforced self-regulation. See John Braithwaite, *Enforcement Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1467-73 (1982). In this model, public agencies delegate monitoring to the regulated entities, reserving government enforcement resources for monitoring the regulated entities' internal compliance regimes. *Id.* This model assumes the existence of regulated entities with the willingness and expertise to

regulatory experimentation can also be useful in instances in which self-regulation by the regulated entities is unlikely in the near term. In these instances, instead of enforced self-regulation, public agencies and PIOs can change the behavior of regulated entities through collaboration, with the goal of amplifying the deterrent effect of enforcement, as exemplified by collaboration between PIOs and public agencies in the Fight for Fifteen movement.⁶

Scholarship that has theorized this possibility⁷ has not yet addressed administrative law literature cautioning that privatizing public regulation can create incentives for abuse, defeat accountability and undermine democratic values.⁸ Collaborative enforcement can

design and implement compliance plans. *See generally* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19–53 (1992); NEIL GUNNINGHAM & PETER N. GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 401–2 (1998) (considering sanctions of private and public enforcers of environmental law).

- 6 *See infra* Part II(C). Legal scholars have focused on the implications of the Fight for Fifteen movement on labor law. *See* Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 8 (2016), but have not yet explored its implications for regulation. While beyond the scope of this Article, the benefits and costs of social movement actor collaboration with public agencies deserves a fuller examination. Law and social movement scholarship primarily explores the role of private, public interest attorneys (often in PIOs) reacting to political opportunities to shape the aims of social movements. *See* Scott Cummings, *Movement Lawyering*, 2017 *U. ILL. L. REV.* 1645, 1669–89 (2017) (describing history of movement lawyering in U.S. from the civil rights era to present). As Douglas Nejaime argues, this focus on private attorneys can obscure the role of government attorneys seeking to advance social movement goals and channeling social movement activities into state-centered tactics. *See* Douglas Nejaime, *Cause Lawyers Inside the State*, 81 *FORDHAM L. REV.* 649, 654 (2012). Examination of the choice by the Fight for Fifteen movement to seek public agency enforcement to obtain and protect its law reform goals, and by public agency attorneys to prioritize PIO referrals and law reform goals, would provide a fuller understanding of the benefits and costs of collaborative enforcement to the social movements that make such collaboration possible.
- 7 CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 15 (2010); JANICE FINE, *CO-PRODUCTION: BRINGING TOGETHER THE UNIQUE CAPABILITIES OF GOVERNMENT AND SOCIETY FOR STRONGER LABOR STANDARDS ENFORCEMENT* 18–29 (2015), http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductioOct_ExecSumm-rf_4.pdf [hereinafter *CO-PRODUCTION*]; Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 *HOFSTRA LAB. & EMP. L.J.* 183, 194 (2003); Fine & Gordon, *supra* note 4, at 575–76.
- 8 *See* JODY FREEMAN & MARTHA MINOW, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND THE*

indeed create incentives for PIOs to misuse delegations and for public agencies to coopt PIOs that might otherwise act as public enforcement watchdogs, requiring political and administrative controls to prevent abuse that will be discussed in Part IV. But a detailed analysis of emergent enforcement collaborations between state and local public agencies and PIOs reveals that restricting delegations to PIOs, and the limited delegation and deeply intertwined nature of collaborative enforcement, make abuse less likely than other private delegations. PIOs have less incentive to abuse a delegation than for-profit firms, particularly PIOs accountable to communities in which public agencies channel enforcement, and which have a shared interest in improving enforcement outcomes in those communities.⁹ The limited delegation of collaborative enforcement, which maintains a bright line separating public and private enforcers, affords public agencies the independence to make value-laden, contestable policy judgments about enforcement priorities without undue interference. Its intertwined nature permits public agencies to exercise meaningful oversight over private delegations to PIOs, and PIOs to act as an important counterweight to prevent capture by the regulated entities by holding public agencies politically accountable for shifts in enforcement priorities that might otherwise be difficult to detect. Collaborative enforcement can also serve the democratic value of facilitating tripartite forms of regulation by encouraging PIOs to channel worker voice into public regulation. These benefits set collaborative enforcement apart from, and suggest a lower threat to democratic government as, other forms of private delegation.

While there are many examples of informal, ad hoc collaboration between PIOs and public agencies, this Article focuses on two formal, emergent collaborative enforcement techniques. In the first, which this Article calls *remedial enforcement*, public agencies coordinate with PIOs to intensively focus their public and private enforcement tools on a particular sector in which current remedies are ineffective or insufficient. In the second collaborative enforcement approach, which this Article calls *grant-based enforcement*, state and local legislatures and agencies fund PIOs to provide capacity and expertise to assist agencies in sectoral or regional enforcement.

AMERICAN DEMOCRACY 9–13 (2009).

9 See *infra* Part IV(A). The greatest risk of abuse in privatizing public litigation comes from the complete delegation of public enforcement to private, for-profit firms. See Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 537–56 (2016).

Examination of these techniques provides texture to empirical studies showing that the presence of PIOs in the workplace can increase “the scope and rigor of regulatory oversight.”¹⁰ In low-wage sectors, where firms are often small and undercapitalized, collaborative enforcement can more effectively and efficiently resolve legal violations and provide restitution to victims than traditional investigations or litigation. Intensively focusing enforcement in previously underregulated sectors can reveal important gaps in remedies that can be addressed through law reform. Grant-based enforcement can also improve the durability of collaborative enforcement by funding the private enforcer’s participation. Both forms of collaboration can foster tripartite bargaining between employers and PIOs to strengthen and raise labor standards through lawmaking, unionization, and codes of conduct.

A detailed examination of remedial and grant-based enforcement also reveals how public and private enforcers configure their collaborations to account for their different enforcement tools, motivations, and legal restrictions. The National Labor Relations Act¹¹ (“NLRA”), for instance, may limit union collaboration in public agency enforcement in ways that pose no obstacle to PIOs outside NLRA regulation. For PIOs that cannot lobby because of their tax-exempt status, political campaigns for stronger labor protections are out of reach without non-exempt PIOs, such as unions, playing a lead role.¹² Non-union PIOs, which are reliant on government funding because they lack the membership funding base of unions, are a more natural fit for collaboration funded through public grants.¹³ Unions,

10 Alison D. Morantz, *What Unions Do for Regulation*, 13 ANN. REV. LAW & SOC. SCI. 515, 523 (2017) (finding that studies of the regulation show more frequent and intensive inspection of unionized establishments compared with non-union establishments).

11 29 U.S.C. §§ 151–169 (2012).

12 26 U.S.C. § 501(c)(3) (2015) (stating that, while 501(c)(5) organizations may engage in a wide variety of lobbying activities, other PIOs that have 501(c)(3) tax status may risk their tax-exempt status if lobbying is a substantial part of their activities).

13 See Leslie C. Gates et al., *Who Funds Worker Centers?: An Analysis of Publicly-available Data and Directions for Future Research (2008-2014)*, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE (LERA Edited Volume) (forthcoming 2018) (finding that over half of surveyed worker centers nationally receive funding from government); ELS DE GRAAUW, MAKING IMMIGRANT RIGHTS REAL: NONPROFITS AND THE POLITICS OF INTEGRATION IN SAN FRANCISCO 53 (2016) (In survey of 100 immigrant-serving PIOs in San Francisco, “sixty-

which are not restricted in their lobbying and can access funding from their membership base, but which face shifting membership demands, are better suited to the short-term and lobbying-focused collaborations of remedial enforcement.

This Article offers collaborative enforcement as a plausible pathway to counteract entrenched norms of noncompliance in low-wage sectors of the economy. Remedial and grant-based enforcement can be deployed as temporary means to create new legal remedies or elaborate a new labor protection, or in an ongoing, two-tier enforcement approach to address persistent enforcement gaps. While the mini-case studies offered here draw from better-known examples in states with a long history of labor standards enforcement, they have important implications for other jurisdictions in need of meaningful remedies and a sustained engagement between public agencies and PIOs to enforce them. Even in jurisdictions untouched by local labor lawmaking, formal coordination with PIOs to identify and assist complainants can enable state and local agencies to channel enforcement resources to sectors characterized by widespread noncompliance. The availability of meaningful remedies and the sustained, coordinated engagement of public agencies and PIOs that collaborative enforcement can offer may also set the stage for enforced self-regulation as a next-generation regulatory strategy.

Collaborative enforcement, while an important, emergent model, also poses challenges to the resulting enforcement design. The use of public resources to fund private enforcement raises legitimate concerns about private delegation undermining public agency and PIO independence.¹⁴ This may require measures to prevent PIO misuse of public funds and to ensure that PIO grants are not simply substituting for capacity and expertise that public agencies could provide alone.¹⁵ The possibility that grant-based enforcement will undermine PIO independence in monitoring public agency enforcement will require strong whistleblower protections as well. Where these risks cannot be controlled through collaborative enforcement's administrative design, it may be necessary to identify alternative means to fund PIO enforcement. While doctrinal

two reported receipt of government funding, with an average of 55 percent of their operating budget coming from government funding in 2006.”).

14 See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 583–85 (2015).

15 See Nester M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 617–19 (2017).

limitations do not threaten the core requirements of collaborative enforcement,¹⁶ NLRA preemption and the nondelegation doctrine limit collaborative enforcement's legislative aims and scope of delegation.

While the focus of this Article is the civil enforcement of employment laws in the low-wage workplace, its conceptual framework has implications for the public and private enforcement of other laws that call for public and private civil enforcement, such as consumer protection, fair housing and civil rights, in which private enforcers cannot effectively vindicate private rights without access to public enforcement tools. In contrast, it has limited applicability to enforcement regimes in which there is no private right to vindicate, such as the enforcement of criminal and immigration laws. In these areas, private delegations often empower private stakeholders to make public enforcement decisions, which can create unmanageable risks of fraud and abuse.¹⁷ This Article will refer to the wholesale

16 See *infra* Part IV.

17 Collaborative enforcement has direct applicability to the underenforcement of consumer protection laws because of mandatory arbitration of consumer disputes since *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which has displaced the consumer protection class action bar from its traditional role as private attorneys general. Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012). The formal coordination of PIOs and public agencies may, for example, assist in the enforcement of consumer protection statutes by identifying complainants with pattern-or-practice complaints, just as public and private enforcers have historically coordinated in the development of matched-pair testing programs to enforce fair housing and civil rights laws. See JORGES ANDRES SOTO & DEIDRE SWESNIK, *THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS* 5–7 (2012) (FHA authorizes the HUD to provide grants to PIOs, which often use testing as an enforcement tool, as evidence in civil litigation or in complaints to federal enforcement agencies.). Delegation of immigration and criminal enforcement powers, in contrast, has been criticized for failing to account for ways in which private interests can undermine public enforcement goals. See, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 427–45 (2009) (arguing that privatizing criminal prosecutions undermines the public goals of public enforcement and creates conflicts of interest and risks of abuse). The delegation to private employers, for example, of the responsibility to determine their employees' authorization to work in the U.S. under immigration law, has been widely criticized for failing to deter illegal immigration or protect U.S. labor markets. See, e.g., Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (2007) (arguing that employer sanctions "has led to increased workplace exploitation of undocumented immigrants, strengthened the 'jobs magnet' that sanctions

delegation of public enforcement responsibilities, including those in which there is no private right to vindicate, such as deputization, to distinguish it from the private enforcer's role in collaborative enforcement to vindicate private rights.

This Article proceeds as follows. Part II will describe the enforcement gaps that have led to the underdeterrence of labor standards and explore the ways in which public agencies and PIOs have addressed these pathologies along a spectrum of public and private enforcement. Part III will explain and evaluate collaborative enforcement through examples of remedial and grant-based enforcement in different jurisdictions and offer them together as a conceptual framework for enforcing labor standards, particularly in the informal economy and to elaborate new labor standards. Part IV will examine the risk of the erosion of public and private enforcer independence in collaborative enforcement, and the doctrinal limitations under NLRA preemption and state nondelegation doctrine. The Article concludes that collaborative enforcement is a plausible pathway to improve state and local employment law compliance, increase the political accountability of public enforcement, and foster tripartite regulation of the workplace.

II. Public and Private Enforcement Pathologies

Workers in the informal economy report routine violations of basic wage and hour and health and safety laws.¹⁸ At the heart of this failure to protect vulnerable workers lies a frayed system of public and private enforcement.¹⁹ Private, for-profit attorneys have little incentive to represent plaintiffs where labor standards are

aimed to weaken, encouraged illegal immigration, and eroded wages and working conditions for U.S. workers").

18 See EASTERN RESEARCH GROUP, *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK* 2–3, 26 (2014), <https://www.dol.gov/asp/evaluation/completed-studies/wageviolationsreportdecember2014.pdf> [hereinafter EASTERN RESEARCH GROUP] (Study commissioned by USDOL estimates that over 10% of low-wage employees in California and nearly 20% of low-wage employees in New York were paid below the minimum wage in the previous month); ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT IN LABOR LAWS IN AMERICA'S CITIES* (2009) [hereinafter *BROKEN LAWS, UNPROTECTED WORKERS*] (2009 survey of low-wage workers in several states finds that three-quarters of them were not paid owed overtime and reported not being paid at all for some portion of their shift.).

19 GUY DAVIDOV, *A PURPOSIVE APPROACH TO LABOUR LAW* 224–29 (2016).

the worst because these employers are often small and judgment proof.²⁰ Public agencies tasked with enforcing labor standards lack the resources to inspect all workplaces effectively, the expertise to detect labor and safety and health violations, and the enforcement tools to remedy them.²¹ Public enforcers have adopted different strategic enforcement approaches to prioritize the worst violations and the least compliant industries.²² Yet, and particularly with the retreat of federal agency labor standards enforcement, state and local agencies face strong headwinds in changing employer norms and ensuring compliance with new statutory protections.

PIOs such as unions, worker centers, and community-based organizations have historically played a significant role in bridging these enforcement gaps through private enforcement the informal economy and by holding public agencies accountable for public enforcement outcomes.²³ But these PIOs also face limitations in their capacity, expertise and remedies.

A. The Enforcement Pathologies of Independent Enforcement

Scholarship examining enforcement gaps undermining enforcement by public agencies and PIOs traditionally treats public and private enforcement as independent approaches with separate regulatory pathways. In this binary framework, public agencies are traditionally the enforcers and PIOs either privately enforce the law or hold public agencies accountable for public enforcement outcomes.²⁴ This is, of course, in part because statutes either contemplate or

20 See generally David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 662 & n.48–49 (2013) (“High-harm misconduct may . . . attract suboptimal private enforcement efforts . . . because regulatory targets are judgment-proof . . .”).

21 David Weil & Amanda Pyles, *Why Complain? Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59, 59 (2005); see also Linda Delp & Kevin Riley, *Worker Engagement in the Health and Safety Regulatory Arena Under Changing Models of Worker Representation*, 40 LAB. STUD. J. 54, 56–57 (2015).

22 See generally DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION (2010).

23 See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 912–23 (2008) (describing community-based efforts by worker centers and social services agencies, and traditional legal services provided by public interest lawyers as two distinct types of PIOs enforcing labor standards on behalf of immigrant workers).

24 See, e.g., AYRES & BRAITHWAITE, *supra* note 5, at 56.

require independent enforcement. Many statutes, such as the Occupational Safety and Health Act of 1970 (OSHA), the NLRA, and state unemployment insurance and workers' compensation anti-fraud provisions, only call for enforcement by public agencies.²⁵ Others provide for public and private enforcement, such as the Fair Labor Standards Act of 1938 (FLSA), as alternative forms of redress.²⁶ Public agencies, PIOs and legislatures have, accordingly, traditionally treated particular public or private enforcement gaps independently rather than as broader, systemic pathologies. This view can elide ways in which enforcement pathologies reach across the public-private divide.

This Part will first show the enforcement gaps in public and private enforcement of employment laws in order to demonstrate how collaboration can bridge these gaps in the next Part. To visually demonstrate how enforcement gaps impact independent enforcement, this Part adapts the familiar enforcement pyramid first introduced by Ian Ayres and John Braithwaite in *Responsive Regulation*. In an enforcement pyramid, Ayres and Braithwaite depict an escalating series of sanctions designed to deter rational actors from violating the law and to incapacitate bad actors. The purpose of this depiction is to explain how a public agency's access to an effective enforcement pyramid can encourage the regulated entities to self-regulate.²⁷ The purpose here, however, is different. It is to show gaps in public and private enforcement pyramids that undermine the effectiveness of independent enforcement, and suggest their resolution through the integration of public and private enforcement tools.

1. Public Agency Enforcement

Many state and local public agencies regulating the workplace begin their enforcement with a workplace inspection or a subpoena to commence an investigation, while others primarily resolve workplace complaints through administrative hearings. Where civil inspections, investigations and adjudications are unsuccessful, public agencies may commence civil litigation. A number of state and municipal agencies also have the power to suspend or terminate business licenses for labor or safety and health-related violations.²⁸

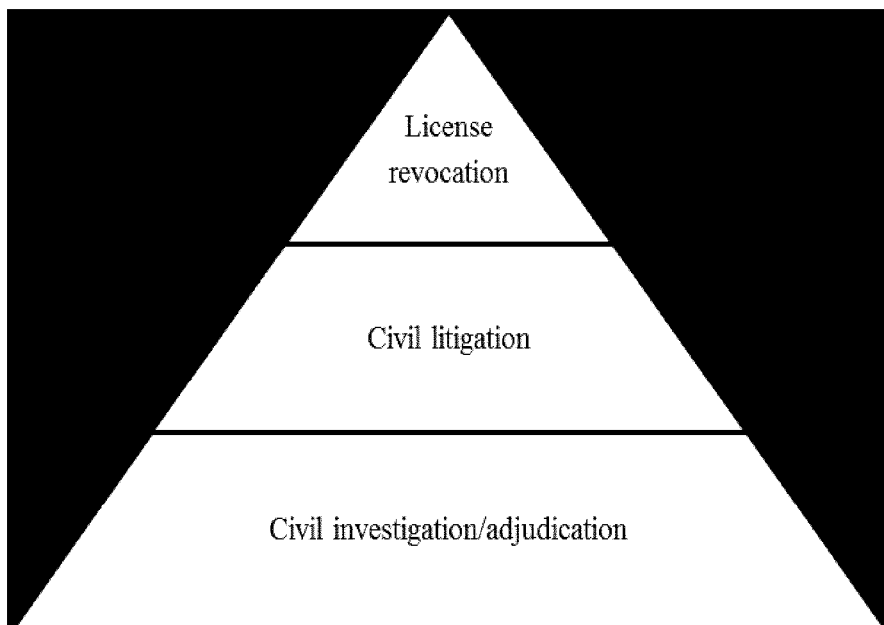
25 See 29 U.S.C. § 160(c) (2012); 29 U.S.C. § 653(b)(4) (2012)

26 See 29 U.S.C. § 216 (2012).

27 AYRES & BRAITHWAITE, *supra* note 5, at 35–36.

28 See Andrew Elmore and Muzaffar Chishti, *Strategic Leverage: Use of State and Local Laws to Enforce Labor Standards in Immigrant-Dense Occupations*, Migration Policy

Together, a simplified public agency workplace enforcement pyramid is thus:



Public Agency Enforcement

Public agencies with an enforcement pyramid with access to several remedies at different levels of severity may develop an “active escalation” regulatory approach. In this approach, most enforcement interactions begin at the base of the pyramid. Public agencies may escalate cases that employers refuse to informally resolve with intermediate sanctions.²⁹ By pushing most regulatory interventions to low and intermediate steps, public agencies reserve severe, resource-intensive interventions at the top of the pyramid as a final threat to incapacitate bad actors that will not otherwise comply with the law.³⁰

Institute 22–30 (2018), <https://www.migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant>.

