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Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations

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Janice Fine¹ and Jennifer Gordon²

Abstract

Structures of employment in low-wage industries, a diminished wage and hour inspectorate, and an unworkable immigration regime have combined to create an environment where violations of basic workplace laws are everyday occurrences. This article identifies four “logics” of detection and enforcement, arguing that there is a mismatch between the enforcement strategies of most federal and state labor inspectorates and the industries in which noncompliance continues to be a problem. In response, the authors propose augmenting labor inspectorates by giving public interest groups like unions and worker centers a formal, ongoing role in enforcement in low-wage sectors. In three case studies, the authors present evidence of an emergent system—one that harkens back to a logic proposed by the drafters of the Fair Labor Standards Act (FLSA) but never implemented—of empowering those closest to the action to work in partnership with government.

Keywords

enforcement, immigrant, labor standards, FLSA, community

Millions of low-wage workers, many of color and foreign-born, toil long hours at the bottom of the American economy, routinely denied their rightful wages. A recent study found that 26 percent of low-wage workers¹ in the nation’s three largest cities suffered

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minimum-wage violations in the week prior to the survey, and more than 76 percent of low-wage workers who labored more than forty hours in the prior week were not paid according to overtime laws.² In some regions, the Department of Labor itself has recorded Fair Labor Standards Act (FLSA) noncompliance levels greater than 50 percent in industries such as nursing homes, poultry processing, day care, and restaurants.³ For a developed nation with a functional legal system, long-standing and fairly comprehensive wage and hour laws at the federal and state levels, and stable inspectorates embedded in well-established civil service systems, the United States has staggeringly low levels of compliance with wage and hour laws.

Labor standards enforcement is not working. Why not, and what should the response be? We begin by analyzing the impediments to effective enforcement in low-wage sectors today. We trace a set of “logics,” or theories as to how best to detect violators, that have dominated wage and hour enforcement over the past century: a logic of detection through worker complaints; a logic of proactive, targeted inspections; a logic of comprehensive coverage; and a logic of self-regulation by firms. While the first and second logics of complaints and strategic inspections remain important, they have proven insufficient to the problem at hand. Resource constraints have rendered the logic of comprehensive coverage infeasible. Furthermore, in low-wage sectors that have proven particularly resistant to enforcement, we note broad agreement that the fourth logic of self-regulation is rarely appropriate.

We then move on to the core argument of the article: that the time has come for the revival of a different approach in low-wage industries, one proposed at the time of the New Deal but defeated before the final version of FLSA even began its journey through Congress. This alternative logic called for workers’ organizations as well as firms to partner with the government to detect violators, relying on the incentives of unions and high-wage enterprises to patrol their industries and labor markets for unfair competition. We draw on this idea in laying out a vision for a new enforcement regime to supplement complaint-driven and targeted inspections at both state and federal levels. Although our proposal has several elements, the most fundamental change it would introduce is *tripartism*:⁴ a strategy of enforcement that involves giving workers’ organizations equal standing with government and employers. In three state and local cases, we find evidence of this approach in an emergent system that harkens back to the original idea of those with the greatest incentive and closest to the action working in partnership with government.⁵

After setting out those cases and analyzing the lessons they offer, we conclude by addressing some objections to the approach, reflecting on what we learned from the case studies. What we propose is unlikely to be adopted wholesale at the federal level any time soon, and yet these experiments in state and local contexts demonstrate the present feasibility of aspects of what we propose and highlight its potential to extend the reach of the state in a context of fiscal crises at every level of government.

I. Why Is Enforcement Not Working in the Low-Wage Sector?

Obstacles to Enforcement

Decreasing funding with an expanding mandate. Although our interest is in wage enforcement at both state and federal levels, we focus in this section on FLSA because of its central importance and because many state wage laws are now patterned on the federal regime.⁶ When FLSA was enacted in 1938, it only covered about a third of American workers. Among those excluded were agricultural, domestic, service, and retail workers. In the decades following its passage, coverage gradually expanded, through incorporation of occupations and industries previously excluded from the act. Many small businesses were included when Congress lowered the threshold volume of annual sales that determined whether a firm had to obey FLSA.⁷ The range of industries now covered by FLSA is much wider than the manufacturing sector for which the law was originally intended. It is not clear to us that the Department of Labor's (DOL's) Wage and Hour Division (WHD) has ever had a theory about how to effectively patrol such vastly different industries.

Meanwhile, although funding for inspections initially increased following the extensions of coverage, it was not sustained. The past thirty years have seen a 55 percent increase in the estimated number of workers and a 112 percent increase in the number of establishments covered under FLSA.⁸ Although the number of WHD inspectors doubled from about 650 in 1960 to a high-water mark of 1,343 in 1978,⁹ by 1982 the inspectorate was down to 929.¹⁰ In 2008, WHD had only 709 investigative staff.¹¹ Even when WHD reached its highest staffing level, the economy was expanding much more rapidly, increasing the number of firms covered under the law. As a result, the share of firms that WHD inspected fell from 9 percent in 1947 to 2 percent by the late 1970s, and continued to decline afterward.¹²

Growth in the hardest-to-police sectors and among the hardest-to-protect workers. As the preponderance of low-wage jobs has shifted from manufacturing to service, long hours, low wages, high rates of injury, and sweeping violations of workplace laws have followed workers there.¹³ These conditions are present in formal as well as informal employment, from the smallest establishments to some of the largest. In certain industries and local labor markets, what Bernhardt et al. have christened the "gloves-off economy" has taken root and is expanding. In such settings, employers are "increasingly breaking, bending, or evading long-established laws and standards designed to protect workers."¹⁴

Part of the problem lies with an increase in the number of small firms. Between 1990 and 2005, there was a decline in the size of the average business establishment, with a concomitant increase in the number of firms and establishments.¹⁵ Using Current Population Survey data on actual hours worked and wages received, Weil and Pyles generate a list of thirty-three industries at highest risk of wage and overtime violations.¹⁶ We refined their findings by analyzing the composition of establishments in those industries.¹⁷ Our analysis demonstrates that most of the industries Weil and

Pyles identify as being at greatest risk of FLSA violations are overwhelmingly composed of establishments of fewer than twenty employees.¹⁸

The predominance of smaller firms and establishments in low-wage industries is worth noting, not only because it seems to correlate with higher wage and hour violation rates, but also because it introduces complications for the design of enforcement strategies.¹⁹ If the same number of workers are employed across a larger number of smaller enterprises, more personnel are required to locate the businesses, travel to them, and inspect their records. Small businesses are also less likely to have the sophisticated human resources departments and centralized record keeping that facilitate proactive learning about the law, cooperation during inspections, and participation in ongoing “regulatory communities.”²⁰ On the very low-wage end of the ladder, small firms are also more likely to be mobile, short-lived, and unregistered.

The growth of subcontracting as a business model introduces additional challenges for enforcement.²¹ The rise of the network supply chain model has resulted in the vertical disaggregation of firms across many sectors and in labor-intensive industries in particular.²² Even when small firms are embedded in subcontracting networks in which one large firm or a few firms set the terms of exchange, they are often not the employers of record for purposes of enforcement. FLSA drafters wrote the “Hot Goods” provision of the law because they recognized the specific challenges posed by subcontracting. But what was once viewed as an exception confined to the garment industry (and agriculture, which was initially exempted from coverage altogether) has become more of a rule. Meanwhile, studies by a range of states as well as the federal DOL have found up to 30 percent of firms²³ misclassify employees as independent contractors to avoid liability under FLSA and other workplace laws.²⁴ For some employers, subcontracting and misclassification are tactics in a larger strategy to evade detection of noncompliance.

A final factor making enforcement difficult in the low-wage sector is the high percentage of immigrants in the most at-risk industries. In 2008, the foreign-born made up about 15 percent of the U.S. civilian labor force and more than 20 percent of the low-wage workforce.²⁵ Two of every five low-wage immigrant workers are undocumented.²⁶ Immigrants constitute a significant share of many of the same industries Weil and Pyles identify as having the highest violation rates: for example, 27 percent of all workers and 40 percent of low-wage workers in construction are foreign-born.²⁷

Immigrants may be unaware of their rights, afraid of deportation, and hesitant to cooperate with government officials. The U.S. government has implemented a policy of work site raids and employer sanctions enforcement that has rendered immigrants increasingly unwilling to come forward to report wage violations. The gap between immigrant communities and regulators is a serious impediment to effective enforcement of wage and hour laws.

The Logics of Enforcement

The state of low-wage work also suffers from a failure to match the logics of enforcement deployed by government agencies to the realities of low-wage work today. We

identify four logics of detection that have dominated wage enforcement over the past century, addressing the strengths and weaknesses of each in relation to the current low-wage context.

The logic of complaint-driven investigation. The logic that emerged in the early years of FLSA was a complaint-driven approach to detection, premised on the assumption that workers would come forward and inspections would be triggered by their complaints.²⁸ Although during the 1940s and 1950s WHD strongly embraced a proactive investigation strategy alongside the complaint-based approach, after 1960 complaints would become the predominant approach.²⁹

Addressing worker complaints is clearly an important part of the work of a workplace enforcement agency. The question is whether this approach makes sense as the *predominant* one. An affirmative answer would be appropriate if the industries logging the largest number of complaints were also those with the worst underlying conditions. However, research by Weil and Pyles found little overlap between industries with the highest FLSA complaint rates and those with the highest wage and overtime non-compliance rates, suggesting that workers in industries with the worst conditions are much less likely to complain.³⁰ The DOL is thus expending most of its resources on inspectors responding to complaints filed by individual workers, without an underlying justification that this approach is likely to be effective in detecting violators.

The logic of proactive investigations. In the case of low-wage industries, there is a strong case for federal and state departments of labor to use data on underlying levels of noncompliance to target specific industries in particular geographic areas. Since the 1940s, WHD has intermittently complemented its reliance on complaints with a focus on proactive inspections, the second “logic” of enforcement.

