

# Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States

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*Disproportionate employer power is at least partly responsible for the sharp increase in economic inequality in the United States, which threatens the fabric of the Republic. Workplace law reform could provide workers with an institutional source of power that countervails employer power and compresses inequality. Ideas for workplace law reform include modest ones, such as instituting “co-enforcement,” and more ambitious ones, such as “sectoral bargaining.” According to their adherents, both require tripartite arrangements where capital, labor, and government provide inputs on how to regulate work.*

*But can the United States, with its liberal market economy typically devoid of meaningful tripartism, shift? This Essay describes two recent co-enforcement experiments that have generated some excitement from labor advocates: the Los Angeles County Public Health Councils and the Chicago Office of Labor Standards. It also discusses two purported sectoral bargaining experiments, New York State’s convening of a minimum wage board (New York Board) for fast food and the Seattle Domestic Workers Standards Board (Seattle Board). The cases are offered to evaluate the extent to which tripartism is developing in the United States. The Essay shows that both co-enforcement experiments lack employer participation. While the New York Board had nominal employer, worker, and government participation, it did not provide bargaining authority to the directly affected parties. Only the Seattle Board is tripartite in fact and provides a space for directly affected parties to bargain. Its limitation might be that the tripartite parties are appointed and therefore not necessarily representative of domestic workers and employers generally. The Essay concludes with an evaluation of what these findings suggest for U.S. tripartism.*

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## INTRODUCTION

Many policymakers and scholars are concerned about the decline of labor union power, the rise of employer power, and how those dynamics have contributed to rampant inequality and democratic erosion in the United States.<sup>1</sup> These policymakers and scholars seek to buttress worker power and to curtail the excesses of our so-called “liberal market economy,” known for being a culprit of inequality.<sup>2</sup> Alternatives to the liberal market—which can be social democratic,<sup>3</sup> corporatist,<sup>4</sup> coordinated,<sup>5</sup> or mediated through state-sanctioned sectoral bargaining<sup>6</sup>—are salient in recent legal scholarship and policy proposals. Other poli-

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<sup>1</sup> See Angela Cornell, *Introduction*, in THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 1–2 (Mark Barenberg & Angela Cornell eds., 2022) (advocating for studies that focus on the parallel decline of democracy and organized labor); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE, 118–45 (2012) (describing the impact of inequality on democracy); Henry H. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 4–38 (NBER Working Paper Series, Working Paper No. 24587, 2018) (documenting and explaining how union decline contributes to inequality); see also Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 518–19 (2011) (describing the effect of labor unions on public policy).

<sup>2</sup> Peter A. Hall & David Soskice, *Introduction*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 8, 21 (Peter A. Hall & David Soskice eds., 2001) (noting that liberal market economies are known for higher rates of inequality than are coordinated market economies); see also *infra* Part II.A.

<sup>3</sup> Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 628–29 (2019) [hereinafter Andrias, *An American Approach*] (describing U.S. experimentation with social democracy through the Fair Labor Standards Act's wage committees).

<sup>4</sup> Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624, 1640–43 (2016) (arguing, as a “thought experiment,” for a “libertarian corporatism” where the government encourages or even mandates “collective bargaining at the occupational or sectoral level . . . while leaving workers nearly unfettered choice as to bargaining representatives and removing certain core legal constraints on workers’ concerted action”).

<sup>5</sup> Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 382 (2020) (noting antitrust law's extralegal bias for private gain and vertical coordination by large firms and sketching possibilities for horizontal coordination by small firms and workers based on the premise that coordination rights should be guided by the public interest).

<sup>6</sup> See Nelson Lichtenstein, *Sectoral Bargaining in the United States*, in THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 87, 99 (Mark Barenberg & Angela Cornell eds., 2022) (arguing that sectoral bargaining through wage boards can help improve wages and working conditions and describing how five U.S. jurisdictions already have them on the books and five others—namely, “liberal” jurisdictions—could also institute them); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 87–88 (2016) [hereinafter Andrias, *New Labor Law*]; DAVID MADLAND, RE-UNION: HOW BOLD LABOR REFORMS CAN REPAIR, REVITALIZE, AND REUNITE THE UNITED STATES 19–22 (2021).

cy proposals call for government and worker groups to collaborate in “co-regulatory”<sup>7</sup> or “co-enforcement”<sup>8</sup> frameworks (here jointly referred to as “co-enforcement”) that give workers a say in workplace law enforcement regimes.<sup>9</sup> Many of these proposals impliedly seem to want to shift the United States from its liberal market trajectory, at least as it pertains to labor and employment regulation, toward something closer to a coordinated scheme.<sup>10</sup> They strive for “tripartism,” since they reckon that capital, labor, and government should all have a say on rules related to economic activity and on rules for the workplace in particular.<sup>11</sup>

Some express or implied tripartists have no realistic expectations that their proposals will be enacted soon in the United States, although their proposals might be viable in the future. Express or implied tripartists can be roughly divided into five overlapping groups. First, for example, Professor Brishen Rogers acknowledged that he engaged in a “thought experiment” when advocating for corporatism in the United States.<sup>12</sup> He and others see themselves as contributing to ideas that can be used at the cusp of crisis, when policy makers would need ready-made solutions to deal with institutional breakdown and calamity.<sup>13</sup> A second group might look to Northern and Continental Europe—think of Senator and presidential-hopeful Bernie Sanders showcasing Denmark<sup>14</sup>—to persuade the public to consider models

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<sup>7</sup> CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 214 (2010).

<sup>8</sup> Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 217 U. CHI. LEGAL F. 143, 146–47 (2017) [hereinafter Fine, *New Approaches*].

<sup>9</sup> *Id.* at 149–54; see also Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 553 (2010); Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-compliance in the United States*, 50 OSGOODE HALL L.J. 813, 823 (2013) [hereinafter Fine, *Solving the Problem from Hell*].

<sup>10</sup> See Hall & Soskice, *supra* note 2; *infra* Part II.A.

<sup>11</sup> Fine, *Solving the Problem from Hell*, *supra* note 10, at 816.

<sup>12</sup> Rogers, *supra* note 4, at 1624; see also Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 86 (2022) (arguing that scholars should think more critically to end the unfettered employer power that is the “employer prerogative”).

<sup>13</sup> See Harry Arthurs, *Labour Law After Labour*, in COMP. RSCH. L. & POL. ECON. RSCH. PAPER SERIES 13, 23 (Peer Zumbansen et al. eds. 2011) (arguing that labor law scholars could develop ideas that can “wait in the wings” for the right political time).

<sup>14</sup> Matthew Yglesias, *9 Questions About Denmark, Bernie Sanders’s Favorite Socialist Utopia* (Oct 16, 2015), <https://perma.cc/H5S4-A238> (noting that some believe that Denmark may represent “the ideal form of social and political development”).

that work elsewhere to reduce inequality and that might work in the United States.<sup>15</sup> A third group might look a little bit closer to home—to Anglo-American jurisdictions, such as parts of Canada, Britain, and Australia that have established some semblance of tripartite governance despite their institutional roots in the liberal market—to show that tripartism could prevail in the United States as well.<sup>16</sup> A fourth group might look even closer to home, at historical experiences in the United States during the Progressive Era,<sup>17</sup> or to the interwar years when the New Deal thrived.<sup>18</sup> They want to learn how tripartism worked then and how it might exist in the future if activists and policymakers revived those traditions. A final group might look at present-day experiments, mostly in some “blue” states and cities, suggesting that what lies there, outside the purview of polarized Washington politics, might be breaking with the old.<sup>19</sup>

Without making any claims that any one of those five groups provides a more compelling case for moving the needle in the United States away from a liberal market economy, this Essay follows the lead of blue-city- or blue-state-focused scholars to explore if tripartism is rising in the United States, at least

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<sup>15</sup> See Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 323 (2012) (discussing the Ghent systems of Belgium, Sweden, and Denmark).

<sup>16</sup> See MADLAND, *supra* note 6, at 86 (2021) (arguing that U.S. reformers can learn about the benefits of sectoral bargaining from Canada, Britain, and Australia). For an account of how the United States, Canada, Britain, and Australia fall into a similar category of liberal market economy, see Hall & Soskice, *supra* note 2, at 18–19.

<sup>17</sup> See Lichtenstein, *supra* note 6, at 89 (noting that wage boards developed in the United States during the Progressive Era).

<sup>18</sup> *Id.* at 90–91 (describing how Progressive Era wage boards were reinvigorated by New Deal policy); Andrias, *An American Approach*, *supra* note 3, at 626–29 (describing how the Fair Labor Standards Act, 29 U.S.C. §§ 201–219, initially required employer and worker representatives to set minimum wages for entire industrial sectors, and how such a tradition could be revived). Professor Sanjukta Paul has also unearthed how the original understanding of antitrust law was built on “moral economy” and not market foundations. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 179–80 (2021). See also generally JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022) (advancing a progressive reintroduction of constitutional political economy to break U.S. oligarchy).

<sup>19</sup> See Andrew Elmore, *Labor’s New Localism*, 95 S. CAL. L. REV. 253, 286–91 (2021) [hereinafter Elmore, *Labor’s New Localism*] (describing labor’s focus on local law and the benefits that home-rule delegations might bring); Andrias, *New Labor Law*, *supra* note 6, at 63–66 (observing a “new labor law” arising from, among other places, New York State’s convening of a minimum wage board to increase wages in fast food); Fine & Gordon, *supra* note 9, at 565–71 (describing government-labor arrangements in California and New York to enforce workplace law).

along the edges. It reports on a cross section of cases—showcased in legal scholarship, by activists, or in the news—that have created recent excitement among worker advocates and scholars as examples of co-enforcement: the Los Angeles Public Health Councils (PHCs)<sup>20</sup> and Chicago’s Office of Labor Standards (Chicago OLS).<sup>21</sup> This Essay also reports on sectoral bargaining in the much-discussed case of New York State<sup>22</sup> and on the newly created Seattle Domestic Workers Standards Board (Seattle Board), which purports to lead the way for domestic workers’ rights.<sup>23</sup>

After reviewing those cases, this Essay concludes that these novel experiments, with the exception of the Seattle Board, are still far from being meaningful tripartite structures. The Los Angeles and Chicago co-enforcement projects lack employer participation. New York’s Minimum Wage Board (New York Board) was formally tripartite but not representative of the parties directly affected by its recommendations. While the Seattle Board is more representative of the parties directly affected by the rules it recommends—domestic workers and households, for example—it embodies a small sector of the economy that does not appear to be predictive of what could happen elsewhere in the U.S. economy, such as in retail, fast food, or technology. Hence, the main argument of this Essay is that, setting aside the exceptional case of the Seattle Board, the United States is, at best, currently building only quasi-tripartite institutions where meaningful collaboration between employers, workers, and the government remains elusive.