29 AYRES & BRAITHWAITE, *supra* note 5, at 39.

30 *Id.* at 35–36. While public agencies may seek to address an inadequate sanctions regime by seeking to persuade legislators to provide additional resources and enforcement tools, they may not engage in grass-roots lobbying campaigns. See Anti-Lobbying Act, 18 U.S.C. § 1913 (2012) (prohibiting federal agencies from substantial participation in grass-roots lobbying campaigns or spending money on lobbying, but permitting public and private

However, the effectiveness of the active escalation approach is contingent on the public agency's ability to detect violations.³¹ First, in most instances this requires access to worker complaints.³² But workers do not complain, especially in workplaces where conditions are the worst.³³ Many employees are unaware that they are paid unlawfully, possibly because they are misclassified as independent contractors, or because of language differences, low literacy levels, or industry norms that—while out of synch with legal obligations—set low worker expectations of permissible workplace standards.³⁴ Even for workers who understand their legal rights, few know where to file a complaint with a public agency.³⁵

communications to promote agency positions). State and local public agencies and officials are subject to different lobbying restrictions. *Compare* CAL. GOV'T CODE §§ 50023, 53060.6, 86300 (prohibiting state and local officials from providing gifts of value to elected officials but permitting state and local agencies and officers to engage in public and private communications to support their agency positions and permitting local agencies and officers to join associations for lobbying purposes) *with* WASH. REV. CODE § 42.17A.635 (prohibiting expenditure of taxpayer funds or facilities to lobby, and limiting communication to legislature to communications invited by legislators and requests for legislative action “through the proper official channels”).

31 See ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE: UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 272–74 (Oxford Univ. Press, 2n ed. 2012).

32 Fine & Gordon, *supra* note 4, at 556.

33 Weil & Pyles, *supra* note 21, at 90–92; WEIL, *supra* note 1, at 245–48 (Wage and hour complaints to USDOL have declined 26% over the past decade, even as violations have increased during the same period.); Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1089 (2014) (Almost all employees who do complain about rights violations complain directly to their employer, and almost none report illegal conduct to public agencies.); Rebecca Smith, *Immigrant Workers and Workers' Compensation: The Need for Reform*, 55 AM. J. INDUS. MED. 537, 537–44 (2012) (Few injured immigrant workers apply for workers' compensation benefits.); OSHA, ADDING INEQUALITY TO INJURY 6–7 (2015), <https://www.dol.gov/osha/report/20150304-inequality.pdf>, (summarizing studies of injured workers, which “found that fewer than 40 percent of eligible workers apply for any workers' compensation benefits at all”).

34 WEIL, *supra* note 1, at 245; Alexander & Prasad, *supra* note 33, at 1085, 1097 (analyzing the results of BROKEN LAWS, UNPROTECTED WORKERS, *supra* note 18, finding that “about 59% of workers did not know their minimum wage and overtime rights”); Ruckelshaus, *supra* note 4, at 380–81. Awareness may be particularly low of subnational protections that do not extend to the federal level.

35 Alexander & Prasad, *supra* note 33, at 1095 (Of surveyed workers, “77% did not know where to file a workplace complaint with the government.”); DE GRAAUW, *supra* note 13, at 8–9.

Public agency efforts to encourage complaints through education is hindered by the justifiable complainant fear that a complaint will result in retaliation, particularly in immigrant-dense industries, where workers may fear that a complaint to a public agency will lead to arrest and deportation.³⁶

Second, even with complainants, public agencies often lack the enforcement capacity to investigate, resolve and monitor cases.³⁷ Capacity deficits are acute and unevenly distributed at the state and local level. Most states have fewer than ten investigators to enforce a wide range of workplace laws,³⁸ and five states do not engage in any labor or safety and health regulation at all.³⁹ Local governments, the site of recent historic increases in regional and sectoral minimum wages and other labor protections, often have no workforce agency to enforce them.⁴⁰

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- 36 Alexander & Prasad, *supra* note 33 at 1091–92 (explaining that nearly half of workers who reported a complaint to their employer in the previous year experienced some form of retaliation, and only 15% of “employers addressed or promised to address the workers’ claims”); Jayesh M. Rathod, *Beyond the “Chilling Effect”: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL’Y J. 267, 280–91 (2010) (citing economic insecurity, language differences, low literacy levels, social and cultural expectations of permissible workplace conditions, lack of experience, as well as age and gender as possible factors driving low OSHA complaint rates in dangerous industries); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 673–80 (2003).
- 37 Despite a rising total number of complaints, staffing at the USDOL and OSHA has declined since the 1980’s in both absolute terms and relative to the rising numbers of low-wage workers in the U.S. Devah Pager, Bruce Western & David Pedulla, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEGAL F. 317, 325–26 (USDOL staffing decreased between 1975 and 2004, and OSHA staffing and annual federal and state OSHA inspections declined by half between 1980 and 2006.).
- 38 ZACH SCHILLER & SARAH DECARLO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES 6 (2010), <http://www.fairwarning.org/wp-content/uploads/2014/04/Link23.pdf>.
- 39 JACOB MEYER & ROBERT GREENLEAF, NAT’L STATE ATTORNEYS GEN. PROGRAM AT COLUMBIA LAW SCH., ENFORCEMENT OF STATE WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS 13 (2011) (Alabama, Florida, Georgia, Louisiana and Mississippi).
- 40 For example, most of the thirteen municipalities in New Jersey that recently passed mandatory sick pay laws have vested enforcement powers in agencies with no expertise in workplace enforcement. *See, e.g.*, BLOOMFIELD, N.J., CODE § 160–2(1) (2015) (delegating enforcement power to local department of health) EAST ORANGE, N.J., CODE § 140–10, § (2016) (same); IRVINGTON, N.J., CODE MC 3513, § 1(1) (2014) (vesting enforcement powers in Department of Neighborhood Services).

Third, an escalation strategy depends on the availability of intermediate steps to secure the immediate compliance of reasonable employers.⁴¹ But many agencies possess only a single remedy and are limited to threatening or using its sole sanction.⁴² Public agencies also often lack meaningful top-pyramid sanctions.⁴³ Some violations of workplace laws carry penalties that are lower than the cost of compliance.⁴⁴ And even with access to a single, top-pyramid deterrence option, such as license revocation, agencies cannot effectively regulate most employers without access to intermediate steps because “it is politically impossible and morally unacceptable to use it with any but the most extraordinary offenses.”⁴⁵

2. Private Enforcement

PIOs often seek to resolve the same types of workplace problems as public agencies. Some PIOs, such as worker centers and community organizations, can informally resolve myriad workplace cases, often on the spot, with a call to the employer. Those that PIOs cannot informally resolve may be referred to public agencies for enforcement that provide case-related assistance, while some PIOs may engage in civil litigation.⁴⁶ Some PIOs may organize a protest

41 See WEIL, *supra* note 1, at 237 (finding that complaint-driven inspections take up more than 70% of USDOL’s wage-and-hour law investigations).

42 This describes USDOL’s Wage and Hour Division, which may only either negotiate an investigative finding or refer the matter to USDOL’s Solicitor’s Office to litigate. See Elmore and Chishti, *supra* note 28, at 17.

43 USDOL recovery for failure to pay minimum wages and overtime is often limited to one to two times the owed wages. 29 U.S.C. § 216(b) (2012).

44 Despite recent increases in maximum penalties, OSHA often imposes penalty amounts less than the cost of compliance that are unlikely to deter violations in industries where complaints are rare. Weil & Pyles, *supra* note 21, at 62; 29 U.S.C. § 666(b) (2012). Employment law violations, even if serious and willful, often only carry a low-level criminal penalty unlikely to garner the attention of criminal prosecutors. See 29 U.S.C. § 666(e) (2012) (Willful OSHA violations is a misdemeanor only if OSHA violation causes the death of an employee.); 29 U.S.C. § 216(a) (2012) (Willful FLSA violation is a misdemeanor, and cannot result in imprisonment until after first offense.).

45 AYRES & BRAITHWAITE, *supra* note 5, at 36. This may help explain why, despite the recent proliferation of “wage theft” laws in municipalities across the country, they have resulted in few criminal prosecutions. MEYER & GREENLEAF, *supra* note 39, at 16.

46 JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 72–91, 73, 78–83 (2006) (“The most common complaint [received by worker centers] by far is unpaid wages, which includes paying below the minimum wage and nonpayment or underpayment of overtime.”).

to resolve a specific case, while unions often have the ultimate end of unionizing the workplace. Unions have also traditionally⁴⁷—and increasingly⁴⁸—lobbied state and local government for higher and more enforceable workplace standards,⁴⁹ a shift from firm-based bargaining to what Kate Andrias calls “social bargaining—i.e., bargaining that occurs in the public arena on a sectoral and regional basis.”⁵⁰

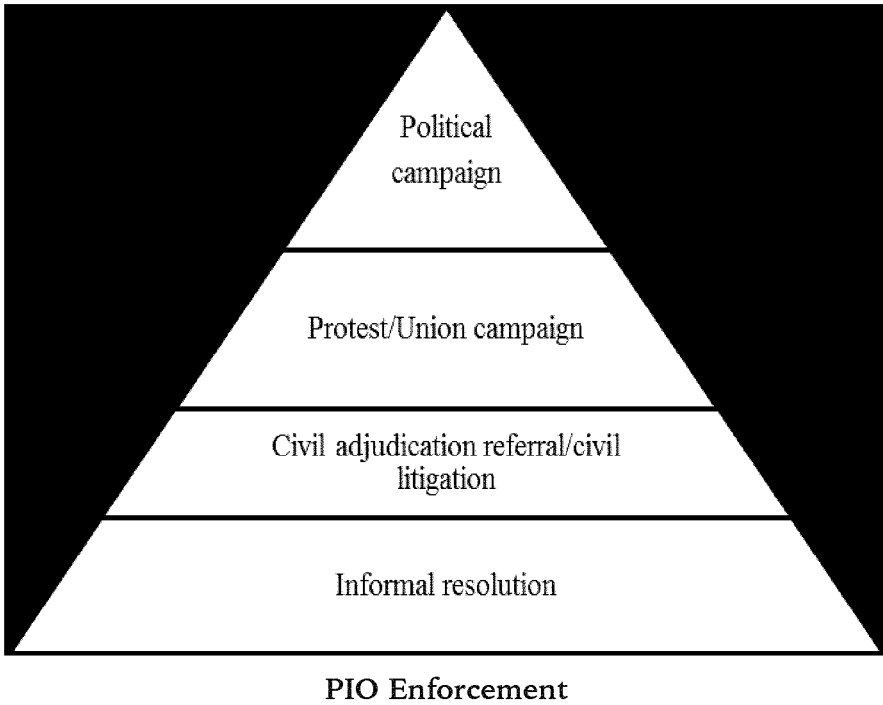
47 Unions have traditionally influenced politics through contributions and membership mobilization. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 191–206 (1984); JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1–2, 31–34 (2014) (describing, for example, Service Employees International Union’s successful lobbying efforts in 1990s and 2000s for states to create public agencies to assume the role of employer to bargain collectively with over 100,000 home-based child care workers in Illinois, California and other states).

48 *See generally* DAVID ROLF, THE FIGHT FOR \$15: THE RIGHT WAGE FOR A WORKING AMERICA 122–64 (2016) (describing union-led lobbying in Fight for \$15 movement and its legislative victories in Washington State, including \$15 minimum wage in Seattle).

49 Unions are incorporated under a provision of the tax code that has no lobbying restrictions. 26 U.S.C. § 501(c)(5) (2015). In contrast, and as with public agencies and officials, most non-union PIOs may not engage in electioneering because of their exempt tax status. 26 U.S.C. § 501(c)(3). This restriction provides ample opportunity for PIOs to engage in administrative advocacy and other forms of lobbying, either by ensuring that their lobbying activities are not “substantial,” or by separately funding lobbying activities through an alter ego 501(c)(4) social welfare organization. *See id.*; *Regan v. Taxation with Representation*, 461 U.S. 540, 551 (1983) (upholding 501(c)(3) lobbying restrictions against first amendment challenge on ground that PIOs can exercise free speech through separately incorporated 501(c)(4)).

50 Andrias, *supra* note 6, at 8.

Altogether, the PIO enforcement pyramid is:



As with public enforcement, the private enforcement pyramid reveals significant enforcement gaps. PIOs are also unable to access complainants at times. In many low-wage sectors, unions, which historically have assisted workers in understanding the laws and how to enforce them, are virtually absent.⁵¹ In their wake, non-union PIOs such as worker centers have increasingly sought firm-level compliance in the low-wage workplace.⁵² But, lacking significant

51 WEIL, *supra* note 1, at 41, 245–46, 254 (Union density was about 7% of total employment when NLRA passed, rose to about 35% in 1954, and has fallen once again to 11.3% by 2012, and only 6.6% of the private sector workforce. Meanwhile, in many sectors in the informal economy, such as commercial cleaning and restaurants, union density is effectively zero.).

52 ESTLUND, *supra* note 7, at 17. These PIOs often have regular contact with the low-wage, disproportionately foreign-born workers they serve, and as a result have specialized expertise about the particular labor and safety problems in the industry or worker community that the PIO serves. FINE, *supra* note 46, at 73 (“Most workers first come into contact with a [worker] center because they are seeking help with an employment-related problem.”); JENNIFER

membership dues or legal fees, these PIOs often depend at least in part on unstable philanthropic funding sources that are cyclical and subject to shifting priorities.⁵³ Those PIOs that only informally resolve or refer cases face the same enforcement problem as single-remedy public agencies.

As with the private bar, civil litigation barriers also undermine PIOs' access to intermediate and top-pyramid enforcement remedies. The ability of PIOs to represent workers in private litigation is limited by its considerable cost,⁵⁴ and the inability of PIOs that receive federal funding for pro bono legal services to represent clients who lack authorization to work.⁵⁵ Even assuming PIO capacity, there is no private right of action to enforce NLRA or OSHA,⁵⁶ and many back wage claims are too small to justify the hassle and expense of a FLSA lawsuit.⁵⁷ In contrast to the ease with which a small employer can evade legal judgments for labor standards violations, unions seeking to protest the same practices could run afoul of the NLRA's labor picketing restrictions.⁵⁸ For these reasons, even

GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 67–111, 185–218, 299 (2005) (describing worker center's legal clinic and organizing work around immigrant worker labor standards complaints, and legal and policy organizations that assist worker centers).

53 See Gates et al., *supra* note 13, at 8–9, 17–18 (finding that worker center funding is unstable, and that over 20% of funding comes from foundations).

54 Fee-shifting statutes, which generally require a collectable judgment, is just as uncertain a funding stream as philanthropy, contingent on becoming a prevailing party in a suit against an employer with an ability to pay. DEBORAH L. RHODE, ACCESS TO JUSTICE 115 (2004).

55 *Id.* at 116; 45 C.F.R. § 1626.3 (2014) (ordering that, except in limited circumstances, Legal Services Corporation “recipients may not provide legal assistance for or on behalf of an ineligible alien”); see Cummings, *supra* note 23, at 914 (describing impact of LSC restriction on immigrant workers' rights infrastructure).

56 See 29 U.S.C. § 653(b)(4) (2012) (stating that there is no private right of action under OSHA); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551–58 (2002) (arguing in favor of a private right of action to enforce NLRA).

57 Although the FLSA has an attorney's fee-shifting provision under § 216, the private bar may be justifiably wary to take small FLSA cases in jurisdictions where settlement offers may be conditioned on fee waivers, or judgment collection is uncertain.

58 29 U.S.C. § 158(b)(7)(C) (2012). *But see* Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 293–321 (2015) (arguing that an interpretation of the “blackmail picketing” statute to prohibit peaceful picketing of employers because of substandard labor conditions violates the First Amendment).

PIOs with the resources to litigate must triage carefully to conserve resources, and often lack intermediate steps for cases that do not merit resource-intensive interventions. PIOs, moreover, lack a top-pyramid enforcement tool to incapacitate bad actors that can evade a legal judgment.

At the center of the remedies gap for public and private enforcement in the low-wage workplace is the lack of meaningful remedies for retaliation. The NLRB may only remedy retaliation for concerted activities such as complaints about labor standards with the “paltry financial threat” of placing the aggrieved employee in the ex-ante position, but only after a long administrative hearing, and without any penalty or other compensatory damages for chilling speech.⁵⁹ The Supreme Court restricted even that remedy in *Hoffman Compounds, Inc. v. NLRB*⁶⁰ for the eight million workers in the U.S. workforce who lack work authorization under immigration law, most of whom work in low-wage workplaces.⁶¹ Although unauthorized workers are employees under the NLRA,⁶² they cannot receive reinstatement or post-termination backpay as a remedy for an NLRA violation.⁶³ For workplaces with high concentrations of unauthorized workers, the most likely remedy for an NLRA violation is a nearly costless cease and desist order and posting.⁶⁴ While courts generally permit recovery of owed wages notwithstanding immigration status,⁶⁵ after *Hoffman* the availability of backpay after the employer’s discovery of unauthorized status for violation of other anti-retaliation laws remains an open question as well.⁶⁶

59 Estlund, *supra* note 56, at 1553–54. See 29 U.S.C. § 160(c) (2012).

60 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

61 Jeffrey S. Passel, D’Vera Cohn & Molly Rohal, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, PEW RESEARCH CTR., (Mar. 26, 2015) <http://www.pewhispanic.org/2015/03/26/share-of-unauthorized-immigrant-workers-in-production-construction-jobs-falls-since-2007/>.