In the 1990s, WHD launched directed enforcement programs in garment, agriculture, nursing homes, and poultry processing. These significant initiatives involved new strategies—in particular, ratcheting up penalties and enlisting firms at the top of supply chains to police their suppliers and contractors. In the garment industry, for example, WHD initiated the “No Sweat” campaign in 1996, with the strategic goal of moving from an exclusive focus on the least-powerful entity in the supply chain—contractors—to manufacturers, retailers, and their production networks. Among its many innovative features, No Sweat required manufacturers with high levels of violations to sign contractor monitoring agreements and used the FLSA Hot Goods provision to seize products that were made by contractors in violation of wage and overtime laws, requiring manufacturers to give up financial gains from shipping those products. WHD also expanded criminal prosecution and civil litigation and assessed civil monetary penalties for repeat and willful violators.³¹

Although the DOL’s initial assessment of its own results was pessimistic,³² a subsequent close analysis of DOL microdata by David Weil and Carlos Mallo reached a considerably more positive conclusion. The analysis found that the contractors of Los Angeles and New York City firms that signed monitoring agreements showed improvement in compliance rates.³³ They attribute the effectiveness of this initiative to the use of public enforcement to change the private incentives of targeted manufacturers and

contractors, a prime example of what Weil terms “regulatory jujitsu”—the tailoring of enforcement strategies to the structures and legal contours of particular industries.

Other industries targeted for WHD’s strategic enforcement initiatives yielded mixed results. Despite a national WHD campaign in the long-term care industry launched in 1997, noncompliance rates remained stubbornly high.³⁴ An effort in poultry, however, appears to have resulted in some improvement in compliance.³⁵ In the view of Rae Glass, a top official at WHD through several Democrat and Republican administrations, the key in this case was a strategy of civil litigation, which increased the cost to processors of noncompliance.³⁶

Despite this experimentation with proactive investigation, the second logic has not taken root at the DOL as the predominant institutional model.

The logic of comprehensive coverage. For a time, at least in high-wage industrial states, the number of federal inspectors was augmented by state labor departments with their own sizeable inspectorates. Our interviews with state wage and hour officials reveal that some states had a large inspectorate that divided up the turf geographically and systematically patrolled it, on the theory that firms would comply in part because they would anticipate inspection. This is what we think of as the third logic. As an example, when Carmine Ruberto, now director of labor standards enforcement at the New York Department of Labor, arrived at the agency in 1966, he joined a staff of more than three hundred inspectors. He was assigned to a small section of the Bronx and was expected to visit every business in his jurisdiction.³⁷ In New Jersey, Mike McCarthy, the recently retired head of the state Wage and Hour Division, told a very similar story about going door-to-door in the Newark business district when he first began as a labor inspector in the 1960s.

Resource constraints have taken this approach off the table. Today, state wage and hour divisions are much smaller and take an overwhelmingly complaint-based approach.³⁸

The logic of self-regulation. Over the past quarter century, the workplace has been a site for experimentation with various forms of “new regulatory” practice.³⁹ This is reflected in a trend toward self-regulation by firms in the arenas of health and safety standards, wage enforcement, and discrimination, among others. We refer to the idea that employers should monitor themselves as the fourth logic of enforcement.

Self-regulation made its first appearance at the DOL in 1969 with the WHD’s Compliance Utilizing Education initiative. Although this program was largely abandoned by the 1980s,⁴⁰ WHD revitalized the employer cooperation approach during the Bush era, approaching firms as the primary partners of WHD and further reducing reliance on penalties and court actions. During the mid-2000s, WHD initiated a series of “partnership agreements” with employers that largely involved outreach and education.⁴¹ A small number of these agreements provided guidelines for employers to monitor themselves or their contractors for potential FLSA violations. During this period, WHD signed agreements to a much lesser extent with other entities, including a very few worker associations and foreign consulates.

Scholars of self-regulation broadly recognize its limitations in a context of small employers and low-wage workers. For example, Ayres and Braithwaite acknowledge that small firms do not have the resources to undertake the enforced self-regulation that the two scholars otherwise strongly advocate.⁴² Legal scholar Cynthia Estlund, whose recent book calls for employee representation as a part of self-regulation in the context of low-wage work sites, likewise emphasizes the need for an ongoing role for government enforcement in the lowest-wage sectors.⁴³ We find further support for such concern in our reading of scholars who have assessed the implementation and impact of Occupational Safety and Health Administration's (OSHA's) self-regulatory programs and, on that basis, caution that such an approach is unlikely to be effective where unions are not present or where firms are small.⁴⁴ We share these concerns about the turn toward self-regulation. Without a consistently enforced public regime of penalties for noncompliance, self-regulation would likely contribute to the further degeneration of standards in low-wage sectors.⁴⁵

To conclude, then, while the first and second logics of complaint-driven inspections and strategic targeting remain essential to any government enforcement strategy, they have proven insufficient to address the problem of noncompliance in low-wage sectors. The third logic of comprehensive coverage is no longer a realistic possibility, and the fourth logic of self-regulation has limited use in the context of the lowest-wage work.

II. Imagining a Regulatory Regime

Our Proposal

How should we retool workplace enforcement? We believe that government must remain central to efforts to ensure compliance with minimum workplace standards, despite serious resource constraints. Since there will never be enough government inspectors to cover all low-wage businesses, we propose the creation of a system that draws on the complementary strengths of government and civil society organizations.

Our ideas build on the work of David Weil, whose core argument is that agencies such as WHD get stuck in enforcement patterns that are increasingly out of sync with the changed structure of work today.⁴⁶ To fix this, regulators need to figure out where the problems really are and shift resources there. WHD is impeded in this process by its tendency to focus on the largest firms in an industry⁴⁷ and by its overwhelming reliance on complaints.⁴⁸ Weil calls for WHD to take a strategic approach by targeting resources toward high-noncompliance industries and "to larger-scale industry or geographic initiatives . . . in order to enhance the deterrence and systemic impacts of their efforts."⁴⁹ He emphasizes the importance of regulatory action that interacts with networks of employers rather than single firms, crafted in ways that respond to the structure of particular industries.⁵⁰ With Pyles, Weil also argues for the need for a close relationship between regulators and labor-market intermediaries.⁵¹

In our view, an improved wage enforcement strategy for WHD would include a focus on *both* reactive (i.e., complaint-based) and proactive investigation strategies.

We share Weil and Pyles's concerns that complaint-driven approaches can divert resources from the most serious problems. So long as incoming cases are prioritized and resources allocated in a way that reflects their potential impact on the most serious problems, however, we see complaints as having an important role to play.

On the proactive side, we agree that a more successful regulatory approach would encompass *affirmative enforcement strategies specifically tailored to particular industries*, based on access to accurate and complete information about relevant actors and their practices. Another central element of a new regime would be *meaningful penalties, collected with enough frequency to generate real deterrence*.⁵² Our primary focus, however, lies in extending the reach of the inspectorate to increase the likelihood that firms in the low-wage sector will be actively regulated in the first place. The third and most important element of what we propose is to *augment labor inspectorates by giving public interest groups like unions and worker centers a formal, ongoing role in the detection of violations*. As noted earlier, employers have been an intermittent presence in the DOL's enforcement strategy for more than half a century.⁵³ We do not advocate abandoning this engagement with firms, although we might reshape it. Instead, we call for the missing leg to be added: a muscular role for third-party worker representatives who possess deep knowledge of specific industries or local labor markets and ongoing relationships with workers.

The Roots of What We Propose

Our idea harkens back to a logic of enforcement proposed during the debate about institutional design and modes of enforcement at the time of FLSA's drafting.⁵⁴ The original architects of FLSA argued that the law should be enacted not "to provide workers with affirmative rights, but because the lack of such regulation violated trade practices, giving sweatshop employers an unfair competitive advantage." To enforce the law, they proposed the establishment of a quasi-judicial agency, the Fair Labor Standards Board, modeled after the Fair Trade Commission, which would work with "enlightened employers and unions" who would "band together and help police sweatshop employers."⁵⁵ Continuing concern on the part of Roosevelt administration officials about how the Supreme Court would interpret the Commerce Clause,⁵⁶ pressure from southern Democrats and farm state Republicans to restrict coverage,⁵⁷ and opposition from American Federation of Labor (AFL) and Congress of Industrial Organizations (CIO) national leaders—who feared DOL wage-fixing powers would weaken private collective bargaining agreements—all contributed to the promulgation of a much weaker bill.⁵⁸

Lawmakers removed the unfair trade provisions, replaced the original proposal to set industry-specific wage standards with one overall minimum wage, and provided no regulatory role for unions. They established a weak quasi-legislative body under the DOL appointed by the president; made WHD dependent upon funds provided from the general budget of the DOL; and appointed inspectors through the civil service rules,

giving the WHD administrator little control over them. WHD had no authority to issue cease-and-desist orders against employers, and fines were set extremely low.

Despite union opposition to the original proposal, at the time of FLSA's passage the AFL still saw itself playing a central role in FLSA enforcement.⁵⁹ In fact, the enforcement provision of FLSA as passed by Congress allowed for opt-in class-action suits with a possible role for unions as worker representatives,⁶⁰ but Congress eliminated this possibility in the Portal to Portal Act in 1947. As Marc Linder recounts, by repealing the provision in FLSA that allowed workers to have a representative sue on their behalf, and requiring each person's written consent to be included in a class-action suit, Congress effectively barred unions from bringing class actions under FLSA.⁶¹

We further root our proposal in Ayres and Braithwaite's robust system of tripartism, in which, along with the government regulator and the firm, a "public interest group" such as a union or some other community-based worker organization is given a formal role in the regulatory process. Likewise, our proposal is rooted in Joshua Cohen and Joel Rogers's call for government to draw on "the distinctive capacity of associations to gather local information, monitor behavior and promote cooperation among private actors"⁶² by assigning enforcement duties as well as other roles to third-party groups. Cohen and Rogers identify the situation where the government has adequately set standards but is unable to monitor compliance because the affected sites are too diverse, numerous, and unstable—precisely the case in the low-wage sector—as a situation where the participation of third-party associations is particularly urgent.⁶³

Our Vision for the Partnerships

In the wake of the marked decline of union representation in the United States (and in the lowest-wage industries, where union density has always been minimal), scholars have rarely asked what workers' organizations and government agencies might do in collaboration. The exception has been Weil, who together with Pyles has affirmatively called for a role for workers' organizations in channeling complaints to regulators regarding health/safety and wage/hour violations.⁶⁴ While Weil and Pyles are persuasive in arguing that involving workers' organizations would increase the likelihood that the worst-off workers would complain of serious violations, we believe there are additional reasons such groups should have a role in enforcement. More importantly, we see the need for a detailed exploration not just of the *why* but the *how*: how might such collaborations be structured and how might they function?