This Essay proceeds in the following way. In Part I, the Essay summarizes literature describing the differences between liberal market economies and coordinated market economies as well as other contemporary literature advocating for what amounts to a break, in one form or another, with the liberal market in the United States. Part II describes co-enforcement in

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<sup>20</sup> Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in COVID-19*, EMORY L.J. 1419, 1455 (2021) (discussing Los Angeles County’s public health councils).

<sup>21</sup> See Alana Samuels, *Can Workers Regain the Upper Hand in the American Economy?*, 16 U. ST. THOMAS L.J. 7, 13 (2019) (discussing Chicago’s Office of Labor Standards); Michael M. Oswalt & César F. Rosado Marzán, *Organizing the State: The “New Labor Law” Seen from the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415, 456 (2018) (same).

<sup>22</sup> See Andrias, *New Labor Law*, *supra* note 6, at 455–56.

<sup>23</sup> See Rebecca Smith, *Seattle Passes Historic Domestic Worker Bill of Rights*, NAT’L EMP. L. PROJ. (July 26, 2018), <https://perma.cc/WK5P-ZUPH>.

the city of Chicago and Los Angeles County and sectoral bargaining in New York State and the city of Seattle. Part III analyzes these cases.

## I. LITERATURE REVIEW

This Part first summarizes scholarship on comparative political economy and the distinctions between so-called liberal and coordinated market economies—the former typically representing Anglo-American jurisdictions and the latter being closer to continental European jurisdictions.<sup>24</sup> In the former, market signals play a more predominant role in economic decision-making; in the latter, economic actors such as firms collaborate more closely between themselves to receive relevant economic information and to make decisions.<sup>25</sup>

Thereafter, this Part describes more recent literature on co-enforcement that reports on new institutional arrangements where workers collaborate with government officials to enforce workplace law. Co-enforcement is in apparent contrast with adversarial capital-labor relationships mediated neutrally by government, as liberal market economies and the United States in particular are stylistically represented.<sup>26</sup> Co-enforcement has thus been labelled as a sort of tripartite arrangement in the sense that workers gain a role in enforcing the law alongside government and employers.<sup>27</sup> Finally, this Part discusses the literature on sectoral bargaining. Sectoral bargaining entails capital, labor, and workers jointly setting the terms and conditions of employment for entire industrial sectors or occupations,<sup>28</sup> in clear contrast with liberal market economic precepts.

### A. Liberal and Coordinated Markets

Social scientists from fields such as political science, economics, and sociology have been studying important distinctions between several prominent rich countries—where robust and

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<sup>24</sup> Hall & Soskice, *supra* note 2, at 19–21.

<sup>25</sup> *Id.* at 7–8.

<sup>26</sup> Andrias, *An American Approach to Social Democracy*, *supra* note 3, at 628 (first citing DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014), and then citing Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 471 (2015)).

<sup>27</sup> IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 56 (1992).

<sup>28</sup> Andrias, *New Labor Law*, *supra* note 6, at 78–81.

profitable firms thrive—as well as their divergent paths toward success.<sup>29</sup> The thrust of this literature, collectively recognized as “comparative political economy,” is that successful capitalist economies are not all created the same.<sup>30</sup> According to this literature, on one end of the political economy spectrum lie the so-called liberal market economies, where firms make decisions and take actions based on market information, such as prices, interest rates, and unemployment levels, and relate to other actors through formal contracting.<sup>31</sup> The United States, the United Kingdom, Australia, New Zealand, and Canada fall into the liberal market economy category.<sup>32</sup> On the other end of the spectrum are the coordinated market economies that make decisions and take actions based on what would otherwise be considered insider information gained through closer collaborations and relationships between firms and their stakeholders.<sup>33</sup> Denmark, Germany, Japan, the Netherlands, Norway, and Sweden tend to fall into the coordinated market economy camp.<sup>34</sup>

According to the comparative political economy literature, in liberal market economies, firms tend to deal with each other and with workers at arm’s length.<sup>35</sup> Thus, formal contracting and the courts that enforce the resulting contracts play important roles.<sup>36</sup>

Moreover, managers in liberal market economies have significant discretion and authority to hire and fire without much legal restraint, all of which is compatible with market behavior.<sup>37</sup> Unlike coordinated market economies, liberal market economies place few, if any, requirements on firms to institute worker-representative bodies such as “works councils.”<sup>38</sup> Trade unions in liberal market economies may have significant

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<sup>29</sup> See, e.g., Hall & Soskice, *supra* note 2, at 247–334. See generally, e.g., Peter A. Hall & Daniel W. Gingerich, *Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis*, in DEBATING VARIETIES OF CAPITALISM 135, 136–79 (Bob Hancké ed., 2009).

<sup>30</sup> Hall & Soskice, *supra* note 2, at 6–21.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 20.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> Hall & Soskice, *supra* note 2, at 9.

<sup>36</sup> *Id.* at 9; K. Sabeel Rahman & Kathleen Thelen, *The Role of Law in the American Political Economy*, in THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 76, 80 (Jacob S. Hacker et. al. eds., 2022) (discussing the impact of the judiciary on the U.S. political economy).

<sup>37</sup> Hall & Soskice, *supra* note 2, at 29 (focusing on the U.S. model).

<sup>38</sup> *Id.*

strength in specific sectors and firms, but they often lack the breadth to negotiate and set terms with employers at sectoral, regional, or national levels.<sup>39</sup>

Firms in liberal market economies are also said to have more formal and distant relationships with government officials than firms in coordinated market economies.<sup>40</sup> The literature posits that firms are especially reluctant to share information with public authorities because governments are powerful actors “under a range of unpredictable influences”—that is, political ones.<sup>41</sup> Those unpredictable influences increase the risk that government actors may “defect from any agreement and use the information they have acquired against the firm.”<sup>42</sup>

Now, despite the arm’s-length transacting that typifies liberal market economies, more recent research on the U.S. political economy has persuasively shown that businesses in the United States have grown particularly adept at playing an antiregulatory “long game” to get more business-friendly judges appointed or elected to courts.<sup>43</sup> U.S. businesses collaborate extensively for such ends. Therefore, their collaborative relations are not focused on pecuniary reciprocity but instead on larger political aims, such as filling courts with judges favorable to their interests.<sup>44</sup> Organized business also plays a long game to fill legislatures and governors’ mansions with politicians favorable to their interests.<sup>45</sup> To date, they have greatly succeeded.<sup>46</sup>

It has also been argued that firms in coordinated market economies depend to a greater degree on insider information and

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<sup>39</sup> *Id.* at 29–30, 72.

<sup>40</sup> *Id.* at 8.

<sup>41</sup> *Id.* at 47; Stewart Wood, *Business, Government, and Policy in Britain and the Federal Republic of Germany*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 247, 259 (Peter A. Hall & David Soskice eds., 2001) (describing the United Kingdom).

<sup>42</sup> Hall & Soskice, *supra* note 2, at 47.

<sup>43</sup> *Id.* at 78–81.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 99–101.

<sup>46</sup> See Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, *Introduction*, in *THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER*, *supra* note 36, at 2, 29 (noting the general success of business interests); see also ALEX HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 174–210 (2019) (describing how a “troika” of state officials, businesses, and conservative activists have succeeded in gaining political dominance with little opposition across a number of states); FISHKIN & FORBATH, *supra* note 18, at 18–21, 361–62 (describing how business and conservative forces have been particularly successful in persuading courts to adopt neo-Lochnerian doctrine).



relationships with other firms than firms in liberal market economies.<sup>47</sup> Many of these relationships are collaborative rather than competitive.<sup>48</sup> Social scientists Peter Hall and David Soskice, pioneers of the comparative political economy movement, have pointed out that coordinated market economies have institutions that encourage deliberation and engagement in collective discussion and agreement between firms and other stakeholders.<sup>49</sup> Hence, in coordinated market economies, firms depend on nonmarket relationships to coordinate “their endeavors with other actors and to construct their core competencies.”<sup>50</sup> Importantly, they monitor compliance with their agreements through “network monitoring based on the exchange of private information inside networks” more often than firms in liberal market economies do so.<sup>51</sup> Firms in coordinated market economies are thus said to depend relatively less on arm’s-length transactions and legal enforcement of their obligations than firms in liberal market economies.<sup>52</sup> Collaborative relationships, rather than just market competition, aid firms to become more effective economic players in coordinated market economies.<sup>53</sup>

Collaboration also helps firms in coordinated market economies to invest in worker training and retention.<sup>54</sup> Given their collaborative relationships with other firms, firms in coordinated market economies are less worried than those in liberal market economies that their competition will poach their workers.<sup>55</sup> Similarly, firms in coordinated market economies are also more willing than those in liberal market economies to provide job security and employment protections, precisely to shield their investments in worker skills.<sup>56</sup> Firms’ investments in their workers also induce labor unions to collaborate more closely with firms to help administer training programs.<sup>57</sup>

Given their collaborative nature, firms in coordinated market economies are said to be governed by more horizontal networks of stakeholders, while firms in liberal market economies

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<sup>47</sup> Hall & Soskice, *supra* note 2, at 23.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 11, 26–27.

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.*

<sup>52</sup> Hall & Soskice, *supra* note 2, at 8.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 10.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 24.

<sup>57</sup> Hall & Soskice, *supra* note 2, at 25.

concentrate more authority in the firms' executives who deal with other firms and actors at arm's length.<sup>58</sup> Ultimately, firms in liberal market economies—perhaps with the exception of U.S. firms collaborating to fill the judicial, legislative, and executive branches with pro-business officials—maintain more distant relationships with other firms and public authorities.<sup>59</sup> On the other hand, firms in coordinated market economies “seek institutions conducive to the formation of implicit contracts between public authorities and business associations” that sustain a coordinated regime.<sup>60</sup> In this light, we might hypothesize that firms in coordinated market economies are also more prone to recognizing the legitimacy of worker groups (e.g., labor unions) and government actors in business affairs—and relating matters to and even negotiating matters with these actors—than firms in liberal market economies.<sup>61</sup> One might also be able to comprehend why firms in coordinated market economies tend to more easily engage with worker representatives at various levels of bargaining, including sectoral, regional, and national levels.