62 *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4–5 (D.C. Cir. 2008).

63 *Hoffman*, 535 U.S. at 151–52.

64 *Id.*

65 See *Lucas v. Jerusalem Café*, 721 F.3d 927, 930 (8th Cir. 2013) (holding unauthorized immigrant may recover for employer’s failure to pay minimum wage and overtime pay); *Patel v. Quality Inn So.*, 846 F.2d 700, 704 (11th Cir. 1988) (“FLSA’s coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. . . . If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them.”).

66 *Compare Ambrosi v. 1085 Park Ave. LLC*, No. 06-CV-8163(BSJ), 2008 WL 4386751, at *12 (S.D.N.Y. Sept. 25, 2008) (relying on *Hoffman* in declining to award future lost wages to an unauthorized immigrant in a personal injury

Gaps in the capacity, expertise and remedies of public and private enforcers have undermined the effectiveness of their enforcement tools. The resulting underenforcement of the law has degraded labor and safety and health standards in many low-wage workplaces.⁶⁷ To address these enforcement pathologies, PIOs have lobbied for, legislatures have enacted, and public agencies have implemented reforms to expand private and public enforcement. But, as the next section will show, these reform efforts have been hampered by their exclusive focus on public and private enforcement as independent regulatory pathways.

B. The Limitations of Independently Addressing PIO and Public Agency Enforcement Pathologies

Public agencies have addressed enforcement pathologies by lobbying for increased public enforcement resources, building internal expertise to investigate the informal economy, and expanding public and private enforcement remedies. State and local agencies have developed internal expertise through agency units to focus on industries where noncompliance rates are high and to elaborate new statutory requirements, and have conditioned business licenses on compliance with labor and safety and health standards.⁶⁸ These measures have improved public enforcement

suit); *Wielgus v. Ryobi Technologies*, 875 F. Supp. 2d 854, 862–63 (N.D. Ill. 2007) (holding unauthorized immigrant bringing workers compensation suit could not recover for lost U.S. wages, but could seek recovery for lost wages in his home country) *with* *Bollinger Shipyards v. Office of Workers Compensation Programs*, 604 F.3d 864, 877 (5th Cir. 2010) (finding unauthorized workers eligible for workers compensation benefits under Longshore and Harbor Workers Compensation Act); *Salas v. Sierra Chemical Co.*, 327 P.3d 797, 809 (Cal. 2014) (finding that immigration law does not preempt state law that permits post-termination backpay up until employer’s knowledge of employee’s unauthorized status).

67 See Zatz, *supra* note 4, at 42–47; see EASTERN RESEARCH GROUP, *supra* note 18, at 48 (Over 110,000 people in New York State and California fell beneath the poverty level because of minimum wage violations.); Occupational Safety & Health Admin., *supra* note 31, at 6 (50% of the cost of workplace injuries are paid out of pocket by workers and their families.).

68 See Elmore & Chishti, *supra* note 28, at 24–28; JULIE A. SU, REPORT ON THE STATE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT 1–3 (2013), http://www.dir.ca.gov/dlse/Publications/DLSE_Report2013.pdf (reporting quintupling of assessment of minimum and overtime wages, 80% increase in penalties, creation of criminal enforcement unit to file felony charges for egregious labor complaints, and reducing time required for wage hearings).

outcomes, but violation rates have remained stubbornly high, which former USDOL Wage and Hour Administrator David Weil attributes to a lack of channeling of public enforcement capacity to where it is most needed.⁶⁹

PIOs have also sought to address enforcement pathologies by lobbying to expand public and private remedies. One PIO successfully lobbied in the 1990s for increased civil and criminal penalties that the New York State Department of Labor (NYDOL) could impose,⁷⁰ and in California, PIOs successfully lobbied in 2003 to require employers in the car wash industry to obtain a license and post a bond to operate in the state.⁷¹ The effectiveness of public enforcement reforms, however, is contingent on the public agency's ability to identify complainants and to resist capture by the regulated entities. PIOs have addressed this latter shortcoming by acting as watchdogs for public enforcement, making public agencies politically accountable for their enforcement outcomes.⁷²

PIOs have also expanded their lobbying efforts to focus on expanding private enforcement. For example, in 2004, California amended its labor code to provide a Private Attorney General Act,⁷³ and in 2011, PIOs in New York successfully lobbied for the

69 WEIL, *supra* note 1, at 222–56 (emphasizing the need for public agencies to focus on the higher level of industry structures, bad actors who repeatedly and willfully violate the law, and to encourage complaints).

70 See JENNIFER GORDON, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW 39 n.8 (Sept. 1999), http://carnegieendowment.org/files/imp_wp4gordon.pdf [hereinafter GORDON, UWPA].

71 Cal. Car Wash Worker Law, CAL. LAB. CODE §§ 2050–118 (West 2016).

72 See GORDON, UWPA, *supra* note 70; KEVIN BARRY, MARCY KOUKHAB & CHLOE OSMER, REGULATING THE CAR WASH INDUSTRY: AN ANALYSIS OF CALIFORNIA'S CAR WASH WORKER LAW (Apr. 2009); CAMPAIGN TO END WAGE THEFT, PROTECTING NEW YORK'S WORKERS: HOW THE STATE DEPARTMENT OF LABOR CAN IMPROVE WAGE-AND-HOUR ENFORCEMENT 16 (Dec. 2006), <http://www.mfy.org/wp-content/uploads/reports/Protecting-Workers-Dept-of-Labor.pdf> (recommending measures to improve NYSDOL enforcement); MARCI SEVILLE, REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW — AN EVALUATION OF ASSEMBLY BILL 633 SIX YEARS LATER, WOMEN'S EMPLOYMENT RIGHTS CLINIC (2005), <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1003&context=werc> (evaluating California Department of Labor Standards Enforcement implementation of law to hold manufacturers liable for violations of labor standards by garment contractors).

73 CAL. LAB. CODE §§ 2698, et seq. (2004).

Wage Theft Prevention Act to increase the civil damages for wage and hour law violations and retaliation that plaintiffs could receive under state law.⁷⁴ Local government private enforcement reforms have also channeled private enforcement to small, pro se claims. In Florida, several counties and one municipality have passed “wage theft” laws to provide low-wage workers with a pro se forum to recover small amounts of owed wages,⁷⁵ and some municipalities have experimented with government-funded, day-laborer hiring hall sites to regulate contingent work in residential construction sites.⁷⁶

There is evidence that expanding private capacity and remedies can improve compliance with labor and safety and health laws.⁷⁷ But law scholars have criticized privatizing public enforcement for failing to consider how to guide private enforcement to improve compliance.⁷⁸ For Margaret Lemos, this concern is most problematic when public agencies delegate a public litigation role to private attorneys.⁷⁹ David Freeman Engstrom’s empirical analysis of private litigants who enforce public law in *qui tam* whistleblower cases, for example, while finding no support for the claim that delegating public enforcement leads to outright abuse, did find that private attorneys have used the False Claims Act to exploit regulatory ambiguities rather than to reveal enforcement gaps.⁸⁰ Particularly where private attorney decisions to file wage and hour lawsuits are motivated in part by the ability to enforce judgments that generate attorney’s fees, private remedies are most likely to be used against larger,

74 N.Y. LAB. LAW §§ 198, 215 (McKinney 2011).

75 These laws target small claims with a small minimum claim amount and individual, pro se hearings, and treble damages to encourage private settlement. Tracey McManus, *Pinellas County Cracks Down on Wage Theft*, TAMPA BAY TIMES (Nov. 10, 2015), <http://www.tampabay.com/news/politics/local/pinellas-county-cracks-down-on-wage-theft/2253390>.

76 See VALENZUELA ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES II 6 (2006), <http://www.coshnetwork.org/sites/default/files/Day%20Labor%20study%202006.pdf> (identifying “63 day-labor worker centers created by community organizations, municipal governments, faith-based organizations and other local stakeholders”).

77 Government-funded hiring halls, for example, reduce the frequency of labor standards violations and workplace injuries experienced by day laborers. Abel Valenzuela, *A Better Day Day-Labor Market*, L.A. TIMES (Aug. 13, 2008), <http://www.latimes.com/opinion/la-oev-valenzuela13-2008aug13-story.html>.

78 Lemos, *supra* note 9, at 529, 578–82.

79 *Id.* For a discussion of this critique of private enforcement of public law, see David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1925–30 (2014).

80 Engstrom, *supra* note 79, at 1964, 2000–01.

solvent employers. As a result, while there has been a substantial uptick for FLSA suits since 2000,⁸¹ it is not clear that these efforts have substantially improved enforcement outcomes either to fill gaps in public enforcement or to address the worst offenses. Shifting private remedies to pro se fora also may not increase complaints from the informal economy without PIO assistance. It seems equally plausible that the workers most likely to take advantage of private enforcement without PIO assistance are those who are most likely to complain to a government agency.

In short, independent public and PIO enforcement reform efforts have shown that addressing noncompliance with labor standards must attend to enforcement gaps as pathologies that extend across the public-private divide. Public and private enforcement require complaints to activate their enforcement pyramids, remedies for complainants and sanctions to deter rational actors and incapacitate bad actors. Public enforcement alone is unlikely to improve compliance without the political accountability that PIOs provide as public enforcement watchdogs, while the effectiveness of private enforcement is contingent on whether it can be channeled to sectors in which it is most needed. The next section will explore how early examples of public-private regulatory experimentation have sought to amplify the deterrent effect of enforcement, with mixed results.

C. Tripartism to Deter Rather Than to Encourage Self-Regulation

The previous section has shown how public and private enforcement pathologies can drive underdeterrence in low-wage workplaces. This section will show how PIOs and state and local agencies have increasingly sought to collaborate in order to address enforcement pathologies that limit the effectiveness of independent public and private enforcement. It will conclude that, unlike previous public-private regulatory experimentation that has sought to shift responsibility for legal compliance to the regulated entities, emergent public-private collaboration in the low-wage workplace seeks to improve compliance by amplifying enforcement's deterrent effect.

81 Lisa Nagele-Piazza, *Uptick in FLSA Litigation Expected to Continue in 2016*, BLOOMBERG BNA (Nov. 27, 2015), <https://www.bna.com/uptick-flsa-litigation-n57982064020/> (noting that FLSA filings have increased 450% from 2000 to 2015).

Scholars of public regulation in law and related disciplines often examine public-private enforcement experimentation through the lens of “tripartism.” Tripartism describes regulation that creates incentives, often in the form of flexible standards and addressing information asymmetries, to facilitate private bargaining between regulated entities and PIOs for firm-specific compliance.⁸² Tripartism can encourage self-regulation by the regulated entities through public enforcement and monitoring by PIOs.⁸³ However, self-regulation, even when backed by public and private enforcement, can have limited potential in low-wage workplaces in which employers are undercapitalized, competition is fierce and labor is a substantial proportion of the business cost. In many low-wage sectors, firms have no personnel department, and owners are often directly responsible for employment law violations. In these sectors, there is a powerful norm of noncompliance with basic employment laws.⁸⁴

Facing entrenched norms of noncompliance and a lack of employer expertise in compliance and motivation to comply, public-private regulatory experimentation to shift employment law compliance to employers through tripartism can have limited impact. OSHA’s Voluntary Protection Program (VPP) is a case in point. Under VPP, participating employers may opt out of OSHA inspections in return for their adoption of a safety program, executed by trained employees with an established protocol to notify managers of and respond to hazards.⁸⁵ Early evidence suggested that employers that

82 Guided by New Governance scholarship, tripartism can describe any regulatory approach that seeks to enlist private participation in regulatory experimentation through improved governance. See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 479–97 (2007); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 372 (2004). For a description of New Governance literature, and a critical evaluation of its application to workplace regulation, see ESTLUND, *supra* note 7, at 136–39.

83 AYRES & BRAITHWAITE, *supra* note 5, at 57–58.

84 In the car wash sector, for example, a 2008 state investigation found that nearly 80% of New York City car wash establishments violated wage-and-hour law, Steven Greenhouse, *Carwashes Violating Wage Laws, State Finds*, N.Y. TIMES (Aug. 15, 2008), and a California state investigator estimated that over half of car washes in Southern California failed to pay the minimum wage during the same period. Sonia Nazario & Doug Smith, *Inspectors Find Dirt on Books at Southern Calif. Carwashes*, L.A. TIMES (Mar. 23, 2008).

85 Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1104–06, 1133 (2005) (“Since 2000, these programs have expanded to thousands of worksites, and the agency has increased the proportion of its resources dedicated to these

participated in VPP improved their safety and health standards.⁸⁶ But more recently, VPP-participating employers have been found to have ignored safety and health standards, which government investigations attribute to OSHA's failure to provide external accountability.⁸⁷ The VPP's devolution from a paradigmatic form of tripartite regulation to a form of deregulation calls into question the usefulness of tripartism in sectors characterized by widespread noncompliance. At a minimum, it suggests that tripartism requires strong, durable roles for public agencies and PIOs to make self-regulation enforceable and accountable.⁸⁸

Law scholars have theorized that tripartism can improve enforced self-regulation by delegating public enforcement responsibilities to PIOs.⁸⁹ But even tripartism backed by delegated private enforcement can be undermined by the divergent interests of public agencies and PIOs in enforcement and the possibility of backlash from the regulated entities.⁹⁰ As Estlund observes, as the

activities to almost 30 percent of its entire budget.”).

⁸⁶ *Id.*

⁸⁷ Susan Bisom-Rapp, *Puzzling Evidence from a Troubled Time: Rethinking State Promotion of Safe Work During the Bush Administration*, 14 EMP. RTS. & EMP. POL'Y J. 295, 308–10 (2010) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY 7–10 (2009)). A 2011 internal OSHA report recommended restructuring the VPP to maintain oversight over VPP participants, but by 2013 a USDOL Office of Inspector General report found that VPP controls were still insufficient to ensure that only employers with adequate safety and health systems participated. Nancy Smith et al., *Voluntary Protection Programs Review* (2011), https://www.osha.gov/dcsp/vpp/vpp_report_nov_2011_rev_7-11-12.pdf; USDOL, *Voluntary Protection Program: Controls are not Sufficient to Ensure Only Worksites with Exemplary Safety and Health Systems Remain in the Program*, 4 (2013), <http://www.oig.dol.gov/public/reports/oa/2014/02-14-201-10-105.pdf>.

⁸⁸ See Cynthia Estlund, *Employment Rights and Workplace Conflict: A Governance Perspective*, in THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS 54, 64 (2014) (arguing that voluntary self-regulation without accountability can “become a thinly disguised form of deregulation”); Fine & Gordon, *supra* note 4, at 558 (Unchecked self-regulation could “contribute to the further degeneration of standards in low-wage sectors.”); Leah F. Vosko, John Grundy & Mark P. Thomas, *Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions*, 26 ECON. & IND. DEMOCRACY 373, 391–93 (2014). Lobel also warns that voluntary self-regulation is vulnerable to deregulation. See Lobel, *supra* note 85, at 1111–14.

⁸⁹ ESTLUND, *supra* note 7, at 23.

⁹⁰ Cynthia Estlund identifies as an example of PIO-monitored tripartism a

interests of public agencies and PIOs diverge, tripartism backed by public enforcement faces the risk of PIO and public agency exit from the collaborative relationship.⁹¹ While enforced self-regulation backed by public agency and PIO enforcement is a promising example of tripartism to regulate the informal economy, it suggests the need to build durable collaborative relationships beyond a single case outcome given unstable PIO funding sources and the shifting priorities of PIOs and public agencies.

To address this durability question, political scientist Janice Fine and law scholar Jennifer Gordon have theorized a form of tripartism in which PIOs and public agencies extensively collaborate beyond the outcome of a particular case.⁹² But formal public-private collaborations to amplify the deterrent effect of enforcement has not yet accounted for the potential risks of abuse and cooptation that collaboration may invite, and doctrinal limitations to the scope of its delegation and its legislative aims.⁹³ Avoiding the employer

code of conduct developed by the New York Office of Attorney General (“NYAG”) to resolve a labor dispute between a union and immigrant service organization seeking to organize employees of small groceries, or “greengrocers,” and thousands of greengrocer owners in New York City. *Id.* at 112–16. After a union organizing drive among greengrocery workers, which identified persistent labor violations, the union and a greengrocer association approached the NYAG, which negotiated the Greengrocer Code of Conduct. *Id.* See also Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183, 194 (2003). The code of conduct required the owners to set workplace conditions at or above the legal requirements and agree to monitoring by PIOs, in return for NYAG’s using its prosecutorial discretion not to target them for enforcement. ESTLUND, *supra* note 7, at 112–113.

91 In the greengrocer code of conduct example, after the unionization campaign fizzled, the immigrant service organization and public agency lacked the resources to sustain firm-level monitoring of code compliance. With the PIOs’ withdrawal from the industry, and without meaningful monitoring, the employer had little incentive to extend it. ESTLUND, *supra* note 7, at 114.

92 Fine & Gordon, *supra* note 4, at 560. Fine and Gordon point to the New York State Department of Labor’s (NYSDOL) formation in 2009 of the New York Wage and Hour Watch (W&HW), modeled on neighborhood watch associations, in which NYSDOL designated specific PIOs, including unions, the task of educating workers in specific neighborhoods and referring complaints to NYSDOL. *Id.* at 569–70.

93 Unfortunately, the W&HW was short-lived. By 2010, NYDOL disbanded the W&HW to avoid politicizing the nomination of then-NYDOL Commissioner Patricia Smith as Solicitor of Labor for USDOL. Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOOD HALL L.J. 813, 841 (2013). During those confirmation hearings, W&HW became a major focus, with one employer-

backlash that has undermined previous public-private regulatory experimentation will require exploration of these risks and doctrinal threats, which this Article will address in Part IV.

Recently, forms of public-private regulatory experimentation have emerged as durable models to amplify the deterrent effect of enforcement.⁹⁴ The New York Attorney General (NYAG) has partnered intensively with PIOs in low-wage sectors,⁹⁵ and since 2007 San Francisco has required its Office of Labor Standards Enforcement (SF-OLSE) to fund non-union PIOs with renewable grants to channel worker complaints to SF-OLSE.⁹⁶ These successes with PIO collaboration have inspired other state and local governments to experiment with formal collaboration to regulate workplace law.⁹⁷

To date there has been insufficient attention paid to why collaboration between PIOs and these agencies have endured where these other forms of tripartism could not.⁹⁸ To evaluate this emergent

backed advocacy group claiming that W&HW “could very likely be a model used by Smith . . . on a national level . . . [I]t could turn tens of thousands of ‘community organizers’ into raving vigilantes nationwide.” *Id.* at 831. While Smith was eventually confirmed, W&HW was shelved. *Id.*

94 Janice Fine has provided detailed case studies of many examples of collaboration between PIOs and public agencies, ranging from informal cross-referral systems to more sophisticated systems to integrate public and private enforcement strategies to enforce labor and safety and health standards. FINE, CO-PRODUCTION, *supra* note 7, at 18–29.