There is a long but sporadic history of collaborations between government and civil society organizations in the context of the workplace. WHD has long experimented with partnerships with employers' organizations and has also attempted more limited collaborations with a few groups advocating for workers.⁶⁵ Several state departments of labor have gone farther in attempting ongoing partnerships with workers' organizations to enforce wage and hour laws, and a number of state attorneys general have launched innovative programs to combat wage violations, including at times joining with workers' centers and unions in particular industry-based campaigns.⁶⁶

Most of these examples, however, have been ad hoc rather than rooted in policy. As a result, they are perennially vulnerable to changes in political regime and agency leadership and to constraints imposed at times of budgetary belt-tightening. Many partnerships are campaign-based—that is, the parties come together only to target a particular employer or industry. What we offer here, first in the abstract and then in our three case studies, is a closer examination of what it might mean for the government to collaborate with workers' organizations in a sustained way, complementing its existing partnerships with employers. Much of what we propose could be implemented administratively, without any amendment of FLSA.⁶⁷

We start with the presumption that to have a meaningful impact on government enforcement, collaborations must be ongoing and robust. They must be *formalized* (so the parties openly negotiate their expectations of and commitments to each other, including regarding the distribution of resources; this is also important to render partnerships less vulnerable to changes in leadership), *sustained* (so that relationships between the staff of the agency and the organizations have time to build, increasing the resiliency of the bond in the face of conflict, and so that lessons learned can enrich the next stages of the collaboration), and *vigorous* (so that the role of third-party partners is not symbolic, marginal, or merely consultative but fully integrated into the work of the agency). The partnerships must also be adequately resourced—states must allocate enough staff to mount a credible effort and provide a threshold level of financial support to partner organizations that need it to fully participate.⁶⁸

Each partnership will work differently, depending on its context and goals and also on the political support it is able to garner. It is perhaps easiest to imagine the possible points of collaboration as a menu of options tied to core regulatory functions.

With regard to *outreach*, workers organizations might target local firms and groups of workers for informational visits and trainings. With regard to the *detection of violations*, the trust that worker centers command in immigrant communities, their links to immigrant networks, their linguistic and cultural competency, and the credible assurances they can provide that a complaint to DOL funneled through the center will not reach the ears of immigration authorities make it likely that a workers' center will hear of a violation before the government does. Beyond acting as a collection point for claims against employers, workers' organizations could proactively patrol the community, reporting evidence of violations to the agency and dramatically expanding the DOL's reach. To the extent that such groups were deputized to visit businesses, a possibility explored below, their presence on the beat would exponentially increase the chance that a firm would be inspected and, thus, raise the cost the rational firm expected to bear for violating the law.

With regard to the *filing and investigation of complaints*, one strategy would be to designate civil society groups as sites where workers could register complaints with the DOL. In the fullest version of the model, workers' organizations could file claims with the government on behalf of workers who remained anonymous, triggering an investigation without putting specific workers at risk. Such organizations could also

use their access to networks and community contacts to find prior employees of the firm and gather evidence to be used in the case.

With regard to *designing proactive strategies for enforcement*, workers' organizations could use the knowledge of their members to help identify the industry-specific leverage points necessary to move forward with "regulatory jujitsu" strategies to increase compliance that are retrofitted to the structure of particular industries.⁶⁹ A complementary approach would be to key a collaborative strategy to violation levels. Under this approach, when compliance fell under a certain percentage in an industry, the DOL would convene a task force for that industry—with representation from the agency, employers, and workers' organizations—to analyze the relationship between the structure of the industry and widespread violations. The task force would then create and implement a proactive plan to increase industry compliance. Alternatively, when workers' organizations identified an industry with high levels of violations, they might initiate a joint campaign with the DOL to target that industry.

With regard to *ongoing deterrence*, ultimately we believe that monetary penalties must be drastically increased and applied frequently, license revocation must be a meaningful possibility, and statutes of limitations must be either abolished or dramatically extended. We maintain this despite powerful arguments by prominent regulatory scholars that strategies based too much on punishment can engender a "subculture of resistance to regulation wherein methods of legal resistance and counterattack are incorporated into industry socialization."⁷⁰ In Ayres and Braithwaite's model of responsive regulation, regulators work their way up a pyramid of enforcement techniques, beginning with persuasion and only reaching significant penalties after all else has failed.⁷¹ They argue that drastic punishment as a first resort will backfire, because inspectors will think the penalties do not fit the crime and will not use them. If the third logic of comprehensive coverage were in effect, we would endorse this model. But many of the firms in the low-wage sector are unlikely to ever be visited by an inspector, let alone effectively monitored over a period of time. Ayres and Braithwaite recognize this problem and argue for "making an example of a cheat in a single episode by iterated escalation of punishment."⁷² We agree that escalation is the right approach in a world of repeat encounters between regulators and regulated firms. But in a setting where there are few repeat encounters, a more assertive approach is required to disrupt the status quo. As an initial stance, inspectors must make clear that systematically noncompliant firms should expect to pay a high price immediately (even if they eventually negotiate something less painful in exchange for broad behavioral change). This approach should be sustained until a new set point of compliance is reached.⁷³

How likely is it that what we propose here could be executed in reality and at a meaningful scale? As a first step in answering this question, we identified cases of formalized partnerships between workers' organizations and government agencies that seek to raise levels of compliance with prevailing wage or minimum-wage laws. In the next section, we describe each partnership, highlight the components that seem most promising, and note concerns that have emerged over the course of the collaborations.

III. Three Case Studies

Los Angeles Unified School District and Board of Public Works Deputization Programs

Description. Since 1996, the Los Angeles Unified School District (LAUSD) has administered a program that trains *and deputizes* business representatives of building trades unions to enforce the prevailing wage on district projects, which are funded by nearly \$30 billion in school construction bonds.⁷⁴ The program grew out of a commitment that building trade unions “would not strike over issues on jobs if the LAUSD would set up an internal compliance enforcement department,” according to Richard Slawson, executive secretary of the Los Angeles County Building and Construction Trades Council, AFL-CIO.⁷⁵ In 2004, a similar program was established by the Los Angeles Board of Public Works (LABPW), which in that fiscal year had oversight over 308 projects with a value of close to \$339 million.⁷⁶

The in-house Labor Compliance Program⁷⁷ of the LAUSD trains business agents as work preservation volunteers (WPVs); provides them with identification badges and business cards; and authorizes them to enter school sites to “conduct labor compliance site visits, interview workers on District property . . . and assist with audits, hearings, and review conferences.”⁷⁸ The LABPW’s deputized inspectors, called compliance group representatives (CGRs), are similarly trained and badged. Both programs seek to make business agents the “eyes, ears and foot soldiers” of city inspectors.⁷⁹ Agents interview employees about hours worked, wages, job classification, official duties, and problems receiving pay, and they fill out wage-complaint forms with workers on the spot when violations are found. They do not determine violations or assess penalties but provide the raw data that city inspectors use to put together cases. They must attend trainings and renew their badges each year. “The authorization is everything,” says Slawson. “If you go out there badged by the agency responsible for enforcing prevailing wage they have to cooperate.”

Both of these programs had to overcome initial opposition to the idea of union participation from city officials. According to John Reamer, director of the Bureau of Contract Administration, labor compliance managers and contract administrators had two major reservations about the program: that building trades unions would target nonunion contractors rather than enforcing prevailing wage, and that it would interfere with the inspectors’ control over access to the job site, providing contractors with an excuse for delays. In addition to management’s concerns, line inspectors worried that the program reflected an intent to eventually subcontract out their jobs.⁸⁰

To forestall objections that business representatives would advance a union-organizing agenda, they are required to sign an agreement prohibiting using the program to promote or gather intelligence for the union, disparage nonunion contractors, or review project data not associated with a pending complaint.⁸¹ Union representatives have almost always complied with these prohibitions. Mark Hovatter, director of contracts for the LAUSD, says that out of two thousand contracts in five years he had “probably a dozen” complaints.⁸² Since initiation of the LAUSD program, one-third of

the repeat contractors working with LAUSD continue to be nonunion. Likewise, in four years of the LABPW program's operation, there have been ten total violations of the similarly constructed Rules of Engagement. Government administrators believe that business agents view the ability to combat unfair competition as a strong enough incentive (and the risk of having their badge withdrawn a strong enough disincentive) to avoid abuse.

CGRs and WPVs have been extremely proactive, effectively operating as LAUSD's and LABPW's directed enforcement team.⁸³ The programs have significantly extended the capacity of the city inspectorate, traditionally focused on quality of workmanship rather than labor compliance.⁸⁴ In 2009, the 85 CGRs expanded the LABPW inspectorate of 244 by more than 30 percent. Over four years, the Office of Contract Compliance has had 742 requests from CGRs to visit 168 work sites, granting 559 of them. These visits resulted in 1,155 interviews, which turned up 161 cases of possible underpayment of wage violations.

Ultimately, department leaders say their fears of union misconduct did not come to pass and that the program has been a great boon for them. Chris Jenson, a top official who has been at the Bureau of Contract Administration from the beginning of the program, states, "I was initially the biggest opponent, however the program has been very successful and there have been very few and very minor problems."⁸⁵ Likewise, Reamer has been so happy with the program that he is "looking to take it citywide." "For us, it was a great wedding in the sense that we have limited staff, and we got knowledgeable volunteers from the trades," he said. While LABPW leaders do not feel they can state categorically that the program discouraged contractor misbehavior, they felt that the program enabled them to identify more of it. Furthermore, Reamer noted, the program augments public resources, especially important following an almost 50 percent reduction in the LAUSD's labor compliance staff since the financial crisis.⁸⁶ The programs have attracted no organized opposition, and the state Division of Industrial Relations and the city of Los Angeles have lauded the LAUSD initiative.

Inspectors' attitudes toward the CGRs have likewise shifted dramatically, according to Jenson. "When the program began, one of the inspectors said to me there is no way in hell I will ever let one of these guys come onto one of my jobsites. . . now I get calls from the inspectors asking can you send one of those guys out? Can you send someone who speaks Spanish or Korean? Very often, I can come up with someone."⁸⁷ In one wage underpayment claim, for example, CGRs were able to expand the case from two workers to twelve: "My case went from fair to phenomenal," said Jenson. The availability of CGRs has been especially valuable for weekend coverage. Furthermore, CGRs have made the inspectors more representative. According to Slawson, while African Americans are still underrepresented, virtually all trades in Los Angeles today have quite significant Latino memberships, and most reflect this in the ranks of their paid staff.