It is important to underscore that the comparative political economy literature is agnostic as to which system, the liberal market economy or the coordinated market economy, is superior.<sup>62</sup> There are laudable success stories in both camps; that said, inequality is more prevalent and pervasive in liberal market economies.<sup>63</sup> Hence, some campaigns to reduce economic inequality look to examples from coordinated market economies, including to the role of collective bargaining, especially that which is broader based or sectoral,<sup>64</sup> and to tighter collaborations between advocacy groups and governments to help reduce the economic role of markets.<sup>65</sup> Two U.S. policy movements that aim to create institutional arrangements that limit the role of markets and unilateral firm authority over workplace norms in favor of more coordinated regimes are co-enforcement and sectoral bargaining.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 8–9.

<sup>60</sup> *Id.* at 53.

<sup>61</sup> *See id.* at 10–11 (discussing the importance of “deliberation” institutions in coordinated market economies).

<sup>62</sup> Hall & Soskice, *supra* note 2, at 21.

<sup>63</sup> *Id.*

<sup>64</sup> *See infra* Part II.C.

<sup>65</sup> *See infra* Part II.B.

## B. Co-enforcement

One development in the field of workplace law at the local and state level that might be moving the United States toward a more coordinated orientation, if only at the margins, is co-enforcement.<sup>66</sup> Co-enforcement aims to pair agency regulators with advocacy groups to identify workplace law violators.<sup>67</sup> Professor Cynthia Estlund described these collaborative arrangements as the government seeking “regulatory eyes” for government in the workplace.<sup>68</sup> Government regulators have limited resources and capacities to monitor all workplaces where infractions may lie.<sup>69</sup> Workers can provide these regulators with information about their workplaces so that regulators can investigate and prosecute employer wrongdoing. In other words, co-enforcement adds private resources and actions, such as whistleblowing, to otherwise public regulation.

Contemporary state-worker collaborations to enforce workplace law are clear echoes of Professors Ian Ayres and John Braithwaite’s *Responsive Regulation*,<sup>70</sup> one of the most influential and cited works on state-society synergies for regulatory purposes. In their seminal work, Ayres and Braithwaite argued that public interest groups, referred to here as “advocacy groups,” could become regulatory parties and be brought into a tripartite framework, alongside government officers and firm representatives, to enforce legal norms.<sup>71</sup> According to Ayres and

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<sup>66</sup> See Stephanie Bornstein, *Public-Private Co-enforcement Litigation*, 2 MINN. L. REV. 811, 831–33 (2019) (examining regimes of co-enforcement through litigation); Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC’Y 359, 364–67 (2017) [hereinafter Fine, *Enforcing Labor Standards*] (examining mechanisms and players in co-enforcement regimes); Fine, *New Approaches*, *supra* note 8, at 146–49 (2018); Seema Patel & Catherine L. Fisk, *California Co-enforcement Initiatives That Facilitate Worker Organizing*, 12 HARV. L. & POL’Y REV. ONLINE 1, 2–4 (2017); Andrew Elmore, *Collaborative Enforcement*, 10 N.E.U. L.J. 72, 101–03, n.98 (2018) [hereinafter Elmore, *Collaborative Enforcement*] (discussing “collaborative enforcement” as something akin to “co-enforcement”); Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Collaborations of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 129, 130 (2016) (describing a study of co-enforcement in Argentina and the United States); Fine & Gordon, *supra* note 9, at 565–71 (examining Californian co-enforcement regimes).

<sup>67</sup> Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 371–72 (2005).

<sup>68</sup> *Id.* at 364.

<sup>69</sup> *Id.* at 376.

<sup>70</sup> AYRES & BRAITHWAITE, *supra* note 27, at 56–60.

<sup>71</sup> Fine & Gordon, *supra* note 9, at 553 (citing AYRES & BRAITHWAITE, *supra* note 28, at 56–60).

Braithwaite, law and policy can provide for tripartism by giving advocacy groups information (i.e., knowledge of regulated subjects possessed by the government), bargaining power, and enforcement authority in a regulatory process.<sup>72</sup>

Professors Jennifer Gordon and Janice Fine, leading voices for co-enforcement in the United States, narrowed Ayres and Braithwaite's tripartism, defining it generally as a "a strategy of enforcement that involves giving workers' organizations equal standing with government and employers."<sup>73</sup> They asserted that the parties need not "work together," but that each one should at least have a say about the regulatory matter.<sup>74</sup> In this way, their focus was mostly on the information and enforcement dimensions of tripartism, not on the bargaining or negotiating roles of the actors. To the extent that the three parties do not engage in negotiations of some sort, which is one of the three dimensions of tripartism that Ayres and Braithwaite argued for, this Essay asserts that such a narrowly focused regulatory arrangement is only nominally tripartite. It lacks three parties actually engaged in a common regulatory project. Hence, this Essay refers to the U.S. co-enforcement vision of tripartism as quasi tripartite.

But to say that tripartism is only nominal, or quasi tripartite, does not mean that three parties are not setting or enforcing terms and conditions of employment in some fashion. They do so, just not jointly. One could imagine, for example, a situation where government and labor enforcers recognize employers' interests without an employer being at the negotiating table. Government and worker representatives might consider that employers can destroy jobs, exit the economy, or go under, if worker protection laws or their enforcement become too onerous.<sup>75</sup> Moreover, state and worker co-enforcers hardly regulate the entirety of the workplace. The employer generally does, excepting those areas where state regulation diverges. Employers retain a general rulemaking role for the workplace.<sup>76</sup>

One of the cases of co-enforcement highlighted by Gordon and Fine is the Los Angeles Unified School District (LAUSD) and Board of Public Works Deputization Programs, where

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<sup>72</sup> AYRES & BRAITHWAITE, *supra* note 28, at 56–60; *see also* Elmore, *Collaborative Enforcement*, *supra* note 66, at 110 (noting that collaborative enforcement can facilitate tripartism).

<sup>73</sup> Fine & Gordon, *supra* note 9, at 553.

<sup>74</sup> *Id.* at 553 n.4 (citing AYRES & BRAITHWAITE, *supra* note 28, at 56–60).

<sup>75</sup> I thank Professor Cynthia Estlund for this point.

<sup>76</sup> Fine, *Enforcing Labor Standards*, *supra* note 66, at 380–82.

LAUSD trains and deputizes local trade union staffers to inspect public school construction sites, including those built by non union contractors, for violations of prevailing wage laws.<sup>77</sup> The program is successful because it provides formal legal mechanisms for collaboration between state and worker representatives to regulate the workplace.<sup>78</sup> Employers respect the union inspectors because they are deputized by the City, and unions voluntarily get involved because their interests are closely aligned with the program's goals.<sup>79</sup>

But most of the time, co-enforcement programs are informal. For example, in California, the state-run Labor Commission Janitorial Enforcement Team (JET), which enforces wage and hour laws against janitorial-service companies, teams up with the Maintenance Cooperation Trust Fund (MCTF), a union group, to more effectively monitor potentially noncompliant businesses.<sup>80</sup> The partnership works because MCTF has won JET's confidence by providing quality evidence on noncompliant employers, greatly enhancing JET's otherwise limited enforcement capabilities.<sup>81</sup>

Similar co-enforcement programs continue to develop. Los Angeles's PHCs set up in 2020 to protect the health and safety of workers in light of the COVID-19 pandemic is one such case.<sup>82</sup> Another one prevails in the new Chicago OLS, which aims to informally collaborate with advocacy groups to learn where workplace law violations might be occurring.<sup>83</sup> The next Part discusses the PHCs and the Chicago OLS to assess their tripartite characteristics.<sup>84</sup>

### C. Sectoral Bargaining

Another salient policy idea for state, worker, and employer collaboration—this one more explicit—is government-orchestrated sectoral bargaining. Sectoral bargaining typically refers to a system of collective bargaining where the bargaining parties (management and labor) negotiate to set terms and con-

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<sup>77</sup> Fine & Gordon, *supra* note 9, at 563.

<sup>78</sup> *Id.* at 564–65.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 565–66.

<sup>81</sup> *Id.* at 568.

<sup>82</sup> Yearby & Mohapatra, *supra* note 20, at 1455.

<sup>83</sup> Samuels, *supra* note 21, at 13.

<sup>84</sup> *See infra* Parts III.A.–B.

ditions of employment for an industrial sector such as automobile manufacturing, trucking, fast food, retail, or hospitality.<sup>85</sup> It contrasts with enterprise-based collective bargaining, which generally sets terms and conditions of employment at the firm level and that prevails in the United States and some other jurisdictions.<sup>86</sup> Sectoral bargaining is geared more specifically toward creating norms and standards rather than enforcing them, although sometimes it can also serve an indirect enforcement role.<sup>87</sup> Sectoral bargaining schemes typically depend on the bargaining parties—management and labor—to police their own members from defecting from the negotiated agreements.<sup>88</sup> One of the various benefits of sectoral bargaining schemes is that they can help increase wages for those workers at the bottom of the pay scales and reduce pay increases for those at the top, thus curbing income inequality.<sup>89</sup>

While sectoral bargaining need not include the government as a mediator between the parties, as a party in the negotiating process, or as the ultimate authority giving legal effect to the sectoral collective agreement, the government might act in any of those ways depending on the jurisdiction, giving the bargain-

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<sup>85</sup> Andrias, *New Labor Law*, *supra* note 6, at 9. *But see* Cynthia Estlund, *Sectoral Solutions that Work*, 97 CHI-KENT L. REV. (forthcoming) (arguing that current U.S. experiments with “sectoral bargaining” should be more accurately be termed “sectoral co-regulation”).

<sup>86</sup> Andrias, *New Labor Law*, *supra* note 6, at 9.

<sup>87</sup> For example, Swedish labor law and industrial-relations experts recognize that national employer associations and employee unions play an important role in maintaining systems of sectoral or national bargaining by disciplining their own members who might want to defect from the sectoral or national agreements. *See* REINHOLD FAHLBECK, *NOTHING SUCCEEDS LIKE SUCCESS: TRADE UNIONISM IN SWEDEN* 10 (1999).