95 See generally Jennifer Brand, *The Role of State Attorneys General in the Enforcement of Labor Laws*, NATIONAL STATE ATTORNEYS GENERAL PROGRAM AT COLUMBIA LAW SCHOOL (2007), available in <http://www.stateag.org/policy-areas/labor/labor-resources/2016/11/22/the-role-of-state-attorneys-general-in-the-enforcement-of-labor-laws>.

96 FINE, CO-PRODUCTION, *supra* note 7, at 23–25; see San Francisco, S.F., Cal., Ord. No. 140687, Amending S.F. Mun. Code § 12R.25 (July 17, 2014) (“The Office of Labor Standards Enforcement shall establish a community-based outreach program to conduct education and outreach to employees. In partnership with organizations involved in the community-based outreach program, the Office of Labor Standards shall create outreach materials that are designed for workers in particular industries.”).

97 Since SF-OLSE began funding PIOs to collaborate, three other cities and counties, including Seattle, Washington, and Berkeley and Los Angeles, California, have adopted a similar approach. Seattle, Wash., CODE, § 3.14.934 (2014); L.A. County, Cal., Wage Enforcement Order § 8.101.090(G) (2016); Berkeley, Berkeley, Cal., Mun. Code Ch. 13.99, § 13.99.080 (2016); Los Angeles Cnty., Cal., Ord. No. 102703 amending County Code, Title 8 - Consumer Protection, Business and Wage Regulations relating to the enforcement of the County Minimum Wage Ordinance, § 8.101.090(G) (Apr. 26, 2016).

98 Matthew Amengual and Janice Fine propose building internal PIO and public agency support for collaborations, which they call “co-enforcement,”

enforcement approach, and its implications for public regulation, a reevaluation of the benefits, limitations and risks of collaborative enforcement is in order. The next Part will offer two different collaborative techniques to bridge enforcement gaps rather than to shift the responsibility for compliance to the regulated entities. Examining these forms of emergent public-private regulatory experimentation will show how collaboration can effectively and efficiently counteract entrenched norms of noncompliance and elaborate new standards.

To understand why this is the case, the next Part will first describe the collaborative enforcement approaches in detail through mini-case studies. It will visually depict the integration of public and private enforcement tools in a single, hybrid enforcement pyramid. It will then evaluate two different techniques for collaborative enforcement, remedial and grant-based, and offer them together as a conceptual framework to amplify the deterrent effect of enforcement by integrating enforcement tools, often with the ultimate aim of strengthening labor standards through law reform. Part IV will then examine the normative risks of and doctrinal threats to collaborative enforcement.

III. Public-Private Regulatory Experimentation to Improve the Deterrent Effect of Enforcement

This Part first introduces the concept of collaborative enforcement through case studies, showing how public agencies and PIOs have increasingly collaborated through two different techniques: (1) *remedial enforcement*, in PIO-led campaigns to intensively deploy public and private enforcement tools to change the structure of the law in regions and sectors where existing remedies are inadequate; and (2) *grant-based enforcement*, by funding PIOs to integrate their private capacity and expertise into public enforcement to channel enforcement into underregulated workplaces or to elaborate a new

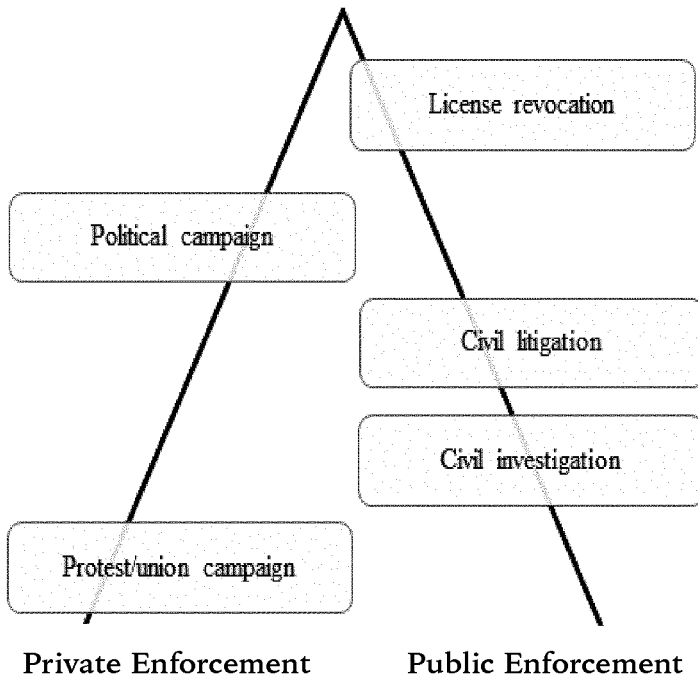
by sustaining partnerships between public agency and PIO staff. Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG'N & GOVERNANCE 129, 129–30 (2017). This Article agrees that to expand public-private regulatory experimentation, it will be necessary for public agency and PIO staff to recognize the benefits of collaboration and overcome mutual mistrust while negotiating conflict. But it will also be necessary to understand why some collaborations succeed while others fail, and the legal limitations and incentives for abuse that can constrain or undermine collaborative techniques.

standard. It uses the same visual depiction of an enforcement pyramid from the previous Part, but now public and private enforcement tools are integrated into a single pyramid to show how collaborative enforcement can effectively address enforcement gaps identified in the previous Part.

A. Collaborative Enforcement

1. Remedial Enforcement

In the remedial enforcement approach, PIOs and public agencies coordinate their use of top-tier private and public enforcement tools in regional and sectoral initiatives. The goal of remedial enforcement is often to improve and create new remedies in a low-wage sector through law reform.



In a remedial enforcement approach, PIOs and public agencies temporarily and intensively focus public and private remedies on a particular problem or industry. Public agencies and PIOs access top-pyramid tools, such as public agency civil investigation, litigation, and license revocation powers, and PIO public protests, unionization drives and political campaigns to improve legal remedies through

law reform. Public agencies and PIOs that engage in remedial enforcement often expressly affiliate with each other's goals in joint media statements and jointly support law reform to improve remedies.

A remedial enforcement approach permits public agencies and PIOs to access uniquely private and public enforcement tools to resolve cases and to improve and create new remedies without formal delegation. In a remedial enforcement model, PIOs and public agencies engage in only limited coordination of priorities and referrals, and there is no delegation of case detection, selection or resolution to PIOs. The fast food and car wash industries are recent sites of remedial enforcement by PIOs and public agencies.

Fast Food Establishments in New York State

Beginning in 2012, Service Employees International Union ("SEIU") and PIOs in New York began organizing fast food workers in a "Fast Food Forward" campaign with the aspirational goal of a \$15 an hour wage and a collective bargaining agreement in the fast food industry.⁹⁹ By November 2012, 200 New York City fast food workers walked off their jobs, and protests swelled to 200 cities by 2015, the largest protest of low-wage workers in U.S. history.¹⁰⁰

In New York beginning in 2012, Fast Food Forward identified witnesses with similar complaints of violations of wage and hour law and referred them to NYAG to fuel a state-wide investigation into violations by wage and hour law by franchise stores of many of the nation's largest franchisors.¹⁰¹ By 2015 NYAG announced over a dozen settlements with Domino's Pizza, Papa John's, McDonald's, and KFC franchisees, amounting to nearly \$3 million in restitution for franchise store employees throughout New York State.¹⁰²

99 Steven Greenhouse & Jana Kasperkevic, *Fight for \$15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015), <http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston>; William Finnegan, *Dignity*, NEW YORKER, Sept. 15, 2014, at 74; see also ROLF, *supra* note 48, at 91–96 (describing formation for Fast Food Forward movement).

100 Greenhouse & Kasperkevic, *supra* note 99.

101 Paul Harris, *New York Attorney General Investigating State's Fast Food Industry*, GUARDIAN (May 16, 2013), <https://www.theguardian.com/world/2013/may/16/new-york-fast-food-attorney-general-investigation>.

102 Press Release, N.Y. Office of the Attorney General, A.G. Schneiderman and U.S. Dep't of Labor Announce Criminal Charges Against, and Civil Settlement With, Papa John's Franchisee for Wage Theft (July 15, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-and-us-department-labor-announce->

In one instance, after Fast Food Forward referred labor complaints about these establishments to NYAG, NYAG received allegations that a franchisee store manager had fired staff who complained about performing extra work after clocking out for no pay.¹⁰³ By the following day, NYAG reached an agreement reinstating the complainants immediately.¹⁰⁴

NYAG's coordination with Fast Food Forward and subsequent finding of widespread employment law violations in fast food stores also led the public agency to support the PIOs' demand for higher state labor standards. The New York Attorney General appeared in Fast Food Forward rallies,¹⁰⁵ and on April 15, 2015 he called on the New York Governor to unilaterally raise the state minimum wage for fast food workers.¹⁰⁶ The following month New York Governor Cuomo announced a plan to convene a wage board specifically for the fast food industry with representation from the fast food employers, unions, and the state.¹⁰⁷ The wage board recommended a phased-in \$15 minimum wage for fast food workers in New York State, which the New York Department of Labor issued as an order in September 2015.¹⁰⁸ The remedial enforcement effort also resulted in a lawsuit

criminal-charges-against-and-civil; see also Will Bredderman, *NY Attorney General Declares Fast Food Wage Theft a 'Crime Wave'*, OBSERVER (Mar. 5, 2015), <http://observer.com/2015/03/ny-attorney-general-declares-fast-food-wage-theft-a-crime-wave>.

103 See Jan Ransom, *Fired Washington Hts. Dominos Workers to be Reinstated After Walkout, Sez Attorney General*, N.Y. DAILY NEWS (Dec. 12, 2013), <http://www.nydailynews.com/new-york/manhattan/ag-delivers-dominos-workers-article-1.1546342>.

104 3683 Washington Heights Pizza, LLC. et al., AOD No. 13-491 (N.Y. Att'y Gen., Labor Bureau Dec. 12, 2013) (assurance of discontinuance).

105 Ginger Adams Otis, *AG Eric Schneiderman Will Join Fight for \$15 Rally Alongside Health Care Workers*, DAILY NEWS (Apr. 14, 2015), <http://www.nydailynews.com/new-york/ag-schneiderman-join-fight-15-rally-article-1.2185186>.

106 Eric Schneiderman, *Gov. Cuomo Can Unilaterally Hike N.Y. Wages: How His Labor Department Can Use Its Existing Legal Authority to Raise Suffering Workers' Pay*, DAILY NEWS, (Apr. 16, 2015), <http://www.nydailynews.com/opinion/schneiderman-cuomo-unilaterally-hike-n-y-wages-article-1.2186808>.

107 Andrias, *supra* note 6, at 64-65. New York Labor Law permitted the creation of wage boards, with representation by employers, employees and the public, to recommend wage rates for occupations in New York State. N.Y. Lab. L. § 655. See Nat'l Rest. Ass'n v. Comm'r Labor, No. 15-001, Resolution of Decision and Order, at 1-4 (N.Y. Ind. Bd. App. Dec. 9, 2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/WB_5-001_Decision.pdf. The wage board's powers were suspended after the minimum wage increase. See Andrias, *supra* note 6, at n.344.

108 Patrick McGeehan, *New York Plans \$15-an-Hour Minimum Wage for Fast Food*

by the New York Attorney General against a franchisor, Domino's Pizza, for wage-and-hour-law violations by its franchisees in New York franchise stores.¹⁰⁹ That case is pending.

In response to Fast Food Forward, New York City has also recently facilitated the self-funding of PIOs in the fast food sector, passing a law in May 2017 permitting fast food employees to make voluntary contributions to not-for-profit organizations of their choice through payroll contributions.¹¹⁰

Car Wash Establishments in California and New York

Remedial enforcement in the car wash sector began in Los Angeles in 2008, where PIOs formed a coalition called the "CLEAN Carwash Campaign," which assisted workers in bringing their complaints of wage theft and health and safety violations to state and local enforcement agencies.¹¹¹ Through these referrals, over five years the California Labor Commissioner issued 1,423 citations to car wash establishments in the state for wage and hour law violations and registration violations and has assessed \$11.6 million in penalties and \$4.2 million in back wages.¹¹² The California Attorney General's office brought a series of civil lawsuits against other operators and in 2012 announced a \$1 million settlement with an owner of eight car wash establishments in Southern California for underpayments.¹¹³

This public and private enforcement provided support for union-PIO lobbying for improved remedies and a unionization campaign.¹¹⁴ To address the persistent problem of judgment collection,¹¹⁵ the CLEAN campaign successfully lobbied for a state restitution fund for workers to recover unpaid wages, which

Workers, N.Y. TIMES, (July 22, 2015), <https://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html>.

109 New York v. Domino's Pizza, Inc., No. 450627/2016 (N.Y. Sup. Ct. May 23, 2016) (alleging that the franchisor, Domino's Pizza, jointly employed franchise store employees and violated state franchise law in failing to correct or disclose flaws in its payroll system that underreported wages owed by franchisees to their employees).

110 N.Y.C. Mun. L. 2017/098 (2017).

111 FINE, CO-PRODUCTION, *supra* note 7, at 18–19.

112 Margot Roosevelt, *Union-Backed Car Wash Workers Fight for More Pay, Shade*, ORANGE COUNTY REGISTER (Sept. 1, 2014, 4:04 PM), <http://www.ocregister.com/articles/car-633355-workers-wash.html>.

113 FINE, CO-PRODUCTION, *supra* note 7, at 25.

114 Sonia Nazaro, *Unions Join to Organize Carwash Workers*, L.A. TIMES (Mar. 28, 2008), <http://www.latimes.com/local/la-me-carwash-280308-story.html>.

115 FINE, CO-PRODUCTION, *supra* note 7, at 25.

is funded by car wash employer registration and annual fees and civil penalties for failure to register.¹¹⁶ The CLEAN campaign also successfully lobbied to increase the labor bond requirement for the car wash industry.¹¹⁷ Since that time, 25 car wash establishments have entered into collective bargaining agreements with the union.¹¹⁸

In New York City, PIOs used a similar remedial enforcement approach to improve labor standards in New York car wash establishments. The PIOs formed a coalition called “Wash New York” to organize car wash workers to improve labor standards in the car wash industry.¹¹⁹ It targeted the owners of a large network of car wash establishments, one of whom had previously been found to have violated wage-and-hour law by USDOL. By 2014 NYAG announced an agreement for these employers to pay nearly \$4 million in restitution for unpaid wages and penalties for failing to pay unemployment insurance contributions and workers compensation premiums.¹²⁰ During this investigation, after the owner sold one of his car wash establishments under investigation, the NYAG obtained an agreement to transfer the workers to other work sites.¹²¹ Since then, workers in eleven car wash establishments in New York won union recognition.¹²²

The New York City Council, similar to California’s legislature, responded with legislation requiring car wash operators to be licensed with the city and to obtain a bond to pay for unpaid wages, with an exemption (or “opt-out”) for establishments with a

116 CAL. LAB. CODE §§ 2055 (describing registration), 2065 (describing restitution fund) (West 2015).

117 CAL. LAB. CODE § 2055(b)(4) (West 2015).

118 Roosevelt, *supra* note 112; FINE, CO-PRODUCTION, *supra* note 7, at 19.

119 WASH NEW YORK, THE DIRTY BUSINESS OF CLEANING NYC’S CARS: CAR WASH WORKERS FACE LOW PAY, OFFENSIVE CONDITIONS, AND POOR TREATMENT (2012), <http://op.bna.com.s3.amazonaws.com/dlrcases.nsf/r%3FOpen%3Dkpin-8s5ssg>.

120 Erica Pearson, *Carwash Kingpin John Lage and Associates to Pay \$3.9M to Settle Labor Violations, Says N.Y. Attorney General Eric Schneiderman*, DAILY NEWS (Mar. 6, 2014), <http://www.nydailynews.com/new-york/carwash-kingpin-pay-3-9m-labor-violations-ag-article-1.1712206>.

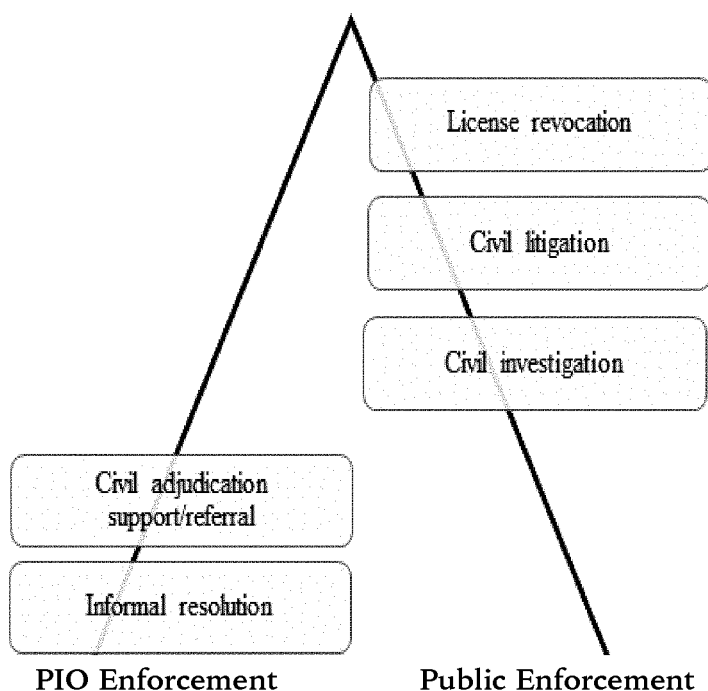
121 Julie Turkewitz, *Workers Who Protested Sale of Carwash Will Get New Jobs*, N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/nyregion/after-sale-of-carwash-owners-agree-to-give-workers-new-jobs.html>.

122 Stephen Rex Brown, *Brooklyn ‘Carwasheros’ Vote to Join Union to Secure Minimum Wage Plus Tips, Overtime*, N.Y. DAILY NEWS (Feb. 16, 2016), <http://www.nydailynews.com/new-york/brooklyn-carwash-workers-vote-join-union-article-1.2533762>.

collective bargaining agreement.¹²³ This opt-out provision of the law, however, has been enjoined by a trial court, which found that it is preempted by the NLRA.¹²⁴

2. Grant-based Enforcement

In a grant-based enforcement approach, legislatures direct public agencies to provide grants to PIOs to identify and triage complaints and channel them into public enforcement. While a grant-based enforcement model requires PIOs to deliver specific services—typically education, triage and referral—it does not deputize PIOs as public enforcement officers or delegate policymaking decisions, such as whether and how to use particular public enforcement tools.