Assessment. The LAUSD and LABPW programs in many ways represent the strongest version of what we call for. They are ongoing rather than campaign-driven, with the feel of deputies walking an industrial beat. That the program is enshrined in public law, rather than operating as a project of a particular administration, speaks well for its

permanence. In addition, these programs are a good example of Weil's "regulatory jujitsu" approach: they benefit from business representatives' knowledge of sector-specific dynamics; are contoured to the set of rules and regulations that apply to public construction; and have access to vast quantities of information due to the requirement that contractors register with the city and submit copies of their payroll weekly, as well as through the public bidding process, which makes detailed data about labor and materials costs available for each bid.

What is most exciting about the Los Angeles Joint Labor Compliance Monitoring programs is the formal power wielded by the labor volunteers as a result of deputization. Although there have been labor-management compliance groups in the construction industry for years, contractors can refuse them access. The fact that the city vests CGRs with formal authority means that contractors are more likely to treat them as they would treat city inspectors. Although the programs are unfunded, the participating unions are willing to fund their own participation because their incentives are closely aligned with the program requirements. Union members benefit directly when union contractors are not underbid through false means.

Our principal concern is that it is difficult to tell whether the programs have reduced the number of prevailing-wage violations in Los Angeles. There is no clear pattern in the annual data before and since the creation of the labor-compliance programs.⁸⁸ On the other hand, while LABPW officials were more equivocal, LAUSD government administrators were absolutely certain that compliance had increased significantly as a result of the program. If the program is not yet reaching its potential for impact, one issue may be inspectors' reluctance to use available penalties. When prevailing-wage laws are violated, California law provides for fines and liquidated damages, withholding of contract payments,⁸⁹ and eventual debarment (removal from the list to get public work). In practice, Reamer notes, the penalties actually assessed in the majority of cases are not severe enough to remove the incentive a contractor has to cheat. "Debarment more is what it would take [to raise compliance levels]," says LABPW's Jenson; but debarment is much more time-consuming than other avenues, which has limited his department's use of that route.⁹⁰

An additional concern about this model relates to the fact that, historically, building trade unions have excluded African Americans and other people of color from their ranks. Although the trades in Los Angeles have begun to address this problem, tensions persist, and in many cities this is still a major issue. Among other problems, this could result in a lack of representativeness among deputies and make communication with non-union workers difficult.

Partnership between the California Labor Commission's Janitorial Enforcement Team and the Maintenance Cooperation Trust Fund

Description. In 2006, California's Division of Labor Standards Enforcement (DLSE) established its Janitorial Enforcement Team (JET), which includes an attorney, a criminal investigator, three deputy labor commissioners, and three partners from the

Employment Development Department. JET has a close working relationship with the Maintenance Cooperation Trust Fund (MCTF), a janitorial watchdog organization established in 1999 by Local #1877 of the Service Employees International Union and its signatory contractors. JET was established by the state in response to pressure from MCTF and other advocates, following revelations of persistent violations in the janitorial industry. A multiagency janitorial task force set up by the Los Angeles District Attorney's office provided one early model.⁹¹ Lilia Garcia, Executive Director of MCTF, sought its replication at the state Department of Labor.⁹² Instead, in 2005 Governor Schwarzenegger initiated a statewide coalition focused on a few low-wage, sub-contracted industries, including janitorial. MCTF grew frustrated with the coalition's practice of using sweeps to find easy-to-identify violations, rather than the thorough investigations necessary to uncover unpaid wages. Eventually, the acting Labor Commissioner agreed to establish JET to focus on janitorial wage and hour violations.

The argument for JET was that policing the janitorial sector required inspectors with specific knowledge of industry structures and strategies. Henry Huerta, the veteran inspector placed in charge of JET, argues, "In order to be effective, you have to understand the method of operation of a particular business, how subcontracting and franchising agreements work, and to do that, the whole system needs to be understood."⁹³ According to MCTF, there are more than twelve thousand janitorial companies in California, but only half are registered with the state as legitimate businesses. In the supermarket sector, for example, large chains routinely contract janitorial work to cleaning contractors, which subcontract the actual work at a significant reduction to labor recruiters. "If you did the math, [with] what the contractor paid [it] would be almost impossible for a labor subcontractor to comply with minimum wage, overtime, meal and rest periods and workers compensation insurance for these workers," explained Huerta.⁹⁴ Under CL 2810, an innovative California labor law adopted in 2003, it is illegal to subcontract services without adequate funding.⁹⁵ For the DLSE to bring cases under this provision, however, workers needed to come forward with qualifying claims.⁹⁶

It is here that the partnership with the MCTF has proved essential. JET alone represents an important innovation, but it would not have succeeded without the MCTF, whose twelve inspectors—many of them longtime janitors—more than quadruple JET's investigative capacity. MCTF provides state inspectors with specialized industry knowledge. In addition, of the three cases presented here, MCTF is the only organization that is employer-funded.⁹⁷ The forty unionized employers who participate in MCTF have a self-interest in policing the industry. Employers, who also include non-union contractors, are strongly engaged in the program.

MCTF plays a critical role in helping to assemble the documentation necessary for the state to bring cases. Understanding that few workers will come either to them or to government, MCTF inspectors routinely go out to worksites at night, during janitors' peak working hours. They identify the full scope of the subcontractor's operation and build cases through systematic "reconstruction" when workers lack pay stubs. They identify and interview each worker, determining which contractor employed him or her,

and establishing the dates and hours worked. They use the state's formula to create a "wage audit" estimate of what the worker is owed. Through MCTF's work, inspectors know what the payroll *should* look like, and have a group of flesh-and-blood workers willing to bring cases.⁹⁸ Where government inspectors were reluctant to exercise their authority to demand wages on behalf of all employees of a firm, saying they could not identify workers who had filed claims, MCTF suggested subpoenaing contracts and seizing work schedules posted in subcontractors' homes to figure out staffing.

While JET's inspectors must still carry out independent investigations, MCTF provides them with much of the raw material. JET investigators now accept cases from MCTF as opposed to requiring that workers approach DLSE directly.⁹⁹ This is a significant departure from the past, when the overwhelming message, according to Huerta, was that investigators were not supposed to accept information from organizations or work cooperatively with them. In his view, JET has been able to overcome this obstacle because inspectors have come to view MCTF's work as making their own jobs easier to do.¹⁰⁰ Frank Capetillo, an investigator assigned to JET from the beginning and now in charge of it, agreed that MCTF's work has been very useful. Nonetheless, Capetillo stresses the need for government inspectors to maintain their independence: "Many times these organizations are quite adamant about what they want you to do with your cases. . . . You don't want to end up working for them."¹⁰¹

Garcia and Huerta argue that the partnership has galvanized government inspectors to pursue violators much more aggressively. Capetillo corroborated this view: "I understand the industry a lot more and the schemes that are behind the violations that employers are doing because I have concentrated on this program."¹⁰² Garcia also believes that JET inspectors have become more invested in improving the enforcement process.¹⁰³ In an example of JET's increasingly proactive approach, state attorneys are becoming involved much earlier in the life of the case rather than waiting until a complaint is filed.

Other issues have proven more contentious. State law permits JET to pursue joint employer cases, holding liable all entities that share the status of "employer." DLSE and MCTF disagree, however, about how many of twelve factors indicating joint employment must be present in order for a case to be brought. Garcia has been frustrated by the state's reluctance to pursue such cases, which she believes to be the real key to transformation in the restaurant and big-box industries.

Since the partnership began, there have been an unprecedented number of administrative, civil, and criminal actions brought against unscrupulous employers, resulting in more than \$38 million in back pay for janitorial workers. In 2007 the State Labor Commissioner and the attorney general filed charges for \$5 million in nonpayment of wages against two janitorial contractors for several restaurant chains.¹⁰⁴ In 2008, the Labor Commissioner filed the first suit under CL 2810 against a major building service company for close to \$2 million,¹⁰⁵ and in 2009 the Labor Commissioner sued Corporate Building Services and its subcontractors for approximately \$7.4 million.¹⁰⁶ As an indication of the impact JET has had, Capetillo points to large companies that provide janitorial services to the hotel industry, which have abandoned contractors that JET has found in violation of the law and now "look for companies that are in compliance." Garcia and

Huerta also point to the partnership's work in the supermarket sector, which has cost stores \$22 million and ultimately resulted in 3,000 janitorial jobs being brought back into the formal sector, as supermarkets, too, began to closely scrutinize contracts.¹⁰⁷

Assessment. This partnership provides a compelling picture of how ongoing collaboration between a state agency and knowledgeable third-party organization can work on the ground, *without deputization* but with intensive collaboration and mutual trust. Just as the LAUSD and LABPW examples violated an old taboo against deputization, this partnership challenges ingrained agency opposition to close cooperation, including accepting documentation developed by third parties. This case is particularly noteworthy for the way the collaboration has overcome information barriers in the private sector. The murky world of janitorial subcontracting bids and payroll records occupies the opposite end of the spectrum from the prevailing-wage contracts in publicly funded construction, but MCTF investigators have developed an impressive capacity to reveal the inner workings and interrelationships of employers. This ability is essential to JET's success, and it is concentrated much more in the hands of MCTF than the state. This program is also an excellent example of "industry jujitsu" in two regards: its industry-specific nature (including attention to the differences between subsectors such as restaurants vs. supermarkets) and its coupling with a specific penalty in the form of CL 2810.

While the partnership is clearly having an impact, to definitively shift the cost-benefit calculations of companies, more of the rest of the state's field enforcement program would need to be modeled after this program, and it would need to be augmented with a streamlined wage-complaint process, criminal referrals, and increased fines and penalties. To date, according to Huerta and Garcia, JET has not catalyzed the establishment of similar teams for other low-wage industries. Garcia and Huerta both said that MCTF has worked best with ground level deputies and is most likely to incur resistance from middle managers. They felt that overcoming this resistance would take extremely strong leadership from the top of the agency, which has not been forthcoming.¹⁰⁸ Our own interviews confirmed this view. When asked whether he viewed JET as a model that other state departments of labor should adopt, Dean Fryer, a spokesman for the Department of Industrial Relations, was cautious: "As a general approach, I don't think it would be the way to go . . . there are violations in all industries—we have to be able to address them and to concentrate staff in one industry pulls staff away from other areas."¹⁰⁹

Our final concern has to do with the long-term political viability of the program. Of the three cases, this is the only one without a formal agreement between government agents and the outside partners. Furthermore, as in the New York case that follows, JET was established by a specific administrator and could be discontinued or curtailed in its work by a less favorably inclined appointee.