<sup>88</sup> Organized actors in coordinated regimes function, *inter alia*, to sanction defection from cooperative endeavors. *See* Hall & Soskice, *supra* note 2, at 10. During German reunification, for example, less productive employers in former East Germany did not join German employer associations because they did not want to be subject to the onerous terms of collective bargaining agreements. *See* Kathleen Thelen, *Varieties of Labor Politics in the Developed Democracies*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE*, *supra* note 41, at 71, 83.

<sup>89</sup> MADLAND, *supra* note 6, at 75 (explaining that “higher-level bargaining” can lead to higher wages for more workers and lower economic inequality); ORG. FOR ECON. COOP. & DEV., *OECD EMPLOYMENT OUTLOOK 2018*, at 74–76 (2018) (discussing wage dispersion in countries with diverse systems of collective bargaining); Susan Hayter & Jelle Visser, *The Application and Extension of Collective Agreements: Enhancing the Inclusiveness of Labour Protection*, in *COLLECTIVE AGREEMENTS: EXTENDING LABOUR PROTECTION* 22–26 (Susan Hayter & Jelle Visser eds., 2018).

ing process a tripartite character.<sup>90</sup> Such tripartism is typically associated with coordinated market economies where governments might bind parties not privy to the sectoral collective agreement; these “contract extension policies” support sectoral bargaining schemes by effectively turning the terms of the collective agreements into law that binds the entire sector.<sup>91</sup>

But while sectoral bargaining is typically associated with coordinated market economies, it may exist elsewhere. In fact, and as we will see below, today the city of Seattle is promoting sector-wide bargaining for domestic work.<sup>92</sup> The Seattle Board, created in 2019, incorporates the interests of employers, workers, and local government in a deliberative body that sets sector-wide terms and conditions of employment and provides for the enforcement of such terms and conditions.

But sectoral bargaining can also be more narrowly focused on particular issues, such as setting minimum wages.<sup>93</sup> Various international jurisdictions have such minimum wage boards, councils, or committees, including Estonia, Lithuania, Slovakia, the Czech Republic, and Hungary.<sup>94</sup> The United Kingdom had influential wage boards until about 1993, when the government disbanded them.<sup>95</sup> Parts of contemporary China have dabbled with them.<sup>96</sup> Chile and Puerto Rico have also had them.<sup>97</sup> Uruguay’s wage councils, where parties meet to set wages in ad-

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<sup>90</sup> See, e.g., Ana Laura Ermida & César F. Rosado Marzán, *Wage Boards and Labor Revitalization: U.S. Aspirations and Uruguayan Realities*, 32 DUKE J. OF COMP. & INT’L L. 109, 129 (2021) (discussing the case of Uruguay).

<sup>91</sup> Andrias, *New Labor Law*, *supra* note 6, at 35; see also HAYTER & VISSER, *supra* note 89, at 20–23 (discussing multiemployer bargaining, which could be synonymous with sectoral bargaining, as existing in various countries, but specifically in Europe).

<sup>92</sup> See *infra* Part III.D.

<sup>93</sup> See Andrias, *New Labor Law*, *supra* note 6, at 84–89 (focusing on sectoral bargaining through wage boards).

<sup>94</sup> Thorsten Schulten & Torsten Müller, *Between Poverty Wages and Living Wages: Minimum Wage Regimes in the European Union*, 1 EUR. STUD. FOR SOC. & LAB. MKT. POL’Y 1, 7 (2020).

<sup>95</sup> Trade Union Reform and Employment Rights Act 1993, c.19, (UK); see also Hayter & Visser, *supra* note 91, at 1, 25.

<sup>96</sup> See Sarah Biddulph, *Responding to Industrial Unrest in China: Prospects for Strengthening the Role of Collective Bargaining*, 34 SYDNEY L. REV. 35, 51 (2012) (discussing tripartite collective bargaining in the woolen-knitwear industry of Xinh township).

<sup>97</sup> Lance Compa, *Labor Law and the Legal Way: Collective Bargaining in the Chilean Textile Industry Under the Unidad Popular* 30 (Yale L. Sch. working paper No. 23, 1973) (discussing Chilean wage councils) (on file with author); César F. Rosado Marzán, *Can Wage Boards Revive U.S. Labor?: Marshaling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 145–47 (2020) (discussing Puerto Rico).

dition to other terms, have been particularly celebrated for their longevity and effectiveness in promoting an entire system of sector-wide bargaining.<sup>98</sup>

Tripartism has not been a defining characteristic of U.S. workplace regulation, but it has existed sporadically. For example, during World War I, the United States deployed tripartism to maintain labor peace and guarantee wartime production.<sup>99</sup> Additionally, as Professor Kate Andrias has described, the 1938 Fair Labor Standards Act<sup>100</sup> (FLSA) provided a system of minimum wages aimed mostly to protect workers who were not covered by collective bargaining agreements.<sup>101</sup> The FLSA called for a tripartite minimum wage-setting machinery where labor organizations could participate.<sup>102</sup> However, Congress eliminated the tripartite system in 1949.<sup>103</sup> Congress then changed the law when the New Deal coalition broke up.<sup>104</sup>

States have also experimented with wage boards. New York State has been recently showcased for using wage boards to increase minimum wages in fast food, leading (in the eyes of some) to the beginnings of a “new labor law” based on sectoral bargaining through wage boards.<sup>105</sup> Further, labor historian Nelson Lichtenstein noted that five additional states have wage boards on the law books, vestiges of the Progressive Era.<sup>106</sup> These are California, New Jersey, Massachusetts, North Dakota, and Colorado.<sup>107</sup> Given its contemporary importance, this Essay focuses on assessing the tripartite nature of the New York Board.

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<sup>98</sup> See Ermida & Rosado Marzán, *supra* note 90, at 29.

<sup>99</sup> Harry C. Katz, Introduction: The Changing Nature of Labor, Management, and Government Interactions, in *THE NEW STRUCTURE OF LABOR RELATIONS: TRIPARTISM AND DECENTRALIZATION 1* (Harry C. Katz et al. eds., 2004); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 598 n.55 (2007) (citing HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT “ISM”* 135 (1997)).

<sup>100</sup> 29 U.S.C. §§ 201–219.

<sup>101</sup> See Andrias, *An American Approach*, *supra* note 3, at 661–62 (“Indeed, FLSA’s backers in Congress expressly claimed that the law would expand the role of unions in politics and the economy, particularly in the nonunion South, and would provide a minimalist surrogate labor union for still-unorganized workers.”).

<sup>102</sup> *Id.* at 625.

<sup>103</sup> See *id.* at 686–87.

<sup>104</sup> See *id.*

<sup>105</sup> See Andrias, *New Labor Law*, *supra* note 6, at 84–89.

<sup>106</sup> Lichtenstein, *supra* note 6, at 96.

<sup>107</sup> *Id.* But see Cynthia Estlund, *Sectoral Solutions That Work*, *supra* note 85, at 17–19 (arguing that recent examples of U.S. sectoral bargaining should more accurately be termed sectoral co-regulation).



## II. FOUR CASES

This Part reports on two pairs of contemporary cases where actors in blue states or cities have recently attempted to regulate the workplace through arrangements that include worker input and, thus, might be setting up systems of tripartism: co-enforcement in Los Angeles County and the city of Chicago, and sectoral bargaining in New York State and the city of Seattle. These cases are not offered as a representative sample of attempts at tripartism. Rather, they are contemporary cases that have caused some level of excitement among worker advocates. The aim of this Essay is to analyze whether these cases provide any evidence of a burgeoning tripartism from the “bottom up”—from the state and local level.

### A. Co-enforcement in Los Angeles County

The Los Angeles PHCs are new, voluntary entities created to increase workers’ knowledge and reporting of employer noncompliance with the Los Angeles County Health Officer Orders (HOOs) during the COVID-19 pandemic.<sup>108</sup> The PHCs were created on November 24, 2020, when the Los Angeles County Board of Supervisors adopted a new ordinance giving antiretaliation protections to workers who are members of a PHC or who form one.<sup>109</sup> Workers are protected against employer retaliation if they report or discuss violations of the HOOs.<sup>110</sup> Through the Los Angeles Public Health website, workers who have been retaliated against can submit an online complaint and reach out to a newly created Retaliation Call Center.<sup>111</sup>

Under the PHC ordinance, PHCs may be created in any of the five business sectors prioritized by Los Angeles County for having the most “significant numbers of COVID-19 outbreaks, complaints, and violations.”<sup>112</sup> The sectors include: groceries and supermarkets, warehousing and storage, apparel manufacturing, restaurants, and food manufacturing.<sup>113</sup>

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<sup>108</sup> *Public Health Councils*, CNTY. OF LA PUB. HEALTH, <https://perma.cc/865G-WK76>.

<sup>109</sup> *Id.*; L.A., CAL., CODE ORDINANCES tit. 11, § 1 (2020).

<sup>110</sup> *Public Health Councils*, *supra* note 108.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

### 1. Purpose of PHCs.

The Los Angeles County created PHCs with the goal of helping the county recover economically from the COVID-19 pandemic.<sup>114</sup> The County assessed the main obstacles toward economic recovery and concluded that ensuring employer compliance with the HOOs was essential.<sup>115</sup> Lack of employer compliance could contribute to COVID-19 infections, illness, and even death among workers.<sup>116</sup> Equity also motivated the new law: the increased infection, illness, and death rates disproportionately affected low-income communities and communities of color at more than three times the rate of higher income areas, making compliance even more urgent.<sup>117</sup> Thus, in an effort “to keep people safe, keep businesses open, and support the economic recovery of the region,” the County decided that businesses must be compelled to implement and abide by the HOOs.<sup>118</sup> To best accomplish this goal, the PHC initiative focused on ensuring employers and workers understood their rights and the HOOs.<sup>119</sup> The County reasoned that if work environments were taking the necessary precautions outlined in the HOOs, and if workers were aware of the protections afforded to them, then fewer workers would be infected and the County would be in a stronger position to recover from the pandemic.<sup>120</sup>

### 2. Forming a PHC.

PHCs can be created when at least two coworkers agree to form one in the workplace.<sup>121</sup> Advocacy groups that are recognized by the law as “community-based organizations” (CBOs) can participate by informing workers about their rights to form PHCs and increasing awareness of the HOOs.<sup>122</sup> Once created, the members of PHCs should educate their coworkers about their rights and report violations to the public health authori-

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<sup>114</sup> *Id.*

<sup>115</sup> *Public Health Councils*, *supra* note 108.