The most prominent example of grant-based enforcement is administered by San Francisco's Office of Labor Standards

123 Erin Durkin, *NYC Car Washes Must Get Licenses Under Bill Passed by City Council in Effort to Stem Labor Violations*, N.Y. DAILY NEWS (June 10, 2015), <http://www.nydailynews.com/new-york/nyc-car-washes-licenses-bill-article-1.2253812>.

124 *Ass'n of Car Wash Owners Inc. v. New York*, 15-CV-08157 (AKH), Order Granting Pl's S.J. Mot. 5–10 (S.D.N.Y. May 26, 2017).

Enforcement (SF-OLSE).¹²⁵ The city and county legislature grants a million dollars annually to fund seven PIOs to provide enforcement services, overseen by SF-OLSE.¹²⁶ The grant requires the PIOs to counsel and refer workers with allegations of labor standards violations to SF-OLSE, the California Department of Labor Standards Enforcement, or USDOL, or to resolve them directly with the employer.¹²⁷ SF-OLSE also requires PIOs to issue joint media statements about resolved cases and to provide trainings with SF-OLSE investigators in the communities targeted for enforcement. SF-OLSE investigators may accept documentation about cases from the PIOs and jointly work on cases with PIOs, and must participate in quarterly meetings with PIOs.¹²⁸

The legislature delegates to SF-OLSE the selection, training and monitoring of PIOs,¹²⁹ while SF-OLSE delegates to a single lead PIO, the Chinese Progressive Association, the task of coordinating with other selected PIOs to meet grant obligations.¹³⁰ The legislature in 2012 also created a “Wage Theft Task Force,” to make recommendations and issue reports about how public agencies may improve their public enforcement, and appointed representatives, including SF-OLSE and other public agencies responsible for enforcing labor standards and other PIOs and employer groups.¹³¹

San Francisco’s grant process has resulted in a large inflow of complaints from the underregulated, low-wage workplaces. Nearly half of the complaints SF-OLSE receives are about restaurants, many of which come from referrals by the Chinese Progressive Association, which focuses on the Chinatown restaurant sector.¹³² After referral,

125 For a detailed description of the SF-OLSE’s partnerships with PIOs, see FINE, CO-PRODUCTION, *supra* note 7, at 23–25.

126 See FINE, CO-PRODUCTION, *supra* note 7, at 23–25.

127 San Francisco Office of Labor Standards Enforcement Wage Theft Prevention Education & Outreach Services Agreement, A-3(1)(A) (on file with author).

128 See FINE, CO-PRODUCTION, *supra* note 7, at 24.

129 San Francisco Office of Labor Standards Enforcement Wage Theft Prevention Education & Outreach Services Agreement, A-3(1)(A) (on file with author).

130 *Id.* at A-1.

131 S.F., CAL., Ordinance No. 102–12 (2012); S.F., CAL. Admin. Code §§ 5.260–5.260–5 (2012); see SAN FRANCISCO WAGE THEFT TASK FORCE, FINAL REPORT 3–6 (2013).

132 SAN FRANCISCO WAGE THEFT TASK FORCE, *supra* note 131, at 11, 23. The San Francisco Wage Theft Task Force reports that SF-OLSE resolves nearly all cases for at least the amount that it determines that the employer has underpaid employees, often with the assistance of a PIO. *Id.* at 16, 26 (SF-OLSE resolves 99% of its cases where it finds back wages owed, 91% of those

PIOs also use private remedies to resolve about a third of them with the employer without any required action by SF-OLSE.¹³³ The San Francisco grant process expressly directs SF-OLSE investigators to collaborate in cases with PIOs, which has resulted in large-scale enforcement. For example, CPA jointly worked on a case with SF-OLSE against Yank Sing Restaurant, where workers were initially too afraid to come forward and where the payroll records falsely showed no violations. CPA identified workers willing to show the public agency that the employer's payroll records were fabricated.¹³⁴ It brought a private lawsuit, and CPA, SF-OLSE and DLSE jointly negotiated with the employer for a \$4 million settlement and a "workplace change agreement" with Yank Sing that required the restaurant to recognize rights not guaranteed by law, including progressive discipline and paid holidays, monitored by CPA and Yank Sing employees.¹³⁵ In 2014 SF-OLSE, CPA and the employer issued a joint press release hailing the agreement.¹³⁶

Seattle adopted a similar model as San Francisco through its Office of Labor Standards (Seattle-OLS), created in 2014 to enforce local workplace laws, including the city's minimum wage and paid sick time requirements.¹³⁷ In September 2015, Seattle's City Council provided \$1 million for Seattle-OLS to fund a PIO to act as a hub to train ten other PIOs to provide outreach, education and technical assistance.¹³⁸ Seattle-OLS also approved a similar grant

for at least the owed amount of back wages.).

133 SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT, MINIMUM WAGE ORDINANCE ANNUAL REPORT FY 2012-2013 (2013), https://sfgov.org/olse/sites/default/files/FileCenter/Documents/11225-FINAL%2069_MinWageOrdinanceReport_1213.pdf (PIOs independently resolved eight of the 25 minimum wage cases they referred to SF-OLSE.).

134 See FINE, CO-PRODUCTION, *supra* note 7, at 27.

135 Press release: *Immigrant Workers Negotiate \$4 Million Settlement*, CHINESE PROGRESSIVE ASS'N, (Nov. 9, 2015), <http://www.cpasf.org/press/settlement-yanksing>.

136 *Id.*

137 Elmore & Chishti, *supra* note 28, at 38–39. Seattle-OLS was initially housed in Seattle's Office for Civil Rights, which principally enforces anti-discrimination protections, but now is a stand-alone agency. *Id.* Like the SF-OLSE, Seattle-OLS has rulemaking authority and can issue administrative orders for restitution and penalties. SEATTLE, WASH., ADMIN. CODE §§ 14.19.075 (administrative order authority); 14.20.040(B) (rulemaking authority) (2015).

138 Seattle-OLS distributed these funds to ten PIOs, designating one lead PIO, the Fair Work Center, to provide technical assistance to nine other PIOs, to engage in "outreach, hosting community-based education events, developing training materials to educate workers and other organizations about Seattle's

to employer associations to educate small businesses about how to comply with the requirements.¹³⁹ Seattle additionally established the Labor Standards Advisory Commission, appointed by the Mayor and City Council and composed of PIOs representing the interests of businesses and workers. The Labor Standards Advisory Commission advises Seattle-OLS, the Mayor and City Council about labor standards, and provides feedback about Seattle-OLS's proposed rulemaking.¹⁴⁰

B. Evaluation of Collaborative Enforcement

This Article's account of collaborative enforcement reveals underdiscussed benefits of enforcement collaboration between PIOs and public agencies. First, these techniques can effectively and efficiently address capacity, expertise and remedy gaps, by integrating private and public enforcement tools within a single enforcement pyramid, channeling enforcement to particular sectors or regions of the economy, and by changing the structure of the law when existing remedies are inadequate. Collaborative enforcement also permits state and local government to channel private enforcement to specific low-wage sectors and to elaborate the requirements of a new labor standard. Third, collaborative enforcement improves upon the political accountability of public enforcement, which can insulate public agencies from capture by the regulated entities. Lastly, collaborative enforcement can facilitate sophisticated forms of tripartism, including social bargaining between worker and employer stakeholders in lawmaking and private, firm-specific bargaining to resolve noncompliance through codes of conduct and unionization.

1. Collaborative Enforcement Can Effectively and Efficiently Address Enforcement Pathologies

These examples show how PIOs and public agencies can create a more complete enforcement pyramid by integrating

labor standards, and providing labor rights intake, counseling, and referral for workers experiencing labor standards violations." 2015-2016 Community Outreach and Education Fund, OFFICE OF LABOR STANDARDS, <https://www.seattle.gov/laborstandards/outreach/community-fund/2015-2016-community-outreach-and-education-fund> (last visited Jan. 15, 2017); Elmore & Chishti, *supra* note 28, at 38–39.

139 Elmore & Chishti, *supra* note 28, at 38–39. The most recent budget has increased the annual grant to \$1.8 million for PIOs for worker education, outreach and referrals and \$800,000 for business trainings. *Id.*

140 *Id.*

enforcement tools that PIOs and public agencies could not access independently. First, collaboration can address enforcement pathologies by bringing complainants into the enforcement regime. In the remedial enforcement technique, PIOs' ties to complainants allowed public agencies to quickly identify targets. Large-scale detection in these industries then enabled the public agencies to use top-tier remedies to address problems that they would otherwise be unable to detect through independent enforcement. As with the SF-OLSE and Seattle-OLS examples, providing grants to PIOs to conduct education and outreach can also provide public agencies with access to complainants to identify enforcement gaps in new labor standards. The SF-OLSE requirement that PIOs assist workers in resolving some of the cases they triage before referring them permits the public agency to establish informal mediation as a bottom-pyramid enforcement step.

The intermediate public enforcement step of civil investigations by NYAG of car wash establishments and fast food franchisees allows PIOs to resolve potentially protracted wage-and-hour and retaliation cases. Investigating retaliation as a form of witness tampering or obstruction of justice enables public agencies to secure a remedy for retaliation long before the NLRB's hearing process could even begin, which the employers may have defeated through delay and attrition.

Third, collaborative enforcement also improves access to top-pyramid enforcement tools to incapacitate bad actors and to change the structure of the law where the existing remedies are inadequate. PIO mass referral of car wash complainants for public enforcement in California led the public agency to issue penalties in amounts greater than the cost of compliance. As in the Yank Sing example, availability of top-pyramid public enforcement remedies also strengthens PIO monitoring by backing it with a credible threat of public enforcement if the employer is unwilling to comply. Where enforcement tools are inadequate, remedial enforcement can change the structure of the law to create or improve a remedial or sanctions regime.¹⁴¹ After complaints from PIOs enabled the New

141 In this manner, agencies can use collaborative enforcement to coordinate with PIOs in lobbying for regulatory changes that make enforcement more responsive. See DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 82 (2010) (describing coordination between U.S. Food and Drug Administration, which was legally prohibited from lobbying, and allied

York Attorney General to conduct a wide-ranging investigation into the pay practices of fast food franchisees, the NYAG now seeks law reform through litigation that, if successful, may establish the franchisor's joint liability for its franchisees' wage-and-hour law violations in New York State.¹⁴² In the car wash examples, access to labor bonds enables PIOs and public agencies to efficiently distribute owed restitution from a surety instead of a potentially insolvent employer. The car wash licensure requirement of labor standards compliance also improves public enforcement with a top-pyramid sanction for egregious violations.

Performing these functions within a single enforcement pyramid can be more efficient than independent enforcement, by avoiding duplication in the use of enforcement tools. PIOs often perform many of the functions otherwise performed by public agencies, such as witness interviews and triage, and informal PIO resolution permits public agencies to strategically reserve their resources. PIO collaboration in case resolution provides public agencies with access to workers through PIOs in monitoring compliance, which can be more effective and efficient than on-site inspections.

Collaborative enforcement also permits public agencies to channel private enforcement to specific enforcement gaps. As with SF-OLSE's PIO grants, public agencies in a grant-based enforcement approach may designate specific regions or sectors where education, outreach, referral and private enforcement may improve compliance. SF-OLSE's selection of CPA as a collaborating PIO, for instance, effectively channels enforcement capacity into San Francisco's Chinatown restaurants. PIOs may also channel public enforcement through remedial enforcement. PIO access to workers and use of private enforcement in the fast food and car wash examples provided NYAG and the California agencies with a compelling reason to prioritize those sectors to amplify the deterrent effect of their enforcement tools.

Lastly, collaborative enforcement attends to the problem of PIO or public agency exit from the collaborative relationship before its goals are met because of the unfunded costs of collaboration or

PIOs, in which the FDA publicized need for greater regulation over food and medicine while PIOs lobbied for more expansive FDA regulatory powers).

142 See Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PA. L. REV. ONLINE 73, 79, 87 (2017), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-73.pdf>.

the shifting priorities of PIOs and public agencies.¹⁴³ Premature exit wastes enforcement resources that would have been better invested in other forms of regulation that did not require coordination. The legislative grants of grant-based enforcement reduce the exit incentive by sustaining costly enforcement functions that PIOs otherwise lack the resources to perform. Remedial enforcement, in contrast, controls for exit by requiring a commitment of significant upfront resources. In the case of the car wash campaigns in Los Angeles and New York, the CLEAN and WASH campaigns invested in the collaborative relationship until they achieved the legislative solution of a bonding and licensing regime that they could monitor. In the fast food initiative in New York, Fast Food Forward invested in the collaborative relationship until the referred complaints had been successfully resolved, and the evidence of widespread noncompliance with labor standards developed a sufficient factual record for the NYAG to seek law reform through litigation. Once these goals were met, the exit costs accordingly dropped for the participating PIOs and public agencies.

*2. Collaborative Enforcement Injects Political
Accountability into Public Enforcement and Prevents
Capture by the Regulated Entities*

Collaborative enforcement can also inject political accountability into public enforcement decisions by making public agency enforcement priorities transparent to PIOs, and promote public agency independence by insulating public agencies from capture by the regulated entities.¹⁴⁴ This is in sharp contrast to independent public enforcement, in which there is no requirement that public agencies subject their enforcement priorities to public scrutiny, or even to tell the public what those priorities are.¹⁴⁵ Public agencies often need not disclose communications with private entities, and anti-lobbying rules exempt enforcement decisions.¹⁴⁶ The opacity of public enforcement has understandably raised

143 Early examples of collaborations between PIOs and public agencies failed to attend to high exit incentives. *See, e.g.* ESTLUND, *supra* note 7, at 114.

144 As Margaret Lemos argues, the challenge of public enforcement is “designing enforcement institutions in a way that promotes accountability while preserving a role for independent, professional judgment.” Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 935 (2017).

145 *Id.* at 933.

146 *Id.* at 999.

concerns about the possibility of capture by the regulated entities.¹⁴⁷

In this backdrop of enforcement unaccountability, the presence of PIOs in the enforcement design can inject political accountability into public agency enforcement decisions.¹⁴⁸ Seattle's Labor Standards Advisory Commission, which provides guidance to Seattle OLSE about enforcement priorities and produces an annual report about Seattle OLSE's enforcement outcomes,¹⁴⁹ provides a greater level of public transparency. Seattle's approach of inviting public participation in public agency enforcement is a traditional role for local government, which "often operate[s] at the edge of a blurry line between governmental action and public participation,"¹⁵⁰ and, as Nestor Davidson argues, this type of public participation in local administration "may bolster the ability of local regulators to resist capture by outside regulated entities."¹⁵¹ The legislative funding of grant-based enforcement, and its formal grant-making procedures, also permit interested third party stakeholders—legislators, ethics groups, and employer associations—to monitor collaborative enforcement through required PIO and public agency disclosures about the use of enforcement resources. In remedial enforcement, elected officials and agency heads publicly state the goals of these high-profile enforcement initiatives, which subjects them to political accountability should the initiative fail or succumb to abuse.

PIOs are also more accountable to the public in collaboration with public agencies than in informal collaboration. In the SF-OLSE and Seattle-OLS examples, these public agencies require PIOs to adhere to a formal grant process, with limited terms, and

147 *Id.* at 949 & n.85.

148 In the words of Ayres and Braithwaite, "in the presence of empowered [PIOs] the firm must capture [PIOs] as well as the [public] agency to be effective." AYRES & BRAITHWAITE, *supra* note 5, at 71.

149 See *Labor Standards Advisory Commission*, SEATTLE.GOV, <https://www.seattle.gov/labor-standards-advisory-commission> (last visited Oct. 9, 2017); *Labor Standards Advisory Commission Meetings*, SEATTLE.GOV, <https://www.seattle.gov/labor-standards-advisory-commission/what-we-do/meetings> (last visited Oct. 9, 2017).

150 Davidson, *supra* note 15, at 572.

151 Davidson, *supra* note 15, at 630. David Freeman Engstrom echoes this argument in his empirical analysis of qui tam suits, finding that public agency delegation to private litigants pursuing enforcement actions "can improve, rather than degrade, democratic politics by offering a salutary counterweight to 'capture' and other patterns of political control within the legislative or administrative process." Engstrom, *supra* note 79, at 2003–4.

performance reviews with measurable outcomes.¹⁵² In jurisdictions in which multiple PIOs seek to deter employment law violations, the contested nature of the grant selection process creates a natural incentive for other PIOs to monitor the collaborating PIOs for abuse.¹⁵³ Abuse by one PIO is also limited by the SF-OLSE and Seattle-OLS reporting structure, in which one PIO grantee is the primary contractor accountable for the enforcement activities of the other PIOs grantees. These controls provide for a greater level of public accountability than exist in pure public enforcement.

3. Collaborative Enforcement Improves Effectiveness and Governance of Public-Private Enforcement Through Tripartism

Finally, these examples show how collaborative enforcement can facilitate sophisticated forms of tripartism unlikely to devolve into weak forms of self-regulation. The remedial enforcement of the CLEAN Carwash campaign and California state agencies is a paradigmatic example. Developing a public enforcement initiative around a PIO's enforcement priority, and the subsequent investigation findings of widespread noncompliance, created an incentive for the public agency to support the PIOs' legislative goal of strengthening labor standards in the sector. The license and bonding requirements now required in the California car wash sector permit PIOs to continue to coordinate with state agencies in seeking remedies for employment law violations and to incapacitate bad actors through license revocation. Grant-based enforcement can also facilitate durable forms of tripartite lawmaking. Seattle's Labor Standards Advisory Commission creates opportunities for tripartite lawmaking through its appointment of worker- and business-affiliated stakeholders to advise the legislature and Seattle-OLS

152 See Alfred C. Aman, Jr., *Privatization and Democracy*, in FREEMAN & MINOW, *supra* note 8, at 264–67 (arguing that the contract process can improve accountability by de-politicizing the privatization debate, and focusing the PIOs and public agency on the priorities and trade-offs of outsourcing a particular function).