New York Wage and Hour Watch

Description. The Wage and Hour Watch (W&HW) program of the New York State Department of Labor is a formal partnership between the DOL and six organizations¹¹⁰

to conduct oversight in specific geographic areas with heavy concentrations of low-wage employers. When we were researching and writing this article, W&HW was at an early stage. As a result, our discussion of W&HW relates to the program design rather than to outcomes.

In the summer of 2009, DOL and the groups signed a memorandum of agreement committing the organizations to identify and train at least six individuals to serve as “Wage and Hour Watch Members” for two years. In their “Wage and Hour Watch Zone,” members provide at least fifty businesses per quarter with labor-law compliance brochures, and hold informational sessions about labor laws for the public. W&HW groups are also charged with referring potential labor-law violations to the DOL. Members will not, however, carry out inspections.¹¹¹ The memorandum of agreement commits the DOL to providing members with training and outreach materials with space for the organizations’ contact information. DOL commits to designating a W&HW contact within the Division of Labor Standards to administer the program, taking complaints and communicating with organizations regarding the status of investigations “to the extent allowable by law,” providing a page on the DOL’s Web site that describes project participants and their areas of work, and participating in quarterly telephone calls with the groups. DOL has weathered deep budget cuts as a result of the fiscal crisis, and so is unable to provide any funding to participating groups.

W&HW has its roots in eight years of close collaboration between government officials and a set of worker centers and unions that began under Eliot Spitzer when he was elected attorney general in 1998 and continued when he became governor in 2007. Lawyers in Spitzer’s Labor Bureau had worked with unions and worker centers in an effort to ratchet up labor-standards enforcement in low-wage, immigrant-heavy service industries, including green grocers, small retail chains, restaurants, dry cleaners, and laundromats. Shortly after becoming governor, Spitzer appointed Patricia Smith, architect of the Labor Bureau’s low-wage worker initiatives, to be commissioner of labor (Smith is now solicitor general at the U.S. DOL). Smith hired several veterans of the Labor Bureau to work with her at NYS DOL, and they brought with them the relationships with community partners and the strategic repertoires they had forged during their years at the attorney general’s office. Several top staff came from the ranks of worker and immigrant-advocacy organizations; although now government employees, they perceived the low-wage labor market through activist eyes. In another indication of their high regard for advocates, NYS DOL implemented a number of administrative and policy suggestions from a wage-theft coalition organized by the Brennan Center, an NYU-based research and policy think tank.¹¹²

During deliberations over models, DOL rejected the idea of any kind of deputization of members proposed by the participating groups. In the context of a powerful union representing the inspectors and an entrenched culture in the inspectorate, it did not make sense to DOL leaders to push deputization.¹¹³ The organizations also realized that deputization might pose difficulties, since some of their more active members were not legally authorized to work in the United States. DOL also has no plan to prioritize cases that originate through W&HW, because the department says it has already instituted a

triage system meant to ensure that the most serious cases are addressed first.¹¹⁴ There is likewise no explicit plan for DOL to follow members' neighborhood canvasses of employers with formal sweeps (although this could change), but employers receiving brochures through W&HW will be considered to have been educated about the law, facilitating the DOL's ability to consider them willful violators subject to additional monetary penalties.

NYSDOL and the groups describe their effort as a "neighborhood watch" model. According to Deborah Axt, director of legal and support services at Make the Road New York, one of the participating organizations, the conception was "people who live in a neighborhood, and care about the safety of the neighborhood . . . organized to keep tabs on what is happening in the neighborhood, to keep an eye out for danger and . . . to be able to trigger some enforcement activities by government."¹¹⁵ While there is no clear-cut theory in terms of exactly how the effort will result in deterrence, the overall goal is to educate employers, raise the profile of wage violations, and unearth increased numbers of strong cases, which—once pursued by the DOL—will send a message to some type of *community* of employers who will respond by coming into compliance. Deputy Commissioner Terri Gerstein, who is in charge of the program, also feels that with more of a neighborhood presence there is also a greater likelihood that workers who would have otherwise been reluctant to complain will come forward.¹¹⁶

Assessment. What we find most compelling about W&HW is its conception of continuing partnerships, involving parties that already have a long history of working together. The formal agreement provides an accountability mechanism and a baseline to improve through experience working together. W&HW will also increase the number of people "walking a beat" in low-wage labor markets, potentially exponentially. Because members are drawn from the same linguistic, ethnic, and cultural groups as workers and come from organizations rooted in specific geographic, ethnic, occupational, or industrial sectors, we would rate highly their ability to uncover problems and generate complaints.

The fact that the partnership agreement is not explicit about groups taking responsibility for delineated sectors might be of concern, because we are persuaded that the most effective strategies respond to industry dynamics and take advantage of industry-specific regulatory frameworks. However, so far most of the partner groups are themselves sectorally focused. In addition, we need to be realistic. Union density is low in many low-wage industries, and community organizations and worker centers (the most likely actors to respond in unions' absence) work across a wide swath of the low-wage labor market. Such organizations could still partner with the state's strategic enforcement division to target specific industries, using industry-specific tools.

We wonder, though, whether the state has committed enough from its side. Organizations already making do on lean budgets commit to add additional work without any more resources. This is of particular concern since W&HW is the only one among our case studies that involves worker centers as well as unions. Unlike unions, worker centers often have very small budgets and depend on foundations for the vast majority of their financial support. While unions may be able to build walking a beat

into their daily work funded through member dues, for worker centers and other community organizations, the day-in and day-out work of policing—the aspect of W&HW that we expect to be the most critical—is the least fundable through philanthropic dollars. It is appropriate, and in fact routine in other fields of endeavor, for private organizations that accept responsibility for important public work to receive state funding. This is not to say that organizations gain nothing from an unfunded partnership. In addition to a potential strategic boost, the worker centers also gain an imprimatur of legitimacy through the program, which in turn can be helpful with private fund-raising.

While dramatic shifts have taken place at the top of the NYS DOL, thorough institutional reform of the inspectorate is at an early stage. We understand that when conflicts occur between organizations and inspectors, W&HW members have access to highly placed individuals to whom they can appeal and get quick action to fix specific cases.¹¹⁷ The key question is whether DOL is able to institutionalize a culture of aggressiveness, creativity, and partnership within the inspectorate itself and not just among top leadership. Furthermore, given that the program is so dependent on the relationships and commitments of the actors currently involved, we have concerns about its sustainability in future administrations.

Finally, at this early stage, it remains an open question whether W&HW will generate the deterrence it aspires to. W&HW members have little power. Mostly they will do educational outreach to employers and workers, with no additional tools to increase compliance. We are heartened, however, that the DOL has administratively implemented several strategies for ratcheting up the costs of noncompliance. Another hopeful sign involves an effort to bring about an internal shift in culture, from one favoring settlement with employers—usually at a ratio of about ten cents per dollar owed—to one that stands firm, requiring much higher payment amounts to settle and taking employers to court if they refuse.

IV. Answering Objections

The preceding three cases embody many of the features of the robust partnerships proposed. All have the potential to be sustained rather than campaign-delimited, to at least potentially involve substantive activities being carried out by groups, and to require substantive collaboration with government inspectors on an ongoing basis. Two of the three are officially chartered projects with clear administrative procedures and agreements that the parties must sign.

With these examples on the table, we are in a better position to give serious consideration to objections that our proposal raises.

Objection 1: Political Infeasibility

The most straightforward objection to what we propose is that it is likely to generate political resistance, particularly at the federal level. While we do not envision our

model being implemented wholesale in the next few years, the growing number of experiments at the local and state level allows us to respond to political objections with concrete evidence.

One political objection relates to the fear that the workers' organizations would abuse the power granted to them. For example, the deputization idea has recently been characterized as "government-approved vigilantism."¹¹⁸ Yet while a vigilante is a person who takes the law into his or her own hands, our proposal is for unions and worker centers to use legal means of bringing companies to justice. In every case we have studied, and in the model we propose, it is the government, not the organizations, that determines whether a case merits further investigation by a labor inspector, and ultimately whether to levy fines and penalties. There has also been resistance to the idea that unions and other workers' organizations can play a meaningful role in preparing cases for the government to pursue. Yet for three years, MCTF's investigators have been reconstructing payroll records and putting together cases for use by government inspectors. There is no indication that they have provided incorrect information or acted inappropriately. All evidence points to their contributions to the substantiation of claims and ultimately to a change in employer behavior in the industry. A related concern is that unions and worker centers might lack a nuanced understanding of how the regulations they seek to enforce play out in real life: that they will see in black and white rather than shades of gray. While we agree that wage and hour laws are complicated, unions and especially worker centers have built up tremendous tacit knowledge about specific industry structures and practices, as well as the subtleties of applying wage and overtime statutes that can vary significantly between industries.

Opponents might also object that monitors from labor unions could use the program to pursue unionization or to protect a closed shop. As we note above, these concerns do not appear to have been borne out in practice in our case study that involved deputization. That one-third of repeat contractors in both the public works and school construction areas in Los Angeles were nonunion both before and after the program supports the claims administrators made that the programs have not resulted in closed-shop hegemony. In fact, we think it is advantageous that unions and unionized firms have a very strong incentive (and often the resources) to police the labor market in industries where they have a presence in order to eliminate unfair competition. If firms are compelled to respect minimum-wage and overtime laws, they will be forced to compete on bases other than savings gained through violations of the law. There is no guarantee, however, that their employees will be any more likely to choose to affiliate with a union.

A related objection is that giving unions a role in enforcement will be giving them a tool to intimidate employers and will lead businesses, especially small businesses, to feel threatened and "outgunned" by big unions. In an era in which a majority of firms in certain sectors are not complying with basic wage and hour laws—and in which it has become normal for firms to engage in illegal activity to resist unions—it seems somewhat disingenuous to worry that employers must be protected from powerful unions. In addition, historically, most mainstream American unions have had a direct incentive to preserve firms' ability to remain competitive and have often mobilized to

defend the economic interests of the industries in which they are embedded. It is also important to recognize that we are discussing the enforcement of minimum protections set substantively at a very low level compared to average wages in the United States. It may be that in emerging market democracies, the need for jobs is so dire that it overshadows the need for labor enforcement.¹¹⁹ However, in the United States, it is clearly in the public interest that firms competing on the basis of underpayment of minimum wages be prevented from doing so, even if this means they go out of business.