<sup>116</sup> *Id.*

<sup>117</sup> *LA County Launches Public Health Councils Initiative in Industries Highly Impacted by COVID-19*, CNTY. OF L.A. PUB. HEALTH (Apr. 28, 2021) [hereinafter *LA Launches*], <https://perma.cc/2VK4-Z36K>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *LA Launches*, *supra* note 117.

ties.<sup>123</sup> In a manner of typical co-enforcement, County officials pair a PHC with an advocacy group to assist the workers in carrying out the purpose of the PHC.<sup>124</sup> As of this writing, ten CBOs have been trained.<sup>125</sup> Additionally, as of this writing, there is no publicly-available data on how many PHCs have been formed in the County.

Los Angeles County relies on CBOs because they can serve as the “eyes and ears” of the County in the workplace,<sup>126</sup> underscoring the important role of the advocacy groups. The COVID-19 pandemic made the County acutely aware that its public health staff was spread too thinly and could not enforce the law on its own.<sup>127</sup> Labor unions can also be certified to train PHCs regarding COVID-19 health procedures, which allows protection for workers without violating collective bargaining agreements.<sup>128</sup>

PHCs are voluntary groups; nonmember workers are not required to utilize the protections and benefits afforded by them.<sup>129</sup> Similarly, employers need not create PHCs or support them.<sup>130</sup> According to the *Los Angeles Times*, the County appears to encourage employers (but without providing incentives or penalties) in the five prioritized sectors to “pay workers for their time participating on the councils, to allow councils to meet on-site, and to help third party organizations reach out to interested workers.”<sup>131</sup> Unionized workforces can also choose to create a PHC.<sup>132</sup> Employer groups, however, opposed the enactment of

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<sup>123</sup> *Id.*

<sup>124</sup> Leila Miller, *L.A. County Approves Program for Workers to Form Public Health Councils to Curb Coronavirus Spread*, L.A. TIMES (Nov. 10, 2020), <https://perma.cc/6P48-8QB5>.

<sup>125</sup> These CBOs were: Filipino Migrant Center, Garment Worker Center, Hospitality Training Academy, Icaza Foundation, Koreatown Immigrant Workers Alliance, Los Angeles Alliance for a New Economy, Restaurant Opportunities Center-LA, Pilipino Workers Center, Thai Community Development Corporation, and Warehouse Workers Resource Center. *LA Launches*, *supra* note 117.

<sup>126</sup> Tom Tapp, *Los Angeles Coronavirus Update: County Supervisors Vote to Empower Employees, Unions in Creating “Health Councils” to Report Businesses in Violation of COVID Orders*, DEADLINE (July 21, 2020), <https://perma.cc/7NT6-THUK>.

<sup>127</sup> *Id.*

<sup>128</sup> Miller, *supra* note 124.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

PHCs, voicing typical concerns that the workplace is overregulated and the ordinance was unnecessary.<sup>133</sup>

PHCs are supposed to remain in place after COVID-19 to better implement health and safety at work.<sup>134</sup> As Los Angeles County Board Supervisor Sheila Kuehl stated in a press release, “While this new program, the first of its kind in the country, emerged from the pandemic, its importance will be felt long, long after the pandemic has subsided, reassuring every worker in LA County that they will be safe at work.”<sup>135</sup>

PHCs are thus voluntary groups of workers that help educate coworkers about health and safety rules and conditions at work and that can report violations to County authorities. They are supported by CBOs. Member workers enjoy special antiretaliation protections.<sup>136</sup> County authorities pair CBOs with PHC members to further training and support.<sup>137</sup> PHCs are, in this sense, state-worker collaborations; they fit the co-enforcement mold.

PHCs do not, however, include the active participation of employers. The law might want employers to promote PHCs, but they are neither part of the PHCs nor formally required to support, negotiate, or collaborate with PHCs in any way. In fact, important employer groups opposed their creation.<sup>138</sup> Whatever the strengths of PHCs, they are not actual tripartite bodies. They are an example of what this Essay has called “quasi tripartism.”<sup>139</sup>

## B. Co-enforcement in Chicago

In 2018, the city of Chicago created the OLS to enforce city ordinances related to minimum wages, shift scheduling, paid sick leave, and antiretaliation protections.<sup>140</sup> The OLS was established under the Department of Business Affairs and Consumer Protection (BACP) of the city of Chicago, the office responsible for issuing business licenses and protecting consum-

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<sup>133</sup> Miller, *supra* note 124.

<sup>134</sup> *LA Launches*, *supra* note 117.

<sup>135</sup> *Id.*

<sup>136</sup> Miller, *supra* note 124.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Fine & Gordon, *supra* note 9, at 560; *supra* notes 73–74 and accompanying text.

<sup>140</sup> CHI., ILL., MUN. CODE § 2-25-35 (2018); CHI., ILL., MUN. CODE § 1-23 (2020); CHI., ILL., MUN. CODE § 1-24 (2020).

ers.<sup>141</sup> It was also created after an important worker advocacy group, Arise Chicago, pressured city officials for the OLS, arguing that BACP lacked sufficient resources to enforce the ordinances. The OLS has the power to investigate violations of the three laws it administers and cite employers in violation of those laws, which may lead to revoking an employer's business license or not renewing it.<sup>142</sup> The OLS also educates the public, including employers, about their obligations under those laws and informs workers about their rights.<sup>143</sup>

As of this writing, the OLS has about five permanent employees, including its director, two investigators, and an administrative assistant.<sup>144</sup> The OLS has also collaborated with advocacy groups, albeit informally.<sup>145</sup> The law does not require that the OLS institute a co-enforcement program.

While the OLS has no legal mandate to collaborate with advocacy groups, the Chicago OLS Director, at least as of this writing, strongly values collaboration with advocacy groups.<sup>146</sup> He thinks that collaboration is key for his office to do its work.<sup>147</sup> Collaboration helps him build trust between the office and the workers that it is supposed to protect.<sup>148</sup> Not only is the OLS new, but he recognizes that many low-wage workers in Chicago are undocumented and generally do not trust the government.<sup>149</sup> To gain their trust, he believes that his office needs to “go where the workers are”—to their communities—rather than expect the workers to show up at his office when they need it.<sup>150</sup> Hence, he wants his investigators to go to the communities where the workers live to learn about their grievances, investigate them, and resolve them.<sup>151</sup>

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<sup>141</sup> Alexia Elejalde-Ruiz, *Chicago to Create Office that Will Enforce City's Minimum Wage, Sick Leave Laws*, CHI. TRIB. (Oct. 31, 2018), <https://perma.cc/D5YP-ZVJV>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Author Interview with Arise Chicago (Feb. 21, 2021); Author Interview with Chicago OLS (Mar. 12, 2021).

<sup>145</sup> Author Interview with Arise Chicago (Feb. 21, 2021); Author Interview with Chicago OLS (Mar. 12, 2021).

<sup>146</sup> Author Interview with Arise Chicago (Feb. 21, 2021); Author Interview with Chicago OLS (Mar. 12, 2021).

<sup>147</sup> Author Interview with Chicago OLS (Mar. 12, 2021).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Arise Chicago, a worker center, agrees that the OLS has a strong collaborative practice.<sup>152</sup> The OLS Director, who had years of experience as a prosecutor in the Cook County State's Attorney's Office,<sup>153</sup> excitedly assumed his position and collaborates closely with Arise.<sup>154</sup> Because of that orientation, Arise feels that since the OLS was created, Arise has had more access to the mayor's office.<sup>155</sup> Arise Chicago gives some credit to the Mayor of Chicago, Lori Lightfoot, as well.<sup>156</sup> According to an Arise representative, Mayor Lightfoot moved quickly once she was sworn in as mayor to hire staff for the OLS, which was established by the prior administration of Mayor Rahm Emmanuel but was never actually staffed.<sup>157</sup> According to Arise, the mayor's transition team actively helped staff the office and worked closely with Arise to ensure that they hired people that Arise thought could best do the job and who have a good working relationship with the workers' rights advocacy community.<sup>158</sup>

While there is collaboration between Arise Chicago and the Chicago OLS, there isn't much more collaboration with other advocacy groups, at least not as of this writing. And while Arise Chicago is a prominent Chicago worker advocacy group, it has merely three hundred members<sup>159</sup> in a city of 2.7 million people.<sup>160</sup> There are at least eight other worker centers in the City.<sup>161</sup> Part of the outreach problem might be that the OLS lacks sufficient staff to send out representatives to other parts of the City and meet with other advocacy groups. Unions also remain very minor partners. Indeed, the head of the OLS admitted that there was not much collaboration with labor unions.<sup>162</sup>

The OLS does not partner with employers to enforce the law. However, it does provide compliance training to those em-

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<sup>152</sup> Interview with Arise Chicago (Feb. 21, 2021).

<sup>153</sup> *Director of Labor Standards*, CITY OF CHI., <https://perma.cc/S7MC-MYZL>.

<sup>154</sup> Interview with Arise Chicago (Feb. 21, 2021).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; see also *Memorandum from Arise Chicago to Lori Lightfoot's Transition Committee: Business, Economic and Neighborhood Development* (May 2, 2019), <https://perma.cc/A6PN-UL36>.

<sup>158</sup> Interview with Arise Chicago (Feb. 21, 2021).

<sup>159</sup> See César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 421 (2017).

<sup>160</sup> *QuickFacts Chicago City, Illinois; United States*, U.S. CENSUS BUREAU, <https://perma.cc/WVG9-88TZ>.

<sup>161</sup> See *About Us*, RAISE THE FLOOR ALLIANCE, <https://perma.cc/99RZ-UWK3>.

<sup>162</sup> Interview with Chicago OLS (Feb. 21, 2021).

ployers who appear to simply not know how to comply. The OLS is much tougher with those employers who attempt to intentionally evade the law.<sup>163</sup> Like other co-regulatory programs, this one is also quasi tripartite.