153 See AYRES & BRAITHWAITE, *supra* note 5, at 73 (arguing that PIO abuse is less likely where the PIO's role in enforcement can be contested by other PIOs). In addition to serving as a check on PIO abuse of grant-based enforcement, third-party monitoring also permits PIOs to evaluate whether selected PIOs effectively represent the interests of the communities that they are charged with assisting, which the public agency may lack the sophistication to evaluate without outside PIO assistance.

about the agency's rulemaking.¹⁵⁴

Collaborative enforcement can also facilitate private firm-level bargaining to improve labor standards. In the car wash examples, remedial enforcement facilitated unionization as a way to regulate low-wage workplaces, and protect complainants from retaliation for complaining about employment law violations.¹⁵⁵ Unionized employers in underregulated sectors are also more likely to support industry compliance with labor and safety and health standards to put them on equal footing with non-union competitors.¹⁵⁶ These workers and employers are therefore more likely to participate in the kinds of tripartism championed decades ago, in which employers and workers share the motivation and expertise, and can privately bargain for their respective roles, in enforced self-regulation.¹⁵⁷

Even with more routine, episodic forms of enforcement, grant-based enforcement can improve the likelihood of tripartite resolutions by assigning clear and durable roles to state actors and PIOs. In the Yank Sing example, CPA's protests of labor conditions in the Yank Sing restaurant opened a pathway for the PIO and public agencies to negotiate a tripartite agreement with the employer that permitted a more complete set of prospective, enforceable labor standards than in a standard resolution of a private wage-and-hour-law suit. Facilitating tripartism, as illustrated by these examples, can also channel employers into private bargaining with PIOs for higher and more uniform industry standards.

Lastly, in addition to improving the effectiveness of enforcement, collaborative enforcement can serve the value of enhancing democratic participation by channeling private participation into public enforcement. SF-OLSE's intervention in

154 Elmore & Chishti, *supra* note 28, at 38–39.

155 In this light, unionization serves important compliance goals. Workers who have the assistance of a union are more likely to know about their labor and safety and health rights, and those with collective bargaining agreements that require good cause for discipline and terminations are more likely to complain about labor and safety and health violations. WEIL, *supra* note 1, at 20–36, 245–48. Firms subject to a collective bargaining agreement have lower rates of workplace fatalities and serious injuries, and are more likely to comply with wage-and-hour law. Morantz, *supra* note 10, at 520–22.

156 This is the experience, for example, of the Maintenance Cooperative Trust Fund, a Taft-Hartley trust fund created by unionized janitorial firms as a watchdog group to enforce labor standards in the industry to deter non-union firms from undercutting them by violating labor standards. Fine & Gordon, *supra* note 4, at 565–66 & n.97.

157 See generally ESTLUND, *supra* note 7, at 65.

the private litigation between CPA and Yank Sing Restaurant, and Seattle's creation of the Labor Standards Advisory Commission, for example, created incentives for employer-led PIOs to negotiate with worker-led PIOs for firm-level and sectoral standards.¹⁵⁸ CPA's joint negotiations with Yank Sing and public agencies enabled Yank Sing employees to participate in public agency enforcement and to monitor compliance with the settlement agreement. Public agency protection of these groups from retaliation can be a critical, often-missing element of worker engagement with public enforcement. Public agency protection of complainants from retaliation in the fast food and car wash remedial enforcement campaigns permitted these workers to speak openly about the problems of precarious employment to public agencies and to the media after the resolution of their cases.

To be sure, the examples of collaborative enforcement offered in this Part could be improved.¹⁵⁹ The New York State wage board only proposed lifting the state minimum wage, leaving unaddressed the question of how to enforce this new, higher standard. The San Francisco approach of tying collaboration to funding streams could, over time, erode public agency and PIO independence, creating disincentives to hold the other publicly accountable. The New York City carwash bonding opt-out provision for unionized establishments, at least for now, has been enjoined as preempted under the NLRA. These limitations and risks suggest the need for additional constraints on the private delegation and legislative aims of collaborative enforcement that will be elaborated in the next Part.

C. Proposal: Collaborative Enforcement to Amplify the Deterrent Effect of Enforcement

The previous sections have shown how collaborative

158 See AYRES & BRAITHWAITE, *supra* note 5, at 55. The New York Car Wash Association, for example, provides members with trainings on OSHA compliance and "a legal code and compliance program" for an attorney to review and correct members' payroll practices. Steve Rotlevi, *Mission Statement*, ASSOCIATION OF CAR WASH OWNERS, <https://nyccarwashassoc.herokuapp.com/about/> (last visited Oct. 9, 2017).

159 The state legislative backlash since 2015, in which employer-backed political campaigns have successfully lobbied many states to preempt local mandatory paid sick leave and minimum wage laws, offers another important limitation to local labor lawmaking. See generally Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403 (2017).

enforcement can amplify the deterrent effect of PIO and public agency enforcement by integrating enforcement tools and improving legal remedies, improve the political accountability of public enforcement and facilitate tripartite lawmaking and case resolution. By analyzing these two approaches individually, these sections have also shown their distinct benefits. Grant-based enforcement is effective in governing ongoing collaborations, while remedial enforcement is more appropriate for intensive, short-term collaborations. Grant-based enforcement permits the legislature and public agency to direct enforcement into areas that the statute is intended to address, whether in an underregulated sector that public enforcement alone cannot reach, or to elaborate the requirements of a new labor standard. Remedial enforcement can stimulate the creation of new remedies if existing enforcement tools are inadequate.

Remedial and grant-based enforcement also have different PIO stakeholders. Unions are vital participants in remedial enforcement, while non-union PIOs are ideally suited for grant-based enforcement. Unions have newly repositioned themselves as lead PIOs in political campaigns for regional and sectoral labor standards in addition to seeking unionization in low-wage firms, top-pyramid tools available to unions but not to non-union PIOs. In contrast, non-union PIOs are well positioned to provide sophistication to public enforcement because of their superior access to information about systemic violations in underregulated sectors of the economy. They also often lack top-pyramid tools to address widespread noncompliance without access to public agency remedies.¹⁶⁰ Lacking the membership dues structure of unions, and often reliant on government funding,¹⁶¹ non-union PIOs are better equipped to sustain this role with public funding in a grant-based enforcement model. And, unlike unions, non-union PIOs are not subject to NLRA regulation, which can constrain unions' ability to protest employers because of labor standards violations.

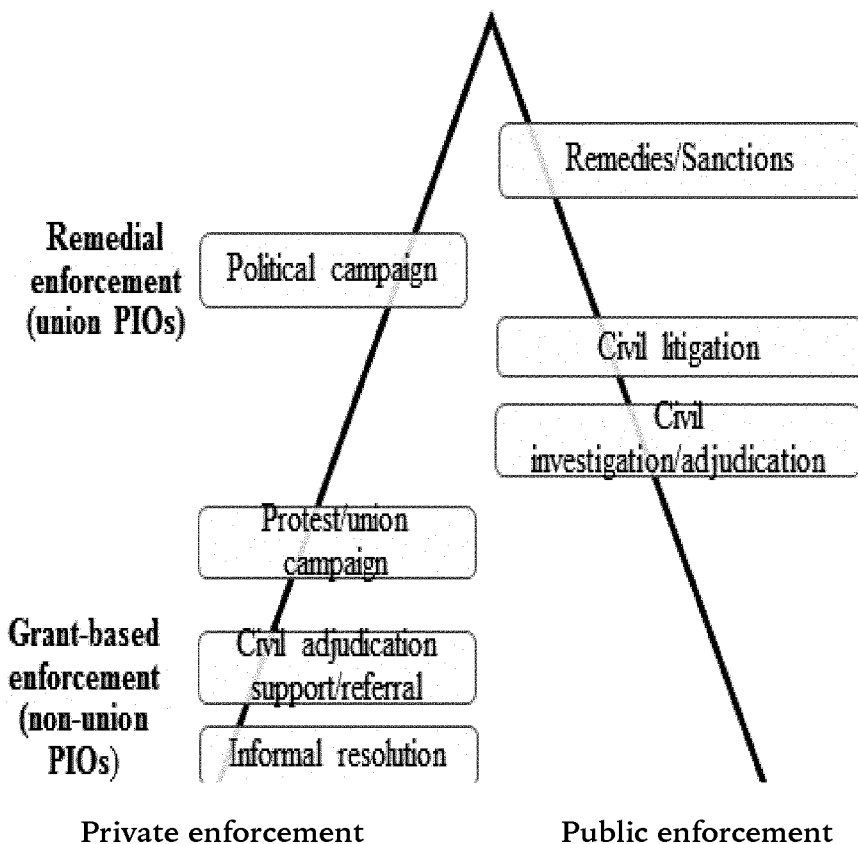
Even as remedial and grant-based enforcement stand apart based on their goals and composition, they are complementary and mutually reinforcing. As shown in Part II, underenforcement is often a result of pathologies that extend beyond the public-private divide. While grant-based enforcement primarily addresses capacity and

160 DE GRAAUW, *supra* note 13, at 51 (finding that only two of 100 studied community-based organizations serving immigrants in San Francisco had the resources to fund political advocacy).

161 *Id.* at 14; Gates et al., *supra* note 13.

expertise gaps, remedial enforcement is often necessary to change the structure of the law where existing remedies are inadequate. An integrated remedial and grant-based enforcement approach may be necessary to bridge all three.

Drawing from these examples, a combined approach appears as follows:



In a combined approach, public agencies collaborate with union-led PIOs to combine public and private enforcement tools to change the structure of the law where remedies and sanctions are inadequate. As those standards must then be enforced, public agencies can then rely on non-union PIOs in a grant-based enforcement technique. In both phases, enforcement is centered on sectors and regions characterized by underenforcement of labor standards. In it, the first goal would be to strengthen labor standards in those sectors and regions through civil enforcement and legislation. Once this goal is met, the enforcement priority would shift to channeling ongoing

enforcement resources to those sectors and regions to establish a norm of compliance. In this model, lawmaking achieved through remedial enforcement would task the public agency enforcing the new labor standard with delegating education, triage and referral to non-union PIOs.

Unlike other proposals for public-private collaboration in labor standards enforcement, which seek to encourage self-regulation backed by PIO oversight with the threat of state enforcement for high-risk employers,¹⁶² collaborative enforcement is an available strategy in sectors in which enforced self-regulation is not a realistic near-term strategy. The history of tripartism in these sectors is that public enforcement often lacks the enforcement tools to counteract entrenched norms of noncompliance. Instead, the goal of collaborative enforcement is to amplify the deterrent effect of public and private enforcement. Deploying PIO and public agency resources to develop, and coordinate the use of, remedies and sanctions in an integrated enforcement pyramid is more likely to impact employer behavior than public agency enforcement alone. These collaborative enforcement techniques, therefore, flip the tripartism focus to high-risk employers with the ultimate goal of deterring legal violations sufficiently to make enforced self-regulation possible.

In this framework, grant-based enforcement would restrict funding eligibility to non-union PIOs. Separating a non-union PIO's grant-based enforcement activities from direct participation in unionization campaigns in this manner would protect the legal regime from political attack as a subterfuge for government-funded unionization and non-union PIOs from attack as a "labor organization" subject to regulation by the NLRA.¹⁶³ In all examples,

162 For example, the "decentered proposal" offered by David Doorey proposes a two-track enforcement approach, a low-risk stream for employers willing to negotiate a code of conduct with worker representatives (not unlike the greengrocer code of conduct), and a high-risk stream for other employers, subject to heightened state enforcement. David J. Doorey, *A Model of Responsive Workplace Law*, 50 OSGOODE HALL L.J. 47, 77 (2012). This is similar to Gunningham's and Grabosky's proposed "two-track" regulatory system to regulate pollution by offering regulatory flexibility for companies that meet a high environmental standard and traditional regulation for firms that do not. See GUNNINGHAM & GRABOSKY, *supra* note 5, at 241–46.

163 29 U.S.C. § 152(5) (2012). The NLRB's Division of Advice has found that a PIO worker center that routinely negotiates with employers on behalf of employees to resolve wage-and-hour law violations is not a labor organization because the settlement agreements reached with employers "were discrete, non-recurring transactions with each [e]mployer." Michael C. Duff, *Alt-Labor*,

remedial enforcement would primarily address gaps in sanctions regimes by creating new sanctions and prophylactic remedies, such as bond requirements for restitution for victims of noncompliance and license revocation authority.

There are limitations to this proposal. Grant-based enforcement requires a public funding stream (or a PIO able to sustain collaboration without funding). Remedial enforcement requires PIOs capable of lobbying state or local governments. In jurisdictions lacking these elements, the traditional PIO roles of private enforcers and holding public agencies accountable for public enforcement will remain necessary.

The next Part addresses the critique that delegating public enforcement to PIOs undermines the independence of public agencies and PIOs and evaluates the vulnerability of collaborative enforcement to challenges under the NLRA and nondelegation doctrine. It responds that the threat to public agency and PIO independence can be mitigated by political and administrative controls. NLRA preemption and the nondelegation doctrine do not threaten the core requirements of collaborative enforcement, but do suggest outer boundaries for the scope of private delegation and its legislative aims.

IV. The Risk of Eroding Public and Private Independence and Doctrinal Limitations to Collaborative Enforcement

Proponents of formal collaboration between public agencies and PIOs have not yet addressed important critiques that public delegation to private entities may undermine public agency independence from PIOs or PIO independence as monitors of public agency enforcement. This Part will address these concerns as well as doctrinal limitations, namely the threats of preemption under the NLRA to the lawmaking aims of remedial enforcement and of

Secondary Boycotts, and Toward a Labor Organization Bargain, 63 CATH. U. L. REV. 837, 855–56 & n.121–24 (2014) (quoting NLRB, Office of the Gen. Counsel, Advice Memorandum, Cases 2-CP-1067, et al. (Nov. 30, 2006)). But as an agency determination subject to change, the line separating a worker center's efforts to improve the working conditions of low-wage workers and those of a labor organization subject to NLRA regulation remains unclear and unstable. See Ben Penn and Tyrone Richardson, *Labor Department Looking Into Worker Center Scrutiny: Acosta*, BLOOMBERG (Nov. 15, 2017), <https://www.bna.com/labor-department-looking-n73014472124/> (reporting that Labor Secretary Acosta is currently reviewing the legal status of worker centers under the Labor-Management Reporting and Disclosure Act).

state nondelegation doctrine to tripartite rulemaking. This Part will conclude that while these normative concerns and doctrinal limitations do not threaten the core requirements of collaborative enforcement, they do suggest the need for controls to ensure that coordination does not erode public or private enforcer independence, and for limiting the scope of its private delegation and legislative aims to avoid litigation challenges.

A. *The Erosion of Independent Enforcement*

Legal scholars, noting the unprecedented scale and scope of privatization, have raised important objections to the contracting out of public services to private entities.¹⁶⁴ This scholarship often focuses on the ways that privatization can erode accountability through the delegation of public services to contractors with inadequate oversight, and by placing private contractors beyond the reach of public agency statutory, administrative and political checks.¹⁶⁵ Contracting out, with its sole focus on efficiency, may obscure democratic or other important values expressed in a public function.¹⁶⁶ Jon Michaels raises the separate danger that public agencies may contract out to private entities as a workaround to bypass political, statutory or administrative controls in order to aggrandize agency power.¹⁶⁷

Not all of these concerns are present in collaborative enforcement. Collaborative enforcement's limited delegation permits public agencies to retain their discretion to make value-laden, contestable decisions about priorities and case decisions, and limits the private enforcer role to the vindication of private interests.¹⁶⁸

164 FREEMAN & MINOW, *supra* note 8, at 3–6.

165 See, e.g., Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in *id.*, 110–147. Margaret Lemos, for instance, argues that the lack of accountability in the deputization of private attorneys to enforce on behalf of the state can lead to private attorney fraud and abuse. See Lemos, *supra* note 9, at 529, 578–82.

166 Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in FREEMAN & MINOW, *supra* note 8, at 134.

167 Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010) (In an administrative workaround, public agencies may turn to privatization to achieve “distinct public policy goals that – but for the pretext of technocratic outsourcing – would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration.”). See also Jon D. Michaels, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 81 (2017) (hereinafter “CONSTITUTIONAL COUP”).

168 The delegation in grant-based enforcement is more modest than in deputization programs, in which local agencies deputize union representatives

Its deeply intertwined nature subjects PIOs to meaningful public agency oversight.¹⁶⁹ Restricting grant-based enforcement to not-for-profit organizations that would suffer a reputational harm from fraud or abuse is another control against abuse.¹⁷⁰ Private delegations to PIOs do not necessarily undermine democratic values; on the contrary, collaborative enforcement can serve the democratic value of channeling worker voice into workplace regulation.

There is, however, the risk that even modest forms of delegation can undermine the independence of public agencies and PIOs. The funding of PIO enforcement may create incentives for PIOs to misuse collaboration by exploiting principal-agent asymmetries and by seeking to substitute instead of complement public agency enforcement. Grant-based enforcement may also create incentives for public agencies to use grants as a form of political patronage, eroding PIO independence.

This section will first address the concern that grant-based enforcement will create incentives for PIOs to abuse information asymmetries and for PIO enforcement to substitute for rather than complement public agency enforcement, and then turn to the

to conduct inspections in public work construction sites and to assist the procurement agency with audits, hearings and review conferences for the enforcement of prevailing wage laws. Fine & Gordon, *supra* note 4, at 563–65. While deputization provides the technocratic benefit of “formal power” to deputies that PIOs often lack in worksite regulation, *id.* at 565, it also creates incentives for PIOs to abuse the delegation by exercising public enforcement “with less notice, resistance, or legal consequence than if they were actually to join the governmental ranks or otherwise shed their private personas.” Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1452 (2010).

169 Lemos, *supra* note 9, at 530 (arguing that abuse of enforcement delegations can be controlled where public enforcers “remain[] in the background, capable of filling in where private efforts fall short”). Engstrom’s empirical analysis of private litigants who enforce public law as whistleblowers, for instance, found no support for the claim that privatizing public enforcement claims leads to abuse. Engstrom, *supra* note 79, at 1963 (“In sum, the composite evidence points decisively away from widespread claims that qui tam enforcement efforts are in the midst of an inefficient ‘explosion.’”).

170 The identity of PIO enforcers is often shaped around assisting the communities most deeply impacted by enforcement gaps, which would be placed at risk by fraud or abuse of collaborative enforcement. Also, unlike for-profit entities, which have an incentive to exploit information asymmetries by charging unreasonably high rates or providing poor services, not-for-profit corporations have no “owner,” but are instead controlled by managers, paid in salary drawn from funders, who would not directly profit from abuse. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE*, 227–30, 233–37 (1996).

risk that public agencies will misuse grants to silence PIOs that are potential watchdogs of public enforcement. The section will conclude that political and administrative controls will be necessary to preserve PIO and public agency independence.

1. *Public Enforcement Independence*

There are two primary ways that collaborative enforcement may erode public agency independence. The first is that PIOs in grant-based enforcement may misuse private delegations by exploiting information asymmetries. The second is that PIOs may seek funding for private enforcement that will replace public agency functions instead of contributing to them.