A final political argument might be that our model represents a radical departure from American regulatory tradition. We believe it does not. From the recent increase in voluntary organizations playing a role in government social service delivery programs, to the DOL's own tradition of collaboration with employers, the line between public and private is more fluid than it has sometimes been painted. Indeed, there have been examples of formal grants of government power to private groups at the federal, state, and local levels going back to the early 1800s.¹²⁰ During the 1930s, when New Deal programs provoked interest in the matter, scholars asked whether such delegation might in some way violate the Constitution.¹²¹ Their greatest concern, however, was reserved for delegations of power that permitted private groups to participate in the *setting* of rates or standards, as opposed to the cases we discuss, where third parties are enlisted in *enforcing* standards that have already been set through the legislative process. For example, the American Society for the Prevention of Cruelty to Animals (ASPCA)—established as a nonprofit organization by the New York State legislature in 1866¹²²—involves the complete delegation of law-enforcement authority to a private group without any standard-setting power. It has survived a number of legal challenges.¹²³ In another example, the Agricultural Adjustment Act of 1938 delegated to elected committees of farmers the power to administer price- and income-support programs, including inspecting stored commodities and making compliance determinations, for which they were paid a modest salary.¹²⁴

Objection 2: The Public/Private Distinction

Some might object that the model we propose will only work in a prevailing-wage setting, with its public funding, public bidding processes, strong penalties, and substantial union footholds. And yet we think it has potential in a range of other nonfoot-loose sectors of the domestic economy as well. As we note in the introduction, low-wage service-sector jobs tend to be configured in steep hierarchies, with the least power concentrated in the subcontractors and with larger entities such as retailers, owners, or brands at the top. This power structure and the repertoire of labor-standards challenges that accompany it provide opportunities for our model to be broadly applied, as long as inspectors are able to address the dynamics of specific industries.

The rationale for a high level of scrutiny on public job sites has been twofold: wages paid by the state should not undercut local wage standards, and projects paid for with state money should be held to the highest safety standards. It is time to rethink old orthodoxies of public and private. The fact that deputization has worked so well in the public sector

ought to encourage its extension to the private sector, especially in industries with very high levels of noncompliance. Wage-and-hour and health-and-safety laws apply to all workplaces, not just public ones. Private employers have public obligations, and private noncompliance has public consequences. Tax money funds the infrastructure private sector employers rely upon; safety problems invariably have fiscal implications, and so, of course, does the nonpayment of wages, workers' compensation, or payroll taxes.

A final public/private question relates to funding. If additional resources could be made available by the state, why not just hire more government investigators? Although we do believe strongly in expanded inspectorates at both the federal and state levels, we also believe that directing additional resources to third-party partners, along with the government staffing necessary to support them, would bring benefits to the inspection program that could not be realized through government inspectors alone, because of the parties' complementary strengths. Furthermore, revenue generated by innovations designed to address the problem of inadequate penalties could be channeled directly to the organizations that worked with them on the case in question. This would represent a sort of "bounty" that would give organizations an additional incentive to seek out the worst violators.¹²⁵

Objection 3: Only Unions Are Suited for the Partnership Role (but Unions Are Scarce)

Given that unions have political pull, a strong self-interest in enforcement, and a normative commitment to workplace standards, it is no coincidence that all three of our cases involve unions and union employers. These cases seem to closely align with the original conception of how FLSA enforcement would work. But what about industries and labor markets where union presence is very low? Only one of our cases (W&HW) also involves workers' organizations that are independent of unions.

In many low-wage sectors, particularly those with a heavily immigrant workforce, worker centers seem to be in a good position to partner with the government. In previous work, we have chronicled the rise of worker centers, which have grown from just five in 1992 to approximately 170 in 2009.¹²⁶ While worker centers are not substitutes for unions, one of their most important functions has been calling attention to widespread labor-standards violations and providing legal and organizing support for some of the worst-off workers to seek redress. In fact, even in labor markets and industries that are partially unionized, it is often the worker centers that have more activist organizing models and deeper relationships with workers.

We do note that there is a significant difference between worker centers and unions regarding their relationship to employers. Because worker centers in general do not negotiate collective-bargaining agreements on behalf of workers, they do not share a set of interests with a group of employers as unions do once they have organized a meaningful segment of an industry. As a result, they may be less sympathetic to employers' concerns. There are some recent indications, however, that this is changing: for example, the Restaurant Opportunities Center of New York (ROC-NY) has been instrumental in

bringing high-road employers together to establish a new restaurant association, and worker centers organizing with the Laborers' International Union of North America (LIUNA) in residential construction and weatherization are also forging relationships with union signatories in the industry. Additionally, we have often heard concern expressed among day laborer centers that efforts to improve conditions through the formalization of hiring not go so far as to eliminate day labor entirely.

...And the Perennial Question of How Institutional Change Takes Place

Ultimately, whether these programs are enacted and whether they are successful will depend, to a large extent, on politics. Political power is how the Los Angeles Building and Construction Trades Council was able to create the LAUSD program in 1985 and expand it to Public Works in 2004, and it is the reason a liberal Democrat was elected governor of New York and was then able to put in new leadership willing to experiment at the state DOL. In asserting that politics is the bottom line, however, we do not mean to imply that the challenges stop at the agency door. A new mayor or governor must bring about change within the bureaucracy. How do prevailing norms and assumptions shift within government agencies or, for that matter, any organizational entity? We think careful documentation and dissemination of results through professional associations like the Interstate Labor Standards Association—along with the establishment of creative programs of internal education and training—are important to demonstrate that innovative programs are actually effective.

Furthermore, we know that organizational cultures can be major barriers to innovation, and that road blocks to implementation arise based upon failures of communication¹²⁷ and from competing sets of interests and power differentials within agencies. If attention is not paid to radically rethinking protocols and shifting incentives on the inside, change at the top will never be enough.¹²⁸ As Piore and Schrank as well as Bardach and Kagan have observed, in reaching an understanding of a state agency, it is critical to develop a sense of the institutional regulatory practices that are entrenched in regulatory bodies.¹²⁹ Our conversations with labor-standards administrators in New York, New Jersey, and California affirm the centrality of the challenge of organizational culture.

Conclusion

In this article, we have tried to understand the different systems of labor-standards inspection that have emerged over the past seventy-plus years and to identify promising contemporary strategies for improved compliance. Ultimately, our case studies brought us back to the logic that architects of FLSA had in mind so many years ago: the direct participation in enforcement of organizations with the greatest incentive to police their labor markets. We find that worker centers and unions have access to information about sectors that are otherwise hard for the government to penetrate,

knowledge about industry structures, and the capacity to reach workers and document complicated cases. Our three examples illustrate they have the incentives to want to be helpful and that, when entrusted with authority, they wield it responsibly.

We understand that some may view these proposals as too large a pill to swallow. We stand strong on our argument that it was a mistake to abandon tripartism as a part of the package of approaches available to government agencies, but we do not see wholesale deputization as required in every case. Partial versions of our proposal could have a significant impact. In fact, the MCTF-JET collaboration, which involves extensive collaboration but no formal deputization, is an example of a highly effective partial approach. The bottom line is that marginal increases in the wage and hour inspectorate alone will be insufficient to solve the problem. In the absence of creative strategies nested within clear logics of detection and deterrence at both state and federal levels, rates of compliance with minimum-wage and overtime laws are likely to remain where they are.

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Notes

1. Our definition of low-wage workers is drawn from Lawrence Mishel, Sylvia Alegretto, and Jared Bernstein of the Economic Policy Institute. Low-wage workers earn less than the hourly wage that would lift a family of four above the poverty threshold, which was \$9.60 an hour in 2005, given full-time, full-year work. Lawrence Mishel, Jared Bernstein, and Sylvia Alegretto, *The State of Working America 2006/2007* (Ithaca, NY: Cornell University Press, ILR Press, 2007).
2. Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (New York, NY: Center for Urban Economic Development, National Employment Law Project; and Los Angeles, CA: UCLA Institute for Research on Labor and Employment, 2009), 2.

3. U.S. Department of Labor, Wage and Hour Division, *1999-2000 Report on Initiatives* (Washington, DC: U.S. Department of Labor, 2001), 7-9.
4. The traditional understanding of tripartism is labor, business, and government working together. Here we are referring to a specific proposal for a republican form of tripartism put forward by Ian Ayres and John Braithwaite in *Responsive Regulation*. Their idea of tripartism is a process in which relevant public interest groups (PIGs) become what they refer to as “fully fledged third player[s]” in the game of regulation. Tripartism allows PIGs to participate in three ways: (1) it grants them and their members access to all the information that the regulator has, (2) it gives the PIG a seat at the negotiating table with the firm and agency when deals are done, and (3) PIGs are granted the same standing to sue or prosecute under the regulatory statute as the regulator. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, NY: Oxford University Press, 1992), 56-60.
5. This language of an overall system was suggested in a very helpful conversation with Michael Piore, October 2009.
6. As was the case with pensions and other welfare-state policies, state laws preceded the federal. State factory laws were enacted as early as the 1860s. State minimum-wage laws began with Massachusetts in 1912 and were enacted in many other states the following year, preceding the Fair Labor Standards Act (FLSA) by several years. FLSA does not preempt state wage and hour laws, but as a practical matter state provisions often mirror those contained in FLSA, and many state laws adopt the federal minimum as the floor for the wages of covered employees. John R. Commons and John B. Andrews, *Principles of Labor Legislation*, 4th ed. (New York, NY: August M. Kelley, 1936/1967), 450-51; and Willis J. Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport, CT: Greenwood, 1997), 1-29.
7. See Nordlund, *The Quest for a Living Wage*; and U.S. Department of Labor, Wage and Hour Division, *Minimum Wage and Overtime Hours under the Fair Labor Standards Act* (Washington, DC: U.S. Department of Labor, 2003).
8. Annette Bernhardt and Siobhán McGrath, “Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004,” Economic Policy Brief (New York, NY: Brennan Center for Justice at NYU School of Law, 2005), 2.
9. Nordlund, *The Quest for a Living Wage*, 119, 186.
10. *Ibid.*, 186, 194-97.
11. Based on a national survey conducted by Fine, we estimate the total number of state wage and hour inspectors at approximately 700. Information provided by the U.S. Department of Labor in response to a Freedom of Information Act request indicates that the total number of federal inspectors in 2008 was 709. This means that in the United States today, there are approximately 1,409 federal and state wage and hour inspectors combined for 7,601,160 establishments employing 119,917,165 workers. See U.S. Census Bureau, *County Business Patterns 2006* (Washington, DC: U.S. Census Bureau, 2008).
12. See Howard Wial’s analysis of 1997 Economic Census data in “Minimum-Wage Enforcement and the Low-Wage Labor Market” (Working Paper for MIT Task Force on Reconstructing America’s Labor Market Institutions Conference, Cambridge, MA, 1999), 10-11.