It should also be underscored that despite advocate and city support and excitement for the OLS, the OLS appears understaffed. For example, peer offices in San Francisco and Seattle have over thirty and forty staff members, respectively, despite being in much smaller cities.<sup>164</sup> This relative lack of resources might explain why the caseload of the OLS is comparatively lower than that of those peer offices, as is the total amount of money it has been able to recover for workers. For example, in 2021 the Chicago OLS reported that it opened 122 investigations, closed 243 cases, fined employers \$236,595, and got workers over \$1 million in restitution.<sup>165</sup> In the same year, the Seattle OLS opened ninety-five investigations, resolved eighty-three cases, fined employers a total of \$340,013, and got workers almost \$11.5 million in restitution.<sup>166</sup> Chicago's population (2.75 million) is about four times the size of Seattle's (737,000).<sup>167</sup>

Chicago's gap with San Francisco is wider even though Chicago's population is more than three times the size of San Francisco (population 874,000).<sup>168</sup> In the fiscal year 2020–2021, San Francisco opened 276 cases while closing 320 cases, collecting from employers \$2,039,553 in fines, and seeking restitution of over \$10 million for workers.<sup>169</sup> The difference between Chicago and both San Francisco and Seattle has been roughly as

<sup>163</sup> *Id.*

<sup>164</sup> Interview with Arise Chicago (Feb. 21, 2021); Interview with Chicago OLS (Mar. 12, 2021). According to the U.S. Census Bureau, in 2020 Chicago had 2,746,388 inhabitants. *QuickFacts Chicago City, Illinois; United States*, *supra* note 160. Seattle had 737,015 inhabitants. *QuickFacts Seattle City, Washington; United States*, U.S. CENSUS BUREAU, <https://perma.cc/WWB6-YZEP>. And San Francisco had 873,965 inhabitants. *QuickFacts San Francisco County, California; United States*, U.S. CENSUS BUREAU, <https://perma.cc/3B3D-YSKK>.

<sup>165</sup> CHI. OFF. LAB. STANDARDS, 2022 REPORT; Seattle Off. Lab. Standards, *Data and Interactive Dashboards*, CITY OF SEATTLE, <https://perma.cc/MND4-32JF>.

<sup>166</sup> Seattle Off. Labor Standards, *supra* note 165.

<sup>167</sup> *See id.*; S.F. Off. Lab. Standards Enforcement, Annual Reports, CITY AND CNTY. OF S.F., <https://perma.cc/A6KJ-NS6B> (reporting on fiscal years 2018–2019, 2019–2020, 2020–2021). For population numbers, see the U.S. Census Bureau data described above in note 164.

<sup>168</sup> See the U.S. Census Bureau data described above in note 164.

<sup>169</sup> S.F. Off. Lab. Standards Enforcement, *Annual Report FY 2020–21*, CITY & CNTY. OF S.F., <https://perma.cc/P49K-CERH>.

large in other recent years.<sup>170</sup> The Chicago OLS thus, according to Arise Chicago, appears to need more staff.<sup>171</sup> Co-enforcement can provide additional resources to government officers, but the OLS still needs core bureaucratic capacity to relate meaningfully with advocacy groups, monitor employers, and enforce the law.

### C. Sectoral Bargaining in New York

In 2016, at the insistence of some organized labor groups, including the Service Employees International Union (SEIU) and its alt labor<sup>172</sup> offshoot Fight for \$15, then–New York Governor Andrew Cuomo decided to increase minimum wages in the fast-food industry significantly above the federal minimum wage.<sup>173</sup> He did so by calling on the state’s Commissioner of Labor to convene a minimum wage board, as the Commissioner is empowered to do under the state laws.<sup>174</sup> That board was, under the law, supposed to have representatives of employers and workers in addition to a member representing the public.<sup>175</sup> The minimum wage board was supposed to hear from members of the public about whether wages in a sector are sufficient to “provide adequate maintenance and to protect the health and livelihood” of workers and, if not, recommend to the Commissioner wage levels that can do so.<sup>176</sup> However, as I have reported elsewhere, the law did not require that the employers and workers of the actual industries being regulated be the members of the New York Board.<sup>177</sup> The 2016 fast-food Board representatives were the secretary-treasurer of the SEIU in Washington, D.C., representing labor, and the former CEO of

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<sup>170</sup> See Seattle Off. Labor Standards, *supra* note 165; S.F. Off. Lab. Standards Enforcement, *supra* note 167.

<sup>171</sup> Author Interview with Arise Chicago (Feb. 21, 2021).

<sup>172</sup> See Dylan Walsh, *Alt-Labor, Explained*, MASS. INST. TECH. SLOAN SCH. OF MGMT., <https://perma.cc/3X7R-9BT8> (“Alt-labor describes the informal coalition of organizations that is pushing to advance workers’ rights in the wake of decreased union membership.”).

<sup>173</sup> Andrias, *New Labor Law*, *supra* note 6, at 64–67; see also Elmore, *Collaborative Enforcement*, *supra* note 66, at 104.

<sup>174</sup> Andrias, *New Labor Law*, *supra* note 6, at 65; N.Y. LAB. LAW § 653(1)–(2) (Consol. 2014).

<sup>175</sup> N.Y. LAB. LAW § 655(1)–(2) (Consol. 2014); see also N.Y. LAB. LAW § 653(2) (Consol. 2014) (stating that labor and employer representatives shall be nominated by the American Federation of Labor/Congress of Industrial Organizations and the New York State Business Council, respectively).

<sup>176</sup> N.Y. LAB. LAW §§ 653(1)–(2), 654, 655(3) (Consol. 2014).

<sup>177</sup> Rosado Marzán, *supra* note 97, at 153.



Gilt (the online apparel company) representing employers.<sup>178</sup> The mayor of the city of Buffalo represented the public interest.<sup>179</sup> Many groups provided testimony to the New York Board, including Fight for \$15.<sup>180</sup>

After the public gave its opinions and the Commissioner issued a report recommending the level of minimum wages for employees in the fast-food industry, the Governor signed a law establishing that fast-food establishments in New York City must increase their employees' wages incrementally until those wages reached \$15 an hour by December 2018. According to a different schedule, fast-food wages for the rest of the state had to be raised incrementally until they reached \$15 an hour by July 2021.<sup>181</sup>

Fight for \$15 aimed to get fast-food workers not only a better wage but also "a union."<sup>182</sup> Hence, after New York increased minimum wages, the SEIU created a new not-for-profit organization, Fast Food Justice.<sup>183</sup> It was a voluntary association that fast-food workers could join to advocate for themselves and their interests.<sup>184</sup> New York City also passed a new law, commonly referred to as the "Deductions Law," that helped fund the new organization by giving fast-food employees the right to demand that their employers send dues directly from their paychecks to nonunion, not-for-profit groups like Fast Food Justice.<sup>185</sup> At least five hundred workers must pledge to send money to the group before employers are obligated to send the funds to the group.<sup>186</sup> Fast Food Justice sought to maintain worker voice by educating

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<sup>178</sup> Andrias, *New Labor Law*, *supra* note 6, at 65–66.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 65.

<sup>181</sup> N.Y. COMP. CODES R. & REGS. tit. 12 § 146-1.2 (2020).

<sup>182</sup> Andrias, *New Labor Law*, *supra* note 6, at 8 (emphasis omitted).

<sup>183</sup> Max Zahn, *The Future of the Low-Wage Worker Movement May Depend on a Little-Known New York Law*, IN THESE TIMES (Aug. 15, 2017), <https://perma.cc/NG89-8N73>.

<sup>184</sup> *Id.*

<sup>185</sup> See N.Y.C. ADMIN. CODE § 20-1302 (2020). This law was part of a package of laws enacted by New York City in 2017, commonly referred to as the "fair workweek" laws. While these laws dealt mostly with scheduling rules, they included new rules giving employees of fast-food employers the right to have part of their paychecks sent directly to not-for-profit organizations of the fast-food industry. Eli Z. Freedberg, Christine L. Hogan, Bruce R. Millman & Michael J. Lotito, *New York City Enacts Laws Limiting Employers' Flexibility to Staff Employees*, LITTLER NEWS & ANALYSIS INSIGHT (Jun. 2, 2017); see also Elmore, *Collaborative Enforcement*, *supra* note 66, at 105.

<sup>186</sup> N.Y.C. ADMIN. CODE § 20-1303(3) (2020).

workers about their rights.<sup>187</sup> Fast Food Justice also sought to advocate for workers' immigration, housing, and transportation concerns.<sup>188</sup> As of 2019, the group had two thousand dues-paying members.<sup>189</sup> Fast Food Justice's goal, however, was to recruit five thousand workers by 2018 and at least ten thousand workers by 2020.<sup>190</sup> As of 2019, there were sixty-five thousand fast-food workers in New York City; membership of ten thousand workers would allow Fast Food Justice to build a \$1.8 million treasure chest to run its campaigns.<sup>191</sup> It fell short of that goal,<sup>192</sup> and the organization now appears to be defunct (given its lack of public presence). Hence, despite real gains—both by increasing wages for many workers and by building a new organization—Fast Food Justice failed to meet some of its central organizational goals.<sup>193</sup>

Moreover, a deal struck to extend the \$15 minimum wage to the state level curtailed the power of the Commissioner going forward to set wages for some occupations.<sup>194</sup> Additionally, while many sectors of civil society participated in public hearings to voice their opinions on minimum wages in the fast-food industry, the wage hike was not the product of negotiation between fast-food workers and employers.<sup>195</sup> Unlike traditional tripartite arrangements where management and labor, in conjunction with the state, agree on and set the terms of employment, including wages,<sup>196</sup> in the New York system, the Commissioner—who was not part of the wage board—had the final say on wag-

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<sup>187</sup> See Zahn, *supra* note 183.

<sup>188</sup> STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 249 (2019).

<sup>189</sup> *Id.*

<sup>190</sup> Steven Greenhouse, *Fast-Food Workers Claim Victory in a New York Labor Effort* (Jan. 9, 2018), N.Y. TIMES, <https://www.nytimes.com/2018/01/09/business/economy/fast-food-labor.html>.

<sup>191</sup> GREENHOUSE, *supra* note 188, at 249.

<sup>192</sup> *Id.*

<sup>193</sup> See Kalena Thomhave, *Fighting for \$15—and a Union*, AM. PROSPECT (Oct. 16, 2018), <https://perma.cc/A2E4-DBQ9> (detailing how workers still lack a bargaining agent in the fast-food industry).

<sup>194</sup> See Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 12 HARV. L. & POL'Y REV. ONLINE 1, 9 (2017).

<sup>195</sup> Andrias, *New Labor Law*, *supra* note 6, at 66–67.