First, PIOs may seek to exploit public agency enforcement resources in unproductive ways.¹⁷¹ In grant-based enforcement, PIOs could triage and refer cases outside the agency's priorities but which may serve PIO recruitment or other goals.¹⁷² Delegation may also invite abuse for difficult-to-monitor functions.¹⁷³ It may be difficult, for example, for public agencies to monitor grants to PIOs to educate immigrant communities about labor standards in languages that public agency personnel cannot speak. While public agencies could control for these abuses by selecting only PIOs that would incur reputational harm for misuse of public funds, there may be few PIOs in a jurisdiction to choose from, and the public agency enforcer may be ill-equipped to identify which PIOs bear the most reputational risk, and may instead prefer PIOs without a strong reputation because of their docility.

In short, the intertwined relationship between PIOs and public agencies in grant-based enforcement suggests the need for political and administrative controls in the grant design to prevent

171 See Engstrom, *supra* note 79, at 2000–01 (In some instances, private attorneys have used the False Claims Act to exploit regulatory ambiguities rather than to reveal enforcement gaps.). See generally FREEMAN & MINOW, *supra* note 8, at 2–6 (2009); Michaels, *supra* note 167, at 718.

172 Matthew Stephenson and Howell Jackson have noted similar principal-agent problems in lobbyist contributions to public policy. See Matthew C. Stephenson and Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. LEGIS. 1 (2010).

173 Government contracting of services, such as education and health care, is often difficult for public agencies to monitor and evaluate because it involves complex tasks and the direct beneficiaries have no direct relationship with the public agency funding the services. HANSMANN, *supra* note 170, at 227–30, 233–37.

abuse in the PIO selection, training, monitoring and evaluation process.¹⁷⁴ Grant-based enforcement often comes at the direction of the local legislature,¹⁷⁵ creating the possibility of a formal legislative review process,¹⁷⁶ and legislative delegation of grant selection and monitoring to third-party government agencies and PIOs¹⁷⁷ to check against abuse.

Transparency is an important, additional control against abuse of grant-based enforcement. A legislative requirement that public agencies disclose their grant-based enforcement priorities and benchmarks prior to PIO selection will improve the screening of PIOs during the selection process by limiting consideration of PIOs to those that can meet pre-set selection criteria. It would also empower watchdogs and the regulated entities to identify and mobilize against perceived abuse in grant-based enforcement.¹⁷⁸

174 See Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT 336 (arguing that “the very government contracting that is the engine of privatization itself opens the space for an intriguing set of accountability mechanisms”).

175 See, e.g., Berkeley, Berkeley, Cal., Mun. Code Ch. 13.99, § 13.99.080 (2016) (“The Department of Finance shall seek out partnerships with community-based organizations and collaborate with the Labor Commission to facilitate effective implementation and enforcement.”); Los Angeles Cnty., Cal., Ord. No. 102703 amending County Code, Title 8 - Consumer Protection, Business and Wage Regulations relating to the enforcement of the County Minimum Wage Ordinance, § 8.101.090(G) (Apr. 26, 2016). (“The DCBA shall have the authority to contract, in accordance with County contracting rules and procedures, with Community Based Organizations for them to assist in the education and outreach related to the Los Angeles County Minimum Wage Ordinance and this Chapter.”); San Francisco, S.F., Cal., Ord. No. 140687, Amending S.F. Mun. Code § 12R.25 (July 17, 2014) (“The Office of Labor Standards Enforcement shall establish a community-based outreach program to conduct education and outreach to employees. In partnership with organizations involved in the community-based outreach program, the Office of Labor Standards shall create outreach materials that are designed for workers in particular industries.”).

176 Michaels, *supra* note 167, at 769–70. If the legislature identifies abuses in the grant-based enforcement it requires, “legislators can apply resistance in proportion to the perceived encroachment on their prerogatives.” *Id.* at 770.

177 As Ayres and Braithwaite argue, delegating monitoring to third-party PIOs can prevent abuse by making grant-seeking PIOs accountable to third parties that may replace the PIO in the grant-based relationship should the initial delegation fail. See AYRES & BRAITHWAITE, *supra* note 5, at 57 (arguing that contestable guardianship requires “a regulatory culture where information on regulatory deals is freely available to all individual members of a multitude of” PIOs).

178 Transparency may also improve training of public agency and PIO staff, by

Transparency may improve legislative review and ongoing screening and monitoring functions by permitting third-party monitoring, to evaluate PIO use of public funding against public agency priorities to detect funding misuse.

The second concern is that public funding of PIOs for services that could be provided by public agencies themselves can erode the public's view of the role of government in society. At least in some instances, this critique does not apply because collaboration entails the integration of private enforcement tools that are otherwise inaccessible to the public agency. In the case of remedial enforcement, the complementary nature of a PIO's top-tier enforcement tools—PIO public protests, unionization and political campaigns—is clear. But PIO collaboration is not *necessarily* complementary. In other instances, it is at least plausible that public enforcement regimes could be retooled to address (or avoid) a capacity or expertise deficit. A public agency, for example, could encourage complaints through an agency-run mediation program instead of by providing grants to PIOs to privately resolve them. In this instance, it may be that a PIO-delegated informal resolution is preferable to public agency mediation. A PIO may have a unique relationship with a particular worker community, its staff may have cultural and linguistic competencies that public agency staff lack, or a PIO may be better positioned to allay worker fears about retaliation than staff in public agencies, at least at the outset.¹⁷⁹ Or, it could be that the public agency would be better served by building internal expertise in cultural and linguistic competencies, and that an internal mediation program would permit public agencies to select targets for public enforcement while promoting civic engagement in public enforcement without PIO assistance.

The question of whether grant-based enforcement is complementary or substitutive, therefore, is necessarily contingent on the enforcement tool, the worker community and the PIO. This suggests an additional need for transparency about the complementary service the public agency seeks through collaboration. Requiring a public agency justification for delegation of responsibilities could restrict grants to services that the public agency could not provide

guiding personnel across the public-private divide about shared priorities. Seattle and San Francisco, for example, require PIO staff to undergo training with public agency staff about the information that the PIOs is charged with providing to the public. Dickenson, *supra* note 177, at 430-41.

179 DE GRAAUW, *supra* note 13, at 9.

itself and that would generate additional benefits if provided by the PIO, such as civic integration of groups that do not normally participate in the political process. The legislature could require public agencies seeking collaboration with PIOs to condition funds on the transfer of expertise to public agency staff, ultimately improving the provision of public services to underrepresented groups.

2. *Harm to Private Enforcement*

There is also the possibility, underdiscussed in the literature, that public delegations could also harm *private* enforcement by undermining PIO independence as monitors of public agency enforcement.¹⁸⁰ Even without imposing legal restrictions,¹⁸¹ a public agency could seek to use the benefits of collaboration to PIOs in order to co-opt them. In essence, public agencies may use grant-based enforcement as a workaround, but instead of evading statutory or administrative controls,¹⁸² the public agency may use grants to evade public accountability by chilling the speech of PIOs that have traditionally served as watchdogs for public agency enforcement. Public agencies could restrict funded collaboration to those PIOs that agree to advocate that the legislature expand the public agency's budgets or authority, or those PIOs that refrain from criticizing the public agency.¹⁸³ Or the public agency could

180 Whether government funding decreases the political activity of not-for-profit organizations has been the subject of sociological research, with the ambiguous conclusion that government funding creates incentives in both directions and has no clear net effect. See Chaves et al., *Does Government Funding Suppress Nonprofits' Political Activity?*, 69 AM. SOC. REV. 292, 313–15 (2004).

181 Some grant-based enforcement may impose broad lobbying restrictions on participating PIOs that suppress their role as monitor of public enforcement. New York City, for example, prohibits the use of discretionary funds for any form of “lobbying.” See NEW YORK CITY COUNCIL, DISCRETIONARY FUNDING POLICIES AND PROCEDURES 7, <http://council.nyc.gov/budget/wpcontent/uploads/sites/54/2017/01/PoliciesProceduresJan2017.pdf> (“Funds may only be allocated for a public purpose and may not support political activities (including but not limited to lobbying, campaigns or endorsements) and/or private interests.”).

182 Michaels points to ways that outsourcing may aggrandize agency executives by permitting them to, for example, bypass statutory privacy protections by contracting data mining operations to private contractors, and sideline politically insulated civil servants who may oppose the executive's priorities by outsourcing research and regulatory drafting responsibilities to private experts. Michaels, *supra* note 167, at 721–22.

183 See, e.g., DE GRAAUW, *supra* note 13, at 14 (finding from interviews with PIOs in San Francisco, that “[w]hen immigrant-serving nonprofits advocated too

seek collaboration to shift responsibility of the priority away from itself, potentially also shifting blame to the PIO if an enforcement effort fails. Some of these risks are mitigated by the nature of PIOs as non-profit organizations that serve communities that can hold PIOs accountable for cooptation by the public agency. PIOs may be less susceptible to adverse treatment by public agencies if they are equally or more deterred by the possibility of backlash from their membership or base. But, and particularly for PIOs insulated from backlash from the communities that they serve, cooptation is a genuine threat to their independence.

Political and administrative controls will be equally important to protect PIOs from public agency cooptation and unfair blame. As with protecting the independence of public agencies, transparency about the public agency's policy choices in the grant-making process would also enable the legislature to control against abuse. The risk of cooptation can also be reduced by assigning the grant-monitoring role to a third-party PIO and public agency. There is an additional need for explicit whistleblower protections in grant contracts sufficient to encourage PIOs to complain about public agency abuse.

In conclusion, while abuse is possible in any principal-agent relationship, grant-based enforcement is less susceptible to abuse because of its limited delegation, intertwined nature, and political accountability. Political control over the grant selection and evaluation in grant-based enforcement, transparency about the public agency's enforcement priorities, and administrative controls, such as third-party selection and monitoring of PIOs and whistleblower protections, can further limit the potential of abuse.

Of course, these political and administrative controls may supply an appearance of public agency and PIO independence without providing substantive protections.¹⁸⁴ The legislature may lack the interest or sophistication to identify fraud or abuse, and third-party PIOs and government agencies may find that objective evaluation of PIOs that seek grants is elusive. Abuses hidden in public agency disclosures may be difficult to unmask. To the extent that the

aggressively, they worried that city officials might react by endangering their tax status or government funding").

184 See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (quoting DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006)) (cautioning that many formal controls on administrative agencies can operate as mere façades that agencies can easily bypass).

funding of PIOs in grant-based enforcement may not overcome the risks of abuse, state and local governments could coordinate with PIOs without funding, and seek other ways to fund PIO enforcement outside of the collaborative relationship.¹⁸⁵

B. NLRA Preemption and State Nondelegation

There are only two legal doctrines that might prevent state or local agencies from collaborating with PIOs in enforcing labor standards. The most important of these is the NLRA, which preempts state and local laws that condition a public benefit on acceptance of union neutrality. The second, state nondelegation doctrine, constrains legislative grants to public agencies and private entities.¹⁸⁶

Other legal doctrines, such as other constitutional separation of powers principles and freedom of information laws, do not significantly restrict collaborative enforcement. The exercise of enforcement discretion is presumptively valid, and the selection and resolution of cases based in part on a PIO's private enforcement does not nullify a law or violate an express statutory command.¹⁸⁷ Any delegation entailed in grant-based enforcement is either expressly or impliedly authorized by statute, presenting no separation of powers problem either.¹⁸⁸ Nor do state and local freedom of information laws significantly constrain collaborative enforcement. A public agency generally need not disclose information about a pending

185 New York City has recently experimented, for example, with allowing fast food employees to self-fund PIO enforcement through voluntary deductions from paychecks, see N.Y.C. COUNCIL Intro. Bill No. 1384 (2016), and where unions have successfully unionized firms in remedial enforcement initiatives, they may seek to create employer-employee funded Taft Hartley funds to enforce labor standards among their competitors. See Elmore & Chishti, *supra* note 28, at 14 (describing formation of Taft Hartley fund in Illinois to police prevailing wage bids in the construction industry); ESTLUND, *supra* note 7, at 117–22 (describing formation of Maintenance Cooperative Trust Fund in California following the “Justice for Janitors” union campaign, “to identify and challenge labor standards violations among janitorial contractors”).

186 *Whitman v. Am. Trucking Ass'ns* 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.”).

187 *Heckler v. Chaney*, 470 U.S. 821, 831–35, 837–38 (1985) (holding that a public agency's nonenforcement decision is presumptively nonreviewable).

188 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”).

investigation or litigation,¹⁸⁹ and open meetings laws would merely require the types of transparency in grant-based enforcement that San Francisco and Seattle already provide.

1. *NLRA Preemption*

While the NLRA contains no express preemption provision, the Supreme Court has found two “unquestionably and remarkably broad”¹⁹⁰ variations of implied preemption under the NLRA.¹⁹¹ Under the first, *Garmon* preemption, the NLRA preempts states and localities from regulating conduct that is “arguably” prohibited or protected by the NLRA.¹⁹² The second, *Machinists* preemption, prohibits any state and local regulation of union conduct that Congress intended to leave unregulated.¹⁹³

Most lawmaking sought by remedial enforcement identified in this Article does not implicate *Garmon* or *Machinists* preemption because they are laws of general applicability, which affects all employees equally, and “neither encourages nor discourages the collective-bargaining process.”¹⁹⁴ State and local lawmaking to establish wage-and-hour law standards above the federal minimum is expressly permitted by FLSA¹⁹⁵ and grant-based enforcement channels enforcement to all employers in the informal economy. Tripartite lawmaking of the type that resulted in the New York wage board proposal to increase fast food worker wages in the state is also a law of general applicability and does not constitute the kind of collective bargaining regulated by the NLRA.¹⁹⁶ Increasing local

189 See, e.g., N.Y. Pub. Off. Law § 87(2) (2015) (discussing interference with a law enforcement investigation exception).

190 Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1164 (2011).

191 *Id.* at 1164–69.

192 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 259–60 (1959).

193 Int’l Ass’n of Machinists v. Wis. Emp’t Rel. Comm’n, 427 U.S. 132 (1976); see also Local 20, Teamsters v. Morton 377 U.S. 252, 259–60 (1964) (State law that prohibits secondary boycotts permitted by the NLRA preempted; boycotts are a self-help weapon permitted under federal law that states cannot regulate.). Labor scholars criticize the breadth of these preemption doctrines for stifling state and local experimentation with labor law. See Estlund, *supra* note 56, at 1572; see also Sachs, *supra* note 190, at 1168–69 (describing the history and evolution of NLRA preemption doctrine).

194 Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985).

195 29 U.S.C. § 218(a) (2012).

196 See Andrias, *supra* note 6, at 91–92 (arguing that finding this type of tripartite lawmaking to be preempted “would require a significant expansion of preemption law”).

minimum wages and establishing uniformly-applied remedies to operationalize these rights, such as licenses and labor bonds to operate a car wash, face no plausible NLRA preemption challenge.¹⁹⁷

Lawmaking that permits union workplaces to “opt-out” of remedies that apply to non-union workplaces, however, faces the plausible argument that *Machinists* preemption applies to the extent that they coerce employers to adopt a position of union neutrality. In New York City, following the passage of a local law requiring a labor bond and registration for car wash establishments, subject to an opt-out for unionized car washes, the local car wash association sued, claiming that the NLRA preempts the law.¹⁹⁸ The trial judge in that case, *Association of Car Wash Owners v. City of New York*,¹⁹⁹ agreed, finding that the opt-out “explicitly encourages unionization, and therefore impermissibly intrudes on the labor-management bargaining process” and is preempted by the NLRA.²⁰⁰ The case is now on appeal.²⁰¹

While the ultimate outcome of *Association of Car Wash Owners* remains uncertain, the trial court’s decision shows that NLRA preemption is a plausible threat to opt-outs, particularly if the opt-out imposes onerous requirements on non-union firms or if legislators seek an opt-out to advance union campaigns. The two Supreme Court cases that set the limits on state and local regulations that impact labor relations are *Golden State Transit Corporation v. Los Angeles*²⁰² and *Chamber of Commerce v. Brown*.²⁰³ In *Golden State Transit Corp.*, the Supreme Court held that the state’s conditioning of the renewal of a taxicab franchise on the settlement of a strike was preempted because it “destroyed the balance of power designed by Congress, and frustrated Congress’ decision to leave open the use of economic weapons.”²⁰⁴ In *Brown*, the Supreme Court held that California could

197 See *Am. Hotel and Lodging Ass’n v. City of Los Angeles*, 834 F.3d 958, 965–66 (9th Cir. 2016). (“We have consistently held that minimum labor standards do not implicate *Machinists* preemption.”).

198 *Ass’n of Car Wash Owners Inc. v. City of N.Y.*, 15-CV-08157 (AKH), Pl’s Mem. Supp. S.J. Mot. (S.D.N.Y. Oct. 16, 2015).

199 *Ass’n of Car Wash Owners Inc. v. City of N.Y.*, 15-CV-08157 (S.D.N.Y. Oct. 16, 2015).

200 *Ass’n of Car Wash Owners Inc. v. City of N.Y.*, 15-CV-08157 (AKH), Order Granting Pl’s S.J. Mot. (S.D.N.Y. May 26, 2017).

201 *Ass’n of Car Wash Owners Inc. v. City of N.Y.*, 15-CV-08157 (AKH), Notice of Appeal, (S.D.N.Y. June 12, 2017).

202 475 U.S. 608 (1986).

203 554 U.S. 60 (2008).

204 *Golden State Transit Corp.*, 475 U.S. at 619.

not condition public contracts on an employer's position of union neutrality.²⁰⁵ It found that Congress had "renounced" the state's policy judgment that partisan employer speech interferes with an employee's choice about whether to be represented by a labor union in the Taft-Hartley Act, and thus conflicted with federal policy.²⁰⁶ In both cases, lawmaking that seeks to coerce an employer to accept union neutrality, even indirectly through government licensing or procurement powers, is preempted under *Machinists*.²⁰⁷

A broad interpretation of *Association of Car Wash Owners* that would displace state laws that contain opt-outs for employers subject to a collective bargaining agreement because they "explicitly encourage[]" and "pressur[e] businesses to unionize"²⁰⁸ would require an extension to existing *Machinists* doctrine. To be sure, the NLRA displaces state laws that substantially interfere with a non-union firm's ability to operate unless it agrees to a collective bargaining agreement.²⁰⁹ But *Golden Gate* and *Brown* do not suggest that state and local labor standards that provide narrow opt-outs for employers subject to collective bargaining agreements are subject to NLRA preemption under *Machinists*, and courts have repeatedly

205 *Brown*, 554 U.S. at 69.