Another consideration when thinking about the coverage challenges faced by the Wage and Hour Division (WHD) is that FLSA is far from the only law it is mandated to enforce.

13. See Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, MA: Harvard University Press, Belknap Press, 2005), chap. 1.
14. Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, eds., *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (Ithaca, NY: Cornell University Press, ILR Press, 2008), 1-2.
15. See U.S. Census Bureau, "Establishments, Employees, and Payroll by Employment-Size Class: 1990-2005," Table 736, and "Employer Firms, Establishments, Employment and Annual Payroll by Enterprise Size: 1990-2005," Table 738, in *County Business Patterns 2004* (Washington, DC: U.S. Census Bureau, 2006).
16. See David Weil and Amanda Pyles, "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace," *Comparative Labor Law and Policy Journal* 27, no. 1 (Fall 2005): 67; and David Weil, personal communication of national and regional list of industries to Fine, March 2009.
17. Weil and Pyles graciously provided us with the North American Industry Classification System (NAICS) codes they used to calculate the industries with the high estimated prevalence of minimum-wage and overtime violations. We cross-referenced their NAICS codes with the 2004 County Business Patterns report to come up with a breakdown of establishment size by industry.
18. U.S. Census Bureau, "Establishments, Employees and Payroll by Major Group for the United States: 2004/2003," Table 1, in *County Business Patterns 2004*, 1-4.
19. For an overview of some of the special issues that smaller businesses introduce for labor inspectors, see Andrew Schrank and Michael Piore, *Norms, Regulations, and Labour Standards in Central America*, Serie Estudios y Perspectivas, no. 77 (Mexico City, Mexico: United Nations, 2007), 32-33, <http://www.eclac.cl/publicaciones/xml/3/28113/Serie%2077.pdf>.
20. Meidinger suggests that, rather than isolating the individual regulatory agency, we think of groups involved in regulatory policy and practice as a regulatory community. Errol Meidinger, "Regulatory Culture: A Theoretical Outline," *Law & Policy* 9, no. 4 (1987): 364-65.
21. See Catherine Ruckelshaus, "Labor's Wage War," *Fordham Urban Law Journal* 3, no. 2 (2008): 373-407.
22. See Peter J. Buckley and Jonathan Michie, eds., *Firms, Organizations and Contracts: A Reader in Industrial Organization*, with a foreword by Ronald Coase (New York, NY: Oxford University Press, 1996).
23. U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention, Report to Congressional Requesters* (Washington, DC: GAO, August 2009).
24. Ruckelshaus, "Labor's Wage War," 380-82.
25. U.S. Department of Labor, Bureau of Labor Statistics, "Labor Force Characteristics of Foreign-Born Workers Summary," news release, March 26, 2009, <http://www.bls.gov/news.release/forbrn.nr0.htm>.

26. Randy Capps, Michael Fix, Jeffrey S. Passel, Jason Ost, and Dan Perez-Lopez, "A Profile of the Low-Wage Immigrant Workforce," in *Immigrant Families and Workers: Facts and Perspectives* (Washington, DC: Urban Institute, Immigration Studies Program, 2003), 1.
27. Randy Capps, Karina Fortuny, and Michael Fix, *Trends in the Low-Wage Immigrant Labor Force, 2000-2005* (Washington, DC: Urban Institute, 2007), 7; and Weil and Pyles, 72.
28. The first phase of wage and hour enforcement was entirely complaint-driven; indeed, the earliest factory laws passed beginning in the 1850s to combat immigrant worker mistreatment in sweatshops did not establish any investigative force at all. Commons and Andrews, *Principles of Labor Legislation*, 450-51. On the first few years of FLSA enforcement, see Nordlund, *The Quest for a Living Wage*, 63-66.
29. Nordlund, *The Quest for a Living Wage*, 67, 118.
30. Weil and Pyles, "Why Complain?"
31. U.S. Department of Labor, *Report*, 11.
32. *Ibid.*, 14.
33. David Weil, "Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage," *Industrial and Labor Relations Review* 58, no. 2 (2005): 238-57; and David Weil and Carlos Mallo, "Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance," *British Journal of Industrial Relations* 45, no. 4 (2007): 791-814.
34. U.S. Department of Labor, *Report*, 19-20.
35. *Ibid.*, 26.
36. Rae Glass (U.S. Department of Labor, Wage and Hour Division), in discussion with Fine, February 2009.
37. Carmine Ruberto (Director of Labor Standards Enforcement, New York Department of Labor), in discussion with author, September 2009.
38. Fine and Burgoon, "The Missing Dimension."
39. We collectively refer to social scientists in the field of regulatory theory and legal scholars in the new governance field as "new regulatory" scholars. Such scholars have critiqued the command-and-control model of regulation as ill suited to addressing complex societal problems. In its place, they propose more decentralized, flexible, and collaborative approaches that usually involve both public and private actors.
40. Nordlund, *The Quest for a Living Wage*, 151.
41. According to a 2008 GAO report, from 1997 to 2007 the agency established seventy-eight formal partnerships. U.S. GAO testimony before the Committee on Education and Labor, House of Representatives; Anne Marie Lasowski, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (Washington, DC: GAO, 2008).
42. Ayres and Braithwaite, *Responsive Regulation*, 106.
43. Cynthia Estlund, *Regoverning the Workplace: From Self-regulation to Co-regulation* (New Haven, CT: Yale University Press, forthcoming).
44. David Weil, "Assessing OSHA Performance: New Evidence from the Construction Industry," *Journal of Policy Analysis & Management* 20, no. 4 (2001): 651-74; and Orly Lobel, "Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety," *Administrative Law Review* 57 (2005): 1104-15.

45. As Estlund writes, "An effective system of self-regulation relies on an effective system of public regulation to catch the laggards, the defectors, and the cheaters. Ideally, '[n]on-compliance comes to be seen (accurately) as a slippery slope that will inexorably lead to a sticky end.' But without a serious escalation in labor standards enforcement—one that increases both the probability that violations will be detected and penalties for serious violations—an effort to apply the tenets of Responsive Regulation might end up masking what amounts to a process of deregulation." Estlund, *Regoverning the Workplace*, 76, quoting John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham, UK: Edward Elgar, 2008), 92.
46. David Weil, "Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters," *Comparative Labor Law and Policy Journal* 28 (2007): 132-33.
47. See Weil, "Assessing OSHA Performance."
48. Weil and Pyles, "Why Complain?"
49. Weil, "A Strategic Approach to Labour Inspection," *International Labour Review* 147, no. 4 (2008): 363.
50. Weil, "Why Enforcement Matters," 139; and Weil, "Strategic Approach," 372.
51. Weil and Pyles, "Why Complain?" 86-92; and David Weil, "Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets," in *Emerging Labor Market Institutions for the Twenty-First Century*, ed. Richard B. Freeman, Joni Hersch, and Lawrence Mishel (Chicago, IL: University of Chicago Press, 2005).
52. Advocates have proposed additional legal strategies and reforms that would strengthen the hand of workers' organizations in addressing violations of immigrants' workplace rights. See, e.g., Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do about It* (New York, NY: New Press, 2009), chaps. 9-10; and Rebecca Smith and Catherine Ruckelshaus, "Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-wage Workers as a Centerpiece of Immigration Reform," *NYU Journal of Legislation and Public Policy* 10 (2007): 555, 584-87.
53. Nonetheless, it is important to note that the Department of Labor (DOL) is not currently engaged with employers in many low-wage sectors, whether because the firms are too small or fly-by-night or because they are not organized in associations through which DOL can easily relate to them. How the DOL might reach out to such employers, and/or how they might be organized to make their involvement in a tripartite system more practicable, is an important question, but beyond the scope of this article. We believe that partnerships with workers organizations are important to consider across industries, even in settings where employers are not (yet) in a relationship with the DOL.
54. For historical analyses of FLSA, see Nordlund, *The Quest for a Living Wage*, chap. 3; Ruth O'Brien, "A Sweat Shop of the Whole Nation: The Fair Labor Standard [sic] Act and the Failure of Regulatory Unionism," *Studies in American Political Development* 15, no. 1 (2001): 33-52; and Sean Farhang and Ira Katznelson, "The Southern Imposition: Congress and Labor in the New Deal and Fair Deal," *Studies in American Political Development* 19, no. 1 (2005): 13-15 and 21-23.
55. O'Brien, "Sweat Shop," 35.

56. Mettler has argued that drafters in the Roosevelt administration excluded from the bill many categories of workers who did not engage in interstate commerce or in the production of goods for interstate commerce, driven largely by the concern that the Supreme Court would otherwise invalidate the law by applying a restrictive interpretation of the Commerce Clause. Suzanne B. Mettler, "Federalism, Gender, & the Fair Labor Standards Act of 1938," *Polity* 26, no. 4 (1994): 643-45.
57. Farhang and Katznelson, "The Southern Imposition," 9-15.
58. Sidney Hillman, president of the Amalgamated Clothing Workers (ACW), on the other hand, strongly supported the unfair trade provisions and union regulatory role; this view was informed by his experience in the 1920s with "regulatory unionism," in which unions worked to stabilize industries and minimize unfair competition by imposing uniform standards of wages and working conditions. O'Brien, "Sweat Shop," 35.
59. American Federation of Labor, "Report of Proceedings, Fifty-ninth Annual Convention, Cincinnati, Ohio, October 2-13, 1939," p. 179.
60. Louise Sadowsky Brock, "Overcoming Collective Action Problems: Enforcement of Worker Rights," *University of Michigan Journal of Law Reform* 30, no. 4 (1997): 797, quoting Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216(b) [1994 & Supp. I 1995]).
61. Marc Linder, "Class Struggle at the Door: The Origins of the Portal to Portal Act of 1947," *Buffalo Law Review* 39 (1991): 167-72.
62. Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," in *Associations and Democracy*, ed. Erik Olin Wright (New York, NY: Verso, 1995), 45. See also Philippe C. Schmitter, "The Irony of Modern Democracy and Efforts to Improve Its Practice," *Politics & Society* 20, no. 4 (1992): 507-12; Claus Offe, "The Attribution of Public Status to Interest Groups: Observations on the West German Case," in *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics*, ed. Suzanne Berger, 123-58 (Cambridge, UK: Cambridge University Press, 1981); and Philippe C. Schmitter, "Interest Intermediation and Regime Governability in Contemporary Western Europe and North America," in Berger, *Organizing Interests*, 285-327.
63. Cohen and Rogers, "Secondary Associations," 45.
64. Weil and Pyles, "Why Complain?" 86-92.
65. Outside of the wage and hour context, formal collaborative programs exist in arenas such as safety and health, where in so-called "state plan" states, OSHA delegates its authority to enforce health and safety standards to state governments that propose standards and strategies "at least as effective" as OSHA's. 29 U.S.C. § 667(c)(2) (2004). Several of these states require certain types of businesses to develop health and safety committees at each worksite. See 29 U.S.C. § 667(c)(4), (6) (2004); and U.S. Department of Labor, "State Occupational Safety and Health Plans," <http://www.osha.gov/dcsdp/osp/index.html> (accessed March 16, 2010).
66. Peter Romer-Friedman, "Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws," *Columbia Journal of Law & Social Problems* 39, no. 4 (2006): 495-553; Matthew T. Bodie, "The Potential for State Labor Law: The New York Greengrocer Code of Conduct," *Hofstra Labor & Employment Law Journal* 21, no. 1 (2003): 183-207; and Estlund, *Regoverning the Workplace*, chap. 5.