<sup>196</sup> For example, as explained by Professor Anne Trebilcock: “[I]n the tripartite context of the [International Labor Organization], the term ‘Member States’ encompasses the representatives of Employers and Workers, who alongside those of government take the decisions about which items will be considered for possible standard-setting.” Anne Trebilcock, *Putting the Record Straight About International Labor Standard Setting*, 31 COMP. LAB. L. POL'Y J. 553, 554 (2010).

es.<sup>197</sup> A tripartite wage board that does not directly represent the concerned parties merely provides advice on what wage levels should be.<sup>198</sup> Hence, while the New York case was heralded as a model for sectoral bargaining in the United States, its results left some labor advocates wanting more.<sup>199</sup>

In all, while a celebrated case, the New York Board did not create a space for labor and management in the actual industry being regulated (fast food) to negotiate a deal on wages. The product of the Board was, moreover, not a binding instrument but a recommendation.<sup>200</sup> The Commissioner had the final say on wage levels. This structure hardly counts as a bargaining body that can effectively coordinate economic activities between the government, labor, and management. Perhaps a way to understand the New York Board is that it was a tripartite regulatory body, not a collective bargaining institution.<sup>201</sup> As such, it did not need to be representative of the actual parties who would need to live by its bargained-for recommendations if turned into law. And so, it was not.

#### D. Sectoral Bargaining in Seattle

The Seattle Board was “established to provide a forum for hiring entities,<sup>202</sup> domestic workers, worker organizations, and

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<sup>197</sup> The New York Wage Board is appointed only to “inquire and report.” N.Y. LAB. LAW § 653 (Consol. 2021). It can conduct public hearings, report, and make recommendations to the Commissioner. N.Y. LAB. LAW § 655(3)–(5). The Commissioner has the authority to order minimum wages and regulations. N.Y. LAB. LAW § 657. In other words, the Commissioner sets the wages.

<sup>198</sup> N.Y. LAB. LAW § 655(4)–(5).

<sup>199</sup> See Tom Juravich, *Fight for \$15: The Limits of Symbolic Power—Juravich Comments on Ashby*, 42 LAB. STUD. J. 394, 395–96 (2017) (arguing that Fight for \$15 focused on a limited strategy of symbolic power that requires building “structural power” against employers); see also Jonathan Rosenblum, *Fight for \$15: Good Wins, but Where Did the Focus on Organizing Go?*, 42 LAB. STUD. J. 387, 389 (2017) (noting lack of union gains by the Fight for \$15).

<sup>200</sup> Ermida & Rosado Marzán, *supra* note 90, at 113.

<sup>201</sup> Cynthia Estlund, *Sectoral Solutions That Work*, *supra* note 85.

<sup>202</sup> The Seattle Municipal Codes defines “hiring entities” as:

[A]ny individual, partnership, association, corporation, business trust, or any entity, person, or group of persons that pays a wage or pays for the services of a domestic worker. It includes any such entity or person acting directly or indirectly in the interest of a hiring entity in relation to the domestic worker. When an individual or household contracts with a separate hiring entity that employs the domestic worker(s) to provide domestic services, the separate hiring entity is solely liable for violations of this Chapter 14.23 unless the individual or household interferes with the rights established for domestic worker(s) in this Chapter 14.23.

the public to consider, analyze, and make recommendations to the City on legal protections, benefits, and working conditions for domestic-worker industry standards.”<sup>203</sup> It was created in 2018, following advocacy by Seattle domestic workers, the Seattle Domestic Workers Alliance (SDWA), SEIU 775 (a union of long-term care workers), Casa Latina (an advocacy group representing rights of Latinx workers), and Working Washington (a broad-based worker advocacy group).<sup>204</sup> The SDWA is a project of Working Washington with important leadership from domestic workers.<sup>205</sup> The SDWA surveyed 174 domestic workers to gather information about working conditions, including wages, harassment, discrimination, and health and safety at work.<sup>206</sup> The SDWA survey report provided policy recommendations, including a plan to create a deliberative body comprised of domestic workers, employers, and a city representative to determine labor standards for domestic work in Seattle.<sup>207</sup>

In light of the SDWA’s report, Seattle City Councilor Teresa Mosqueda sponsored the Seattle Domestic Workers Bill of Rights<sup>208</sup> (Domestic Workers Ordinance) to create a Domestic Workers Standards Board (Seattle Board) and to guarantee domestic workers meal breaks, rest breaks, minimum wage, days of rest, protection of personal documents, and the right to seek legal recourse against employers for violations of labor laws.<sup>209</sup> Through her efforts and those of others, the city council unanimously passed the ordinance, which amended the Seattle Municipal Code.<sup>210</sup> The Municipal Code now outlines the requirements of the Seattle Board and guides its purpose.<sup>211</sup> The Seattle Office of Labor Standards (an office that is similar to

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SEATTLE MUN. CODE § 14.23.010.

<sup>203</sup> SEATTLE MUN. CODE § 14.23.030(A).

<sup>204</sup> Kelsey Hamlin, *In Seattle, Domestic Workers Don’t Have the Same Protections as Others—But That Could Change*, CURBED SEATTLE (May 19, 2018), <https://perma.cc/9XM2-KE2E>.

<sup>205</sup> Margaret Diddams, *Home Equity: Inequality and Exclusions Facing Domestic Workers in Seattle*, SEATTLE DOMESTIC WORKERS ALL., <https://perma.cc/EGQ9-E3Y9>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> SEATTLE MUN. CODE, ORDINANCE NO. 125,627, COUNCIL BILL NO. 119,286 (2018).

<sup>209</sup> Steven Hsieh, *Seattle City Council Passes New Labor Standards for Domestic Workers*, CURBED SEATTLE (July 23, 2018), <https://perma.cc/3VB6-R2FJ>.

<sup>210</sup> SEATTLE MUN. CODE, ORDINANCE NO. 125,627, COUNCIL BILL NO. 119,286 (2018).

<sup>211</sup> SEATTLE MUN. CODE, ORDINANCE NO. 125,627, COUNCIL BILL NO. 119,286 (2018).

Chicago's OLS and which predated the Seattle Board) is tasked with providing support and staff to the Seattle Board.<sup>212</sup>

1. Appointed tripartitism.

The Seattle Board is currently composed of thirteen members (called Commissioners). Four of these Commissioners represent "hiring entities,"<sup>213</sup> two represent individuals either contracting with or hiring one or more domestic workers (typically for households), four represent domestic workers or worker organizations, two represent domestic workers not in worker organizations, and one represents the community.<sup>214</sup> Six of the positions are appointed by the city council, six are appointed by the mayor, and the remaining position is appointed by the Domestic Workers Standards Board.<sup>215</sup> While six of the positions were initially for two-year terms, subsequent appointees to those positions, and appointees to all other positions, serve three-year terms.<sup>216</sup> Hence, the Seattle Board is a tripartite organization. However, whether a majority of Seattle domestic workers, hiring entities, and households agree that they are being represented in the Seattle Board remains unknown because the positions are appointed, not elected.

2. Authority.

The Seattle Board is responsible for "providing a forum for hiring entities, domestic workers, worker organizations, and other affected parties to share information, insights, and experiences on the working conditions of domestic workers, and recommendations on how working conditions can be changed to meet the needs of domestic workers and hiring entities."<sup>217</sup> The Seattle Board can recommend "possible legislation or policies

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<sup>212</sup> SEATTLE MUN. CODE, ORDINANCE NO. 125,627, COUNCIL BILL NO. 119,286 (2018); see also Elmore, *Collaborative Enforcement*, *supra* note 66, at 109 (acknowledging Seattle's Office of Labor Standards model to enforce laws in the workplace).

<sup>213</sup> Hiring entities include "any individual, partnership, association, corporation, business trust, or any entity, person, or group of persons that pays a wage or pays for the services of a domestic worker." SEATTLE MUN. CODE, ORD. NO. 125627, COUNCIL BILL NO. 119286 (2018).

<sup>214</sup> SEATTLE MUN. CODE § 14.23.030(B).

<sup>215</sup> SEATTLE MUN. CODE § 14.23.030(B).

<sup>216</sup> SEATTLE MUN. CODE § 14.23.030(C).

<sup>217</sup> SEATTLE MUN. CODE § 14.23.030(G).

changes, changes to the City's outreach and education efforts, and/or changes to the City's enforcement strategies."<sup>218</sup>

Pursuant to the ordinance, the Seattle Board is required to create a "workplan" every two years.<sup>219</sup> Once created, the workplan requires approval by the city government.<sup>220</sup> Pursuant to the workplan, the Seattle Board provides recommendations on, among other things:

- training for hiring entities and domestic workers;
- standard setting, including wages, overtime, and pay differentials;
- access to paid leave, paid family leave, paid time off for bereavement, vacation, and retirement health care benefits, such as through a leave bank or portable benefit structure;
- workers' compensation and temporary disability insurance;
- hiring practices, including notice of rights and record-keeping template language;
- best practices for work schedule changes; and
- outreach and enforcement strategies to ensure compliance with the applicable labor standards.<sup>221</sup>

While certainly tripartite and tasked with relevant norm-creating duties, we should underscore that the Seattle Board's role is primarily, although not uniquely, advisory. The Seattle Office of Labor Standards retains most norm- and standard-making authority, as well as enforcement duties.<sup>222</sup>

That said, the ordinance does provide the Seattle Board some authority to investigate violations of the Seattle Municipal Code, to coordinate implementation and enforcement of the domestic workers chapter, and to create appropriate guidelines or rules to implement and enforce the chapter.<sup>223</sup> In this manner, the Seattle Board has some lawmaking power and authority to enforce rules, which is different from the wholly advisory role that the New York Board has. It is tripartite in character, and, while perhaps not democratically representative of the sector, it

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<sup>218</sup> SEATTLE MUN. CODE § 14.23.030(G).

<sup>219</sup> SEATTLE MUN. CODE § 14.23.030(H).

<sup>220</sup> SEATTLE MUN. CODE § 14.23.030(H).

<sup>221</sup> SEATTLE MUN. CODE § 14.23.030(I).

<sup>222</sup> SEATTLE MUN. CODE § 14.23.075(C).

<sup>223</sup> SEATTLE MUN. CODE § 14.23.075(A)–(B).

does have domestic workers and their employers as Commissioners.