206 *Id.*

207 Project labor agreements are typically not preempted under the market participant doctrine because they advance only the proprietary, and not regulatory, interest of the state. See *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Massachusetts/Rhode Island*, 507 U.S. 218, 223, 231–32 (1993); *Michigan Bldg. and Constr. Trades Council v. Snyder*, 729 F.3d 572, 581–82 (6th Cir. 2013). But state and local governments cannot bypass NLRA preemption review by formally grounding its power to condition union neutrality in its procurement or tax authority. See *Brown*, 554 U.S. at 70 (rejecting the argument that using a procurement power to require union neutrality fell within the market participant exception to NLRA preemption); *Assoc. Builders and Contractors Inc. v. City of Jersey City*, 836 F.3d 412, 417–21 (3d Cir. 2016) (explaining that a city that conditions tax exemptions on union neutrality acts as a regulator rather than a market participant).

208 *Ass'n of Car Wash Owners Inc. v. City of N.Y.*, 15-CV-08157 (AKH), Order Granting Pl's S.J. Mot. at 6 (finding that "a fivefold increase in the amount of a surety bond required for car washing companies that are not parties to a collective bargaining agreement, or, alternatively, an independent monitoring scheme and large security deposits," amounts to a penalty on non-union car washes).

209 See *Golden State Transit Corp.*, 475 U.S. at 619; *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995) (requiring prevailing wage terms in private contract *Machinists* preempted because terms so onerous it dictated collective bargaining process).

upheld them against NLRA preemption challenges.²¹⁰ States have “broad authority under their police powers to regulate the employment relationship,”²¹¹ even if they alter the economic balance between labor and management.²¹² The NLRA “cast[s] no shadow on the validity”²¹³ of an opt-out provision, even if it “provided an incentive to unionize or to remain non-union” and may have a “potential benefit or burden in application.”²¹⁴ The Ninth Circuit in *American Hotel and Lodging Association*,²¹⁵ for example, recently upheld a city ordinance’s waiver for collective bargaining in a minimum wage ordinance against a *Machinists* preemption challenge. The modest opt-out provision in *American Hotel* did not approach the overreaching enforcement action of *Golden State*, in which the state agency sought to use state regulation to intervene in a labor strike, or the state command of union neutrality in *Brown*, which went well beyond protecting state funds.²¹⁶ For the Ninth Circuit, unlike state action that “intrudes on the mechanics of collective bargaining,” like those found preempted in *Golden State* and *Brown*, opt-outs merely establish a labor standard that sets the stage for future bargaining, which is not preempted.²¹⁷ Thus, while a wage bond opt-out almost certainly creates a cost for non-union employers, the court appears to have ignored the second step of the analysis, to determine whether the cost sufficiently interferes with collective bargaining.²¹⁸ This is

210 See *Am. Hotel and Lodging Ass’n*, 834 at 965 (holding that union opt out provision in minimum wage standard not preempted by NLRA); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489–90 (9th Cir. 1996) (holding that union carve out in state maximum hours legislation not preempted by NLRA); *Filo Foods, LLC v. City of SeaTac*, 183 Wash. 2d 770, 778, 796–97 (Wash. 2015) (upholding union waiver provision in SeaTac’s recent \$15 per hour minimum wage increase against *Machinists* preemption challenge).

211 *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

212 *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987); *Metro. Life Ins. Co.*, 471 U.S. at 754; see also *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85 (2d Cir. 2015).

213 *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

214 *Viceroy Gold*, 75 F.3d at 490. See also *Livadas*, 512 U.S. at 132 n.26 (reasoning that it does not “seem plausible to suggest that Congress meant to pre-empt such opt-out laws, as ‘burdening’ the statutory right of employees not to join unions by denying nonrepresented employees the ‘benefit’ of being able to ‘contract out’ of such standards”).

215 834 F.3d 956, 965 (9th Cir. 2016).

216 *Id.* at 964–66.

217 *Id.* at 964.

218 *Castillo v. Toll Bros*, 197 Cal. App. 4th 1172, 1207 (Cal. Ct. App. 2011) (finding that to the extent that an opt-out imposed costs on firms that can

particularly the case, as the Supreme Court reasoned in *Fort Halifax*,²¹⁹ since opt-outs only apply to firms that have already bargained for a similar requirement.²²⁰

However, while a broad interpretation of *Association of Car Wash Owners* that would invalidate all opt-outs cannot be reconciled with established law, a narrower, more defensible interpretation is possible, that animating the court's decision is skepticism of the local law's purpose. The court, citing comments made by New York City councilmembers during the legislative hearing supportive of the PIOs' unionization campaign,²²¹ concluded that "a central purpose of [the wage bond bill] is to encourage unionization in the car wash industry."²²² This suggests the need for clarity in opt-out provisions

be reduced in collective bargaining, that impact on collective bargaining is "insufficiently substantial to trigger *Machinists* preemption"). Cf. *Rondout Elec., Inc. v. NYS Dept. of Labor*, 335 F.3d 162, 168 (2d Cir. 2003) ("While the [state] regulation may impose an additional cost on non-union employers . . . this increase does not affect the bargaining process that is the subject of the NLRA.").

219 *Fort Halifax Packing Co.*, 482 U.S. at 21–22 ("If a statute that permits no collective bargaining on a subject escapes NLRA pre-emption . . . surely one that permits such bargaining cannot be pre-empted."); see also *Livadas*, 512 U.S. 107 (1994) (distinguishing California policy not to enforce state law requiring immediate payment of wages due upon discharge for employees subject to collective bargaining agreements on this ground).

220 California's wage bond opt-outs only apply to collective bargaining agreements that obligate employers to pay particular wages and "An expeditious process to resolve disputes concerning nonpayment of wages." CAL. LAB. CODE § 2055(b)(4)(D) (West 2015). See *St. Thomas-St. John Hotel & Tourism Ass'n v. Government of U.S. Virgin Islands*, 218 F.3d 232, 245 (3d Cir. 2000) (upholding opt-out to minimum wage protection because it "does not force an employee to choose between collective bargaining and the protections of state law; rather, it protects all . . . employees, but gives employees the option of relinquishing the territorial statutory protections through the terms of a collective-bargaining agreement"); *Firestone v. Southern California Gas Co.*, 219 F.3d 1063, 1068 (9th Cir. 2000) (upholding California overtime opt-out provision because it "does not operate automatically to exempt virtually all union-represented employees from its coverage—it exempts only those who have bargained for an alternative overtime compensation scheme").

221 *Ass'n of Car Wash Owners Inc. v. New York*, 15-CV-08157 (AKH), Order Granting Pl's S.J. Mot., at 6 (S.D.N.Y. May 26, 2017).

222 *Id.* While it is unclear from the court's decision whether the councilmembers' statements were in reference to the opt-out provision, the decision correctly states that opt-out provisions must be motivated by a purpose other than to support or encourage unionization. See *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 63 (2008) (quoting the statute's express legislative purpose to "prohibit an employer from using state funds and facilities for

that their intent is to permit private negotiation for remedies rather than to encourage unionization. Legislation permitting waiver of prophylactic remedies such as labor bonds could also clarify the low need for labor bonds in firms subject to collective bargaining agreements because they are less likely to violate employment laws than non-union firms. To mitigate the preemption threat, the cost of compliance with a statute without a waiver should also be directly tied to the enforcement problem and should not be so onerous that union neutrality is the only meaningful choice for employers in the sector or region.

Alternatively, one might seek to minimize the preemption threat by modifying a statutory opt-out by expanding the exemption to not only employers with a collective bargaining agreement, but also those non-union employers who can adequately demonstrate compliance with labor standards. However, such an approach would multiply the administrative complexity of the law. It may also provide incentives for employers to use the exemption to skirt the requirements of the law. Given these countervailing risks, and that these waivers are not essential to collaborative enforcement, should preemption law expand to encompass remedial differences between unionized and non-union firms, it may be preferable to avoid them entirely.

2. *State Nondelegation Doctrine*

Collaborative enforcement must also account for the nondelegation doctrine, which constrains administrative rulemaking, not enforcement authority, which is an executive function.²²³ As a result, nondelegation principally constrains remedial enforcement's use of tripartite rulemaking. Federal nondelegation doctrine and that of most states impose few constraints on private delegations. Courts have not found a violation of the federal nondelegation doctrine since 1936, and the distinction between public agency and private

the purpose of influencing employees to support or oppose unionization") (quoting 2000 Cal. Stat. ch. 872 § 1). In *Brown*, the Supreme Court relied on the state statute's preamble to conclude that it sharply conflicted with federal policy under the NLRA to permit noncoercive employer speech opposing unionization. *Id.* at 68.

223 Courts routinely uphold delegations of executive power, including the power to arrest, to private individuals. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 648, 666 (1986) ("The power to arrest has been delegated to railway police, to humane society agents, and to bail bondsmen.").

stakeholder delegations has not figured prominently in federal nondelegation cases.²²⁴ While courts have invoked the nondelegation doctrine to strike down private delegations at the state and local levels,²²⁵ in most states delegations to private parties are permissible so long as the agency retains the ultimate authority to approve and the agency provides sufficient safeguards to prevent abuse.²²⁶

For these states, two cases that consider claims that prevailing wage laws unconstitutionally delegate prevailing wage rate setting power to local employers and unions illustrate the nondelegation doctrine constraints on state and local delegations of rulemaking power to private parties. In *Beary Landscaping, Inc. v. Costigan*,²²⁷ the Seventh Circuit considered a challenge by construction contractors of the Illinois prevailing wage law that set the wage rate based on collective bargaining agreements (CBA) for construction work in the county on the ground this constitutes an unconstitutional

224 Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Nondelegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 956-62 (2014). Federal courts have declined to strike down delegations to private entities since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). See Gillian E. Metzger, *Privatization and Delegation*, 103 COLUM. L. REV. 1367, 1438-40 (2003); *Curran v. Wallace*, 306 U.S. 1, 15-18 (1939) (Delegation by Secretary of Agriculture to private auction markets to inspect and sell tobacco products is constitutional because growers vote on creation of markets by referendum and Secretary may suspend designated market for lack of competent inspectors or insufficient quantity of tobacco.); *Todd & Co. v. S.E.C.*, 577 F.2d 1008, 1012-14 (3d Cir. 1977) (describing how delegated self-regulation of securities dealers by SEC to private, independent association not unconstitutional as permitted by Maloney Act, which permits the SEC to register private organizations to discipline brokers in order to prevent fraud and protect investors, with a right of appeal to the SEC).

225 See generally Davidson, *supra* note 15, at 622-24. Courts routinely strike down local zoning ordinances, for example, that delegate lawmaking power to private residents to limit neighbors' use of their property. See, e.g., *Marta v. Sullivan*, 248 A.2d 608, 610 & n.3 (Del. 1968).

226 See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191-1201 (1999). The nondelegation doctrines of California and Washington both track federal nondelegation doctrine. See *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1494 (Cal. Ct. App. 2014) (finding that private delegation of development of programs to preserve wild salmon not unlawful delegation so long as agency exercised independent discretion in their evaluation); *Murray v. State, Dept. of Lab. & Ind.* 403 P.3d 949, (Wash. Ct. App. 2017) (finding that legislative delegation of determination regarding whether health technology is includable as a covered benefit in a health care program to a public authority composed of private physicians did not violate state nondelegation doctrine).

227 667 F.3d 947 (7th Cir. 2012).

delegation of rulemaking power to unions and employers subject to CBAs. In rejecting this argument, the Seventh Circuit reasoned that the Illinois statute, which required administrative and judicial review of a prevailing wage rate before it became final, sufficiently constrained private rulemaking power to satisfy the nondelegation doctrine.²²⁸ In contrast, the Second Circuit in *General Elec. Co. v. New York State Dep't of Labor*²²⁹ held that an allegation that a union and employer colluded to raise prevailing wage rates established through their CBA to off-set lower private-sector wages (thereby shifting the disproportionately high rate to the taxpayers) without any administrative oversight sufficient to allege an unconstitutional delegation.²³⁰

Beary and *General Electric* suggest that in these states, the nondelegation doctrine requires state and local legislatures in legislating collaborative enforcement to refrain from delegating rulemaking power to PIOs unless it is guided by administrative agencies and subject to judicial review. Tripartite rulemaking in these states can follow the model of the New York wage board, which included government representatives, required public agency approval and afforded opponents the opportunity for judicial review.²³¹

While *Beary* and *General Electric* reflect the majority view of how states constrain tripartite regulation via the nondelegation doctrine, a minority of states have a stronger nondelegation doctrine,²³² and it is an open question how these states treat private delegations. At the outer end of private delegation skepticism is Texas, which crafted a unique set of criteria to “specifically impose some limits on delegations to private parties.”²³³ Reasoning that “private delegations clearly raise even more troubling constitutional issues than their public counterparts,” the Texas Supreme Court

228 *Id.* at 951.

229 936 F.2d 1448, 1457–59 (2d Cir. 1991).

230 *Id.* at 1457–59.

231 See *Nat'l Rest. Ass'n v. Comm'r of Labor*, 141 A.D.3d 185, 191–95 (3d Dept 2016). See also Andrias, *supra* note 6, at 65, 89–90.

232 This is the law in New York. See *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dept. of Health and Mental Hygiene*, 23 N.Y.3d 681, 711 (2014) (Read, J., dissenting) (characterizing New York's nondelegation doctrine as “strong” in criticizing the majority decision striking down the Sugary Drinks Portion Cap Rule as an unconstitutional delegation of lawmaking).

233 Volokh, *supra* note 224, at 965.

in *Texas Boll Weevil Eradication Foundation v. Lewellen*²³⁴ held that in addition to judicial review and safeguards against abuse, that state's nondelegation doctrine requires that that private delegations be free from potential conflicts,²³⁵ which is difficult to reconcile with the purpose of tripartite regulation to include all interested stakeholders in the regulatory process.²³⁶

One might discount the Texas nondelegation doctrine as an outlier, but it does reflect a broader concern of the deeper involvement of private actors in public regulation at the local level, raising judicial concerns about local corruption.²³⁷ Indeed, this skepticism is warranted, as is Jon Michaels's call for a stronger nondelegation doctrine in order to protect "the tripartite architecture of administrative power" from privatization.²³⁸ While this Article agrees that judicial supervision must account for the incentives for abuse in private delegations,²³⁹ as Nestor Davidson argues in proposing a functionalist local nondelegation doctrine, oversight of collaborative enforcement "should reflect the advantages as well as the risks that public involvement, knowledge, and accountability bring to local agencies."²⁴⁰ Collaborative enforcement seeks to integrate private participation in tripartite workplace regulation, a potentially

234 952 S.W.2d 454, 468 (Tex. 1997). In *Lewellen*, the Texas legislature created a non-profit organization to oversee boll weevil eradication efforts to protect the state's cotton industry, overseen by the state's agriculture commission. *Id.* at 457–62.

235 *Id.* at 469–72.

236 See Volokh, *supra* note 224, at 969–70.

237 Davidson, *supra* note 15, at 623–24.

238 MICHAELS, *supra* note 167, at 188–90; see also Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1770–75 (2014) (arguing that "mission creep" and other potential abuses of large-scale surveillance and enforcement justify administrative law controls on law enforcement).

239 This Article agrees that the nondelegation doctrine should supervise private delegations that "disrupt the democratic inclusivity and heterogeneity of civil society." MICHAELS, *supra* note 167, at 190. But a test that hinges on the public/private distinction is difficult to apply to collaborative enforcement, which is neither fully public nor private, and collaborative enforcement is entitled to more deference than other private delegations that create a high risk of abuse. Specifically, a functional nondelegation doctrine would not prohibit delegations to private stakeholders that have an interest in the delegation, would instead determine whether the limited delegation and intertwined nature of the delegation were sufficient safeguards against abuse, and would only invalidate tripartite rulemaking if it lacked administrative oversight and an inclusive process to invite participation by private stakeholders.

240 Davidson, *supra* note 15, at 624.

democracy-enhancing benefit. Stimulating tripartite regulation of the low-wage workplace requires administrative interventions that encourage PIOs to channel worker voice into regulation. In most states, this benefit and the limited delegation and intertwined nature of collaborative enforcement should be sufficient for its private delegations to survive nondelegation review. But a strong nondelegation doctrine may ignore these benefits and controls, greeting collaborative enforcement with the same skepticism as privatization schemes that invite local corruption or administrative aggrandizement. As with opt-outs under the NLRA, in Texas and states with a similar nondelegation test for private delegations, remedial enforcement can avoid nondelegation challenges through a standard, non-tripartite rulemaking process.

V. Conclusion

This Article offers an important, emerging proposal for how state and local public agencies and PIOs can collaborate to make workplace regulation more effective and efficient, create a system of political accountability for public enforcement, and facilitate sophisticated forms of tripartism. It proposes positioning PIOs as private enforcers coordinating resources and creating and deploying sanctions with state and local public agencies to change the behavior of regulated entities with high rates of legal noncompliance. This inverts the standard account of the PIO role in regulation, from enforcing self-regulation by high-compliance firms to amplifying the deterrent effect of enforcement among low-compliance firms, and to elaborate new legal requirements. This refines previous theories of public-private regulatory experimentation by showing that collaboration can not only promote self-regulation where the regulated entities have the expertise and motivation to comply with the law, but also to deter violations where enforced self-regulation is unlikely in the near term. The transparency that collaborative enforcement requires makes public enforcers more political accountable for the value-laden choices they make, and can preserve their independent judgment by limiting the scope of private delegation and preventing capture by the regulated entities. While the private delegation of collaborative enforcement can create incentives for abuse, the limited delegation and intertwined nature of collaborative enforcement make abuse less likely than more familiar forms of private delegations, such as deputization, and manageable through political and administrative controls. This analysis is applicable to other areas, such as consumer

protection, fair housing and civil rights enforcement, in which PIOs cannot effectively vindicate private rights alone, and in which public agencies may benefit from PIO sophistication and access to private enforcement tools.

A final, underdiscussed theme of collaborative enforcement is the role of state and local government in mediating and channeling public participation into enforcement governance, and as a site for sophisticated tripartite regulation. Coalescing individuals into stakeholder groups is of particular value in regulating small, undercapitalized employers, where traditional regulation rarely reaches, and which otherwise would not participate in tripartite regulation of the workplace.²⁴¹ This suggests that the effectiveness of collaborative enforcement in facilitating tripartism will depend, in part, on where the collaborating agency is positioned in the federalist system.

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²⁴¹ See ESTLUND, *supra* note 7, at 141.