67. The DOL might need to address the notice and balanced membership requirements of the Federal Advisory Committee Act (FACA). 41 C.F.R. §102-3.60(b)(3) (2001). But FACA does not seem to have been an obstacle to WHD's efforts to partner with employers (or other groups) in the past. FACA also has exemptions. Its mandates do not apply when the government seeks advice from participants "on an individual basis and not from the group as a whole." 41 C.F.R. §102-3.40(e) (2001). It also appears not to apply when the government asks not for advice but for the assistance of third parties to enforce the law. 41 C.F.R. §102-3.40(k) (2001).
68. As Ayres and Braithwaite argue, "Where there is no power base and no information base for the weaker party, tripartism will not work." Ayres and Braithwaite, *Responsive Regulation*, 59.
69. David Weil, "Regulatory Jujitsu: Using Industry Structure to Protect Low-Wage Workers" (PowerPoint presentation at Rutgers University School of Management and Labor Relations, New Brunswick, NJ, January 29, 2008).
70. Ayres and Braithwaite, *Responsive Regulation*, 20.
71. *Ibid.*, 35-36.
72. *Ibid.*, 43.
73. We find support for this assertion in Roberto Pires's observation of labor inspection regimes in several Brazilian states. Roberto Pires, "Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil," *International Labour Review* 147 (2008): 2-3.
74. Richard Slawson (Executive Secretary, AFL-CIO), in discussion with Fine, July 2009.
75. *Ibid.*
76. *Ibid.*
77. Both programs were facilitated by a 1989 amendment of California's Labor Code to authorize the establishment of Labor Compliance Programs (LCPs) to enforce prevailing wage requirements on public works construction projects. Office of the Director, "Labor Compliance Programs, Introduction," California Department of Industrial Relations, <http://www.dir.ca.gov/LCP.asp> (accessed March 16, 2010).
78. Los Angeles Unified School District (LAUSD), Facilities Services Division, "Joint Compliance Monitoring Program Los Angeles Unified School District & All Work Preservation Groups: Rules of Engagement (Fiscal Year 2009-2010)," http://www.laschools.org/contractor/lc/documents/download/work-preservation/Rules_of_Engagement.pdf.
79. Slawson, discussion.
80. John Reamer (Director, Los Angeles Bureau of Contract Administration), in discussion with Fine, July 2009.
81. Mark Hovatter (Director of Contracts, LAUSD), in discussion with Fine, November 2009.
82. *Ibid.*
83. *Ibid.*
84. Chris Jenson (Intergovernmental Agency Liason Officer, Los Angeles Bureau of Contract Administration), in discussion with Fine, December 2009.
85. *Ibid.*
86. Reamer, discussion.

87. Jenson, discussion.
88. We were not able to get data on the LAUSD program, but the LABPW provided data for the years 1999 to 2008. Dale Kanagawa, private correspondence to Fine, July 29, 2009.
89. For details on penalties for noncompliance, see Facilities Services Division, "Frequently Asked Questions," <http://www.laschools.org/contractor/lc/faqs/> (accessed March 18, 2010); City of Los Angeles, *Labor Compliance Manual, November 30, 2006*, http://bca.lacity.org/site/pdf/labor/labor_compliance_manual.pdf (accessed March 18, 2010).
90. Reamer, discussion.
91. Lilia Garcia (Executive Director, Maintenance Cooperation Trust Fund [MCTF]), in discussion with Fine, July 2009.
92. *Ibid.*
93. Henry Huerta (inspector, Division of Labor Standards Enforcement [DLSE], Janitorial Enforcement Team [JET]), in discussion with author, July 2009.
94. *Ibid.*
95. California Labor Code, sec. 2810(a) (2003).
96. Henry Huerta, discussion.
97. Participating union employers contribute 2 to 5 cents/hour per worker to fund MCTF, which is structured as a Taft-Hartley Trust Fund. For background on MCTF, see Lilia Garcia, "The Maintenance Cooperation Trust Fund: Combating Worker Exploitation and Unfair Competition through Collective Action with Responsible Employers," in *Unhealthy Work: Causes, Consequences, Cures*, ed. Peter L. Schnall, Marnie Dobson, and Ellen Roskam (Amityville, NY: Baywood, 2009); 267-83; Ruckelshaus, "Labor's Wage War," 390-94, 404-7; and Leonel Sanchez, "Watchdog Group Helps Keep Janitorial Contractors Clean," *San Diego Union-Tribune*, January 28, 2004.
98. Internal MCTF documents in authors' possession, including San Diego Albertson's Janitorial web, diagramming relationships between Albertson's, Capital Cleaning Contractors (CCC), and CCC's six subcontractors; wage reconstruction of Albertson's San Diego; examples of wage audits and affidavit outlines.
99. Garcia, discussion.
100. Huerta, discussion.
101. Frank Capetillo (JET), in discussion with Fine, November 2009.
102. *Ibid.*
103. Garcia, discussion.
104. MCTF, "Excell Cleaning and Building Services and Mo's Restaurant and Cleaning Services Sued," news release, December 20, 2007.
105. California Department of Industrial Relations, "California Labor Commissioner Files Complaint against Janitorial Services Contractor," news release, March 3, 2008.
106. MCTF, "California State Labor Commission Sues Cleaning Companies for Over \$7 million," news release, January 12, 2009.
107. Garcia, discussion; Huerta, discussion.
108. *Ibid.*
109. Dean Fryer (Spokesman, Department of Industrial Relations), discussion with author, November 24, 2009.

110. The six groups are Make the Road New York, the Workplace Project, Centro del Derecho, Chinese Staff and Workers Association, RWDSU, and UFCW Local #1500.
111. Drawn from the draft Memorandum of Understanding and other draft documents provided by Terri Gerstein, New York State Department of Labor.
112. Brennan Center for Justice and Others, *Protecting New York's Workers: How the State Department of Labor Can Improve Wage-and-Hour Enforcement* (New York, NY: Brennan Center for Justice, 2006).
113. Terri Gerstein (Deputy Commissioner, New York Department of Labor), in discussion with Fine, October 2009.
114. Gerstein, in discussion with Fine, May 2009.
115. Deborah Axt (Director, Legal Program, Make the Road New York), in discussion with the authors, July 2009.
116. Gerstein, discussion, May 2009.
117. *Ibid.*
118. In reference to Patricia Smith and Lorelei Boylan's nominations to solicitor general and Wage and Hour Division administrator, respectively, Americans for Limited Government argued that "Smith's nomination is troubling for among other reasons because of an initiative she devised in her current position, the 'Wage Watch.' . . . This initiative could very likely be a model used by Smith and Boyland [*sic*] on a national level if both are confirmed. If so, it could turn tens of thousands of 'community organizers' into raving vigilantes nationwide." Americans for Limited Government, "Who Are M. Patricia Smith and Lorelei Boylan?" *Nominee Alert*, May 2009.
119. See Judith Tendler, "Small Firms, the Informal Sector, and the Devil's Deal," *Bulletin* (Institute of Development Studies) 33, no. 3 (2002): 1-13; and Michael J. Piore and Andrew Schrank, "Toward Managed Flexibility: The Revival of Labor Inspection in the Latin World" (Working Paper, November 2007), 8-11, 15-20.
120. See Note, "Delegation of Governmental Power to Private Groups," *Columbia Law Review* 32, no. 1 (1932): 80-93.
121. Louis L. Jaffe, "Lawmaking by Private Groups," *Harvard Law Review* 51, no. 2 (1937): 201-53; and Note, "Delegation of Governmental Power."
122. Laws of the State of New York, 89th sess., chap. 469 (1866).
123. See, for example, *ASPCA v. City of NY*, 199 N.Y.S. 728 (N.Y. App. Div. 1923) (fines paid to the American Society for the Prevention of Cruelty to Animals [ASPCA] did not violate the state constitution because the money was being used for a valuable public purpose); and *Hand v. Stray Haven Humane Society and SPCA*, 799 N.Y.S.2d 628 (N.Y. App. Div. 2005) (affirming that New York law authorized peace officers to enter private property to investigate reported animal abuse).
124. Reed L. Frischknecht, "The Democratization of Administration: The Farmer Committee System," *American Political Science Review* 47, no. 3 (1953): 711-19.
125. The ASPCA was originally authorized to keep the fees it collected through licensing and investigation. Note, "Delegation of Governmental Power to Private Groups," 92.
126. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca, NY: Cornell University Press, 2006); and Gordon, *Suburban Sweatshops*.

127. On fostering innovation through processes of interpretation, see Richard K. Lester and Michael J. Piore, *Innovation: The Missing Dimension* (Cambridge, MA: Harvard University Press, 2004).
128. In “Taming Prometheus: Talk of Safety and Culture,” Susan S. Silbey argues that “research on safety in complex systems should explore just those features of complex systems that are elided in the talk of safety culture: normative heterogeneity and cultural conflict, competing sets of interests within organizations, and inequalities in power and authority.” *Annual Review of Sociology* 35 (2009): 343.
129. Piore and Schrank, “Toward Managed Flexibility”; and Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness, a Twentieth Century Fund Report* (Philadelphia, PA: Temple University Press, 1982).

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