### III. ANALYSIS

The results of these case studies are summarized in Table 1. Without a doubt, laws, ordinances, or informal practices of the four bodies reported here provide for worker participation. The Los Angeles PHCs provide spaces for worker collaboration with Los Angeles County officials to better protect health and safety at work. While the PHCs are formally structured as co-enforcement bodies, the Chicago OLS informally engages with worker advocacy groups to receive information about employers who do not comply with Chicago workplace ordinances. The New York Board and the Seattle Board both have worker participation of some sort. Employers also participate in the New York Board and the Seattle Board but not in the co-enforcement cases of Chicago and Los Angeles County.

TABLE 1: SOME CONTEMPORARY U.S. EXPERIMENTS WITH CO-ENFORCEMENT AND SECTORAL BARGAINING

<i>Body</i>	<i>Workers Participate?</i>	<i>Employers Participate?</i>	<i>Body Is Representative?</i>	<i>Affected Parties Bargain?</i>
L.A. PHCs	Yes	No	No	No
Chicago OLS	Yes (informally)	No	No	No
New York Board	Yes	Yes	No	No
Seattle Board	Yes	Yes	Somewhat	Yes

The presence of some sort of employer participation in the sectoral bargaining cases of New York and Seattle, and their absence in the co-regulatory cases of Chicago and Los Angeles County, is likely because the former cases require some form of negotiation between parties, while the latter, being enforcement bodies, do not.<sup>224</sup>

Employers might oftentimes be a presence in co-enforcement decisions without being an actual party, in the

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<sup>224</sup> Cynthia Estlund, *Sectoral Solutions That Work*, *supra* note 85.

sense that their interests might be considered by government and labor regulators given employers' capacity to destroy jobs or exit the economy altogether if enforcement becomes too onerous.<sup>225</sup> Moreover, employers retain the authority to regulate the workplace unilaterally in areas where state regulation is absent. In this manner, tripartism under a co-enforcement model could be nominal, or quasi tripartite, rather than actual or real.

There are also limitations in the government-labor collaborations not captured in Table 1. The Chicago OLS mostly collaborates with Arise Chicago, which is just one worker advocacy group in the Windy City and which has a mere three hundred members<sup>226</sup> in a city of 2.7 million people. The Chicago OLS still has some ground to cover to handle caseloads as large as those in Seattle and San Francisco, which are smaller cities. Hence, the reach of the Chicago OLS is narrow. It seems that they need more resources to do their work. Additionally, as of this writing, there is no available evidence of how many PHCs exist or how effectively they're handling health and safety in Los Angeles workplaces. More research is needed to know how effective these bodies are, or if they even exist.

While the New York Board was tripartite and had employer participation, there was no requirement that it have members who represent the industry that they were attempting to set minimum wages for. The fact that no fast-food employer representative—or fast-food worker representative for that matter—was a member of the 2016 fast-food wage board is telling of the lack of representativeness of this body. In this sense, it was also a quasi-tripartite institution. The parties who were really affected by the wages it set had no bargaining authority and could not recommend terms.

Different from the New York Board, the Seattle Board has representatives of actual workers and employers in the domestic work sector. However, these representatives are appointed, not elected, so it is difficult to assert that Seattle domestic workers and employers are generally represented in the Seattle Board. In other words, while the New York Board was not a representative body, the Seattle Board is likely only limitedly so.<sup>227</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> See Rosado Marzán, *Worker Centers and the Moral Economy*, *supra* note 159, at 421.

<sup>227</sup> This is not to say that appointed representatives can never be generally representative of a sector. As I have described with Professor Ana Ermida, Uruguayan wage



While we could celebrate the Seattle Board as an exceptional tripartite body given that government, directly affected employers, and workers all actually participate, we should not generalize too much from this case. While domestic work is an important sector—it employs about 24,500 workers in Seattle<sup>228</sup>—it is most likely not a significant part of the \$331 billion Seattle economy.<sup>229</sup> Multinational giants such as Amazon, Boeing, Costco, Microsoft, and Starbucks have either headquarters or major operations in Seattle.<sup>230</sup> Hence, the economically small size of the Seattle domestic-work sector also makes it an exception that proves the rule of a liberal market economy in the United States, devoid of actual tripartism.

#### CONCLUSION

This Essay argued, using evidence from case studies, that tripartism remains elusive in the United States. Employers are absent from the co-enforcement projects in Los Angeles and Chicago. The New York Board, while formally tripartite, did not provide directly affected parties the capacity to bargain. To the extent that these are tripartite, they appear to be only quasi tripartite. The Seattle Board may be a celebrated exception. Hence, tripartite bargaining spaces, as understood by labor lawyers, and even by Ayres and Braithwaite, do not have much of a presence in the United States, where a liberal market economy prevails and persists. Moving the United States away from its liberal market condition is a very uphill battle.

This Essay does not suggest that robust tripartism is an impossibility in the United States. A limited cross section of four programs that are creating excitement today cannot predict all that we should expect in the future. Moreover, actual tripartism and bargaining prevail in the Seattle Board. Additionally, the United States has experienced actual tripartism through sectoral bargaining and other experiments in the past, and these

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councils are populated with appointed delegates that are generally socially recognized as representative of the actors in the sector. Ermida & Rosado Marzán, *supra* note 90, at 134, 136, 140.

<sup>228</sup> Julia Wolfe, Jori Kandra, Lora Engdahl & Heidi Shierholz, *Domestic Workers Chartbook*, ECON. POL'Y INST. 47 (May 14, 2020), <https://perma.cc/A4ZY-X9VU>.

<sup>229</sup> *Gross Domestic Product by County (Current Dollars)*, WASH. REAP <https://perma.cc/7Q7G-58Y5>.

<sup>230</sup> *About Seattle*, SEATTLE METRO. CHAMBER OF COM., <https://perma.cc/26QT-MNZ4>.

might repeat in the future.<sup>231</sup> The state and city initiatives discussed here can also be understood in an evolutionary manner: Campaigns might build from past movements, scale upwards, and diffuse more broadly with time.<sup>232</sup> Changes in political economies hinge on shifting political coalitions as much as they rest on established institutional legacies.<sup>233</sup> So while the cross section of four high-profile cases might say something about how things currently exist in the United States, they do not foreclose the historical debate. That is clear. But all that said, it appears that, at least in the predictable future, quasi tripartite schemes, perhaps with some celebrated exceptions, are the kinds of institutional arrangements that our political conditions and liberal market institutions will deliver.

But, before we conclude, we should note that as this Essay went to press, the state of California passed the Fast Food Accountability and Standards Recovery Act<sup>234</sup> (FAST Recovery Act), giving employers, workers, and public officials of the state and some counties<sup>235</sup> authority to promulgate, amend, or repeal regulations and promote the financial and physical well-being of fast-food workers.<sup>236</sup> These parties receive that authority through their participation in a new government body, the Fast Food Council (Council).<sup>237</sup> The Council has broad authority to regulate health, safety, and employment standards in the state's fast-food restaurants.<sup>238</sup> Six of the ten council members must

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<sup>231</sup> See Andrias, *An American Approach*, *supra* note 3, at 709; Fishkin & Forbath, *supra* note 18, at 447–56 (arguing for a constitutional politics where sectoral bargaining is one of many other institutional interventions required to displace oligarchy).

<sup>232</sup> Elmore, *Labor's New Localism*, *supra* note 19, at 304.

<sup>233</sup> Rahman & Thelen, *supra* note 36, at 7–8; see also Sara Slinn, *Broader-Based and Sectoral Bargaining Proposals in Collective Bargaining Law Reform: A Historical Review*, 85 *LABOUR/LE TRAVAIL* 13, 50–51 (2020) (describing the history of broader-based bargaining in Canadian jurisdictions and how it has failed to gain legislative traction at key moments because labor unions' support for it fractured, employers sometimes opposed it, and governments were unwilling to move forward in such fissured political contexts).

<sup>234</sup> California A.B. No. 257 (2022).

<sup>235</sup> The FAST Recovery Act allows cities or counties with populations greater than two hundred thousand to establish their own local fast-food councils to review local industry standards and conditions and make recommendations to the state's Fast Food Council. California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(i)).

<sup>236</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471).

<sup>237</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471).

<sup>238</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(b)).

vote in favor of any proposed regulation or amended regulation for it to pass.<sup>239</sup>

The Council is comprised of ten members serving four-year terms.<sup>240</sup> Council members are appointed, not elected, and no member can serve more than two consecutive terms.<sup>241</sup> The governor is tasked with appointing eight of the ten members, comprised of:

- two representatives from state agencies—one from the California Department of Industrial Relations and one from the Governor’s Office of Business and Economic Development;
- two representatives of fast-food franchisors;
- two representatives of fast-food franchisees; and
- two representatives of fast-food employees.<sup>242</sup>

The Senate Rules Committee and the Speaker of the Assembly each appoint one of the remaining two positions.<sup>243</sup> Both positions are for “representatives of advocates for fast-food restaurant employees.”<sup>244</sup> In other words, four of the council members represent fast-food workers or advocates for fast-food workers, four members represent fast-food employers, and the other two members represent the government.

Regulations promulgated by the council are *minimum* standards, and they are binding on all covered fast-food employers, except for situations in which there is a valid collective bargaining agreement.<sup>245</sup>

In this sense, the FAST Recovery Act creates a body where worker-representatives affected by the promulgated standards and rules can participate. Like the Seattle Board, these members are appointed, not elected, and hence are representative only to some extent. However, at least on paper, the new law creates a body that appears as tripartite as the Seattle Board,

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<sup>239</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(d)(1)(A)).

<sup>240</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(a)(1), (3)).

<sup>241</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(a)(2) and (3)).

<sup>242</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(a)(1)

<sup>243</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(a)(2).

<sup>244</sup> California A.B. No. 257 (2022) (to be codified at CAL. LABOR CODE § 1471(a)(1).

<sup>245</sup> California A.B. No. 257 (2022) (as codified in CAL. LABOR CODE, DIV. 2, § 1471(k)(3). But, per the same provision, the collective bargaining agreement must comply with certain standards. Under no circumstance, however, can collective bargaining agreements waive occupational health and safety protections.

but in a larger sector of the economy. If the Council succeeds in regulating the industry, it might well be the first major tripartite scheme built in the United States in many years, and it may mark a more substantial shift away from the liberal market scheme and toward coordination, at least in one blue state.<sup>246</sup>

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<sup>246</sup> The new state law also creates protections regarding discrimination and retaliation against fast-food employees who engage in activities protected by the Act, including making complaints or participating in investigations related to employee or public health and safety, and refusing to work in unsafe conditions. CAL. LABOR CODE, §§ 96, 1472).