

DEBATE

WORKPLACE FEDERALISM

In a decision from the last term, the Supreme Court held that a state law prohibiting the use of state funds by employers for both anti- and pro-union advocacy was preempted by federal law. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). The *Brown* decision sparks this debate between Professors Paul M. Secunda, of Marquette University Law School, and Jeffrey M. Hirsch, of the University of Tennessee College of Law, as to whether the federal government or the states are best equipped to protect the rights of workers under the law.

Professor Secunda argues that federal regulation enacted to protect workers in the workplace has suffered from lack of enforcement and political bias. Thus, because “the federal government . . . has proven unwilling and unable to protect the basic rights of workers,” he maintains that “state law should be permitted to play a complementary role in all of [the] areas of workplace regulation where federal law is silent or absent.” Individual states, then, could act as “laboratories” that could “engage in thoughtful, legislative experimentation.” Finding the idea of an exclusive federal scheme likely to result in “self-selection bias and inefficient prioritization of agency resources,” he concludes that needed regulation may only be available to the states.

Professor Hirsch counters that Professor Secunda’s proposal would exacerbate the problems with the current underenforcement of workers’ rights, which at least partly results from the complexity created by a regulatory framework made up of federal, state, and local law. As a solution, Hirsch proposes that the federal government should be given exclusive control of the workplace, under a single system of enforcement and regulation. His suggested changes include a single workplace law statute, a single agency to administer that statute, and a litigation-based enforcement approach that includes the creation of private-rights of action for violations and the creation of a specialized Article III labor and employment court. Thus, while conceding that “[t]he federal government’s regulation of the workplace has been far from perfect,” he argues that “it is a far better choice than fifty different state regimes.”

OPENING STATEMENT

*The Ironic Necessity for State Protection of Workers*Paul M. Secunda[†]

I.

There is a palpable irony in turning to the states for assistance in protecting workers in the workplace. Laws like the Railway Labor Act of 1926, the Norris-LaGuardia Act of 1932, and the National Labor Relations Act (NLRA) of 1935, were expressly enacted to take power away from management-friendly state courts. Historically, these courts, at a moment's notice and often *ex parte*, intervened in labor disputes and entered injunctions against unions and their allies based on the whims of the judge. Proponents of the NLRA saw its enactment as a way to overcome these anti-union state influences and to foster at the federal level the use of collective bargaining to promote the workplace rights of employees.

Nevertheless, some seventy-five years later, it is the federal government that has proven unwilling and unable to protect the basic rights of workers through exclusive federal regimes like the NLRA, the Employee Retirement Income Security Act (ERISA), and the Occupational Safety and Health Act (OSHA). In such an environment, it is time to "employ" state legislatures to see if they can find the necessary balm for what ill the American worker in areas where federal labor law remains silent. To borrow Justice Brandeis's federalism conception, by allowing states to operate as laboratories of experimentation today, workplace rights will not only flourish at the state level in the short term, but also gain traction at the federal level for years to come.

II.

In *Taking States out of the Workplace*, Professor Jeffrey Hirsch argues that for workers' best interests, states should play no role in regulating the workplace. 117 YALE L.J. POCKET PART 225 (2008), <http://>

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thepocketpart.org/2008/04/01/hirsch.html. More specifically, he argues that in order to make federal workplace law enforcement more effective, state law should simply disappear, making regulation in this area less complex and, therefore, more enforceable. Hirsch paints with this anti-federalist broad brush, all the while conceding the current dire situation facing American workers.

For me, Hirsch's anti-federalist stance is theoretically appealing from a structural standpoint in that I agree that the federal government ideally would be best equipped to manage labor relations. But the idea lacks practicality because of the current inability of the feds to do anything of the sort. This skepticism of a benevolent, universal federal regime is further fueled by the history of labor and employment law in contexts as diverse as union-management relations, occupational safety and health, and employer-provided pension and welfare benefits. Courts, agencies, and employers have routinely operated together in order to stifle employees' rights to organize, to receive promised pension and health benefits, and to work in a non-hazardous work environment. State regulation to fill in the gaps in federal labor and employment is therefore vital to ameliorate the harshness of these existing regimes.

In this Debate, I argue that state law should be permitted to play a complementary role in all of these areas of workplace regulation where federal law is silent or absent. Of course, in a short essay it is not possible to explore the numerous state law initiatives that would complement current federal labor and employment law. Yet, a recent labor decision by the United States Supreme Court and a flurry of legislative initiatives by states in the labor relations context helpfully illuminate the dangers of an exclusive federal workplace regime and the advantages of allowing states to provide additional protections for workers.

III.

The workplace federalism debate has gained increased prominence in the labor-management world in light of the United States Supreme Court's decision last term in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). In *Brown*, the Court found that federal labor law preempted a California state law which prohibited the use of state funds by employers for anti- or pro-union expression. Justice Stevens, for the majority, relied on the *Machinists* labor preemption doctrine to find the California law preempted. That doctrine, based on a 1976

Supreme Court case, requires a court to strike down a state law that interferes with the free flow of economic forces between labor and management. Justice Stevens concluded that the California law impermissibly interfered with the free flow of economic forces in the organizing context and thus carried no force. Consequently, California employers may now use state funds to fight unionization efforts.

The likely outcome of *Brown* is that many California employers facing organizational campaigns will utilize these additional funds to make anti-union presentations, called captive audience speeches. In these meetings, employers force their employees during work to listen to their views on union, political, and religious issues. (Wal-Mart has recently been accused of engaging in these meetings with its employees for political purposes.) Employees in return usually cannot speak, leave, or offer a rebuttal, without risking termination for insubordination. The effectiveness of this tactic is illustrated by the fact that a recent government report studying four hundred union campaigns found that ninety-two percent of these campaigns included captive audience meetings and the average union campaign had eleven such captive audience meetings held by employers.

In an exclusive federal labor regime of the type Professor Hirsch favors, that is the end of the story for employees. Employees will simply have to put up with captive audience speeches by their employers in an at-will employment world and the likelihood of union representation will continue to dim with employers using state money to tilt the economic forces, discussed in *Brown*, even further to their favor.

IV.

The operative legal regime need not exist in this manner. The NLRA does not prohibit captive audience meetings, nor does it specifically include them within employee free speech rights under Section 8(c). This is because, since the National Labor Relations Board's (NLRB) *Livingston Shirt* decision in the early 1950s, captive audience meetings have been found noncoercive and therefore not subject to unfair labor practice proceedings. It is accurate to say that federal law does not regulate captive audience meetings at all.

But what if states could come in and fill this gap in labor law, providing employees protection against captive audience meetings? The answer depends on whether one thinks states should be able to enact minimum conditions legislation to support these rights of workers to organize.

I believe such action on a state's part would be consistent with the long tradition of states using their police powers to protect the "life and limb" of workers by regulating the workplace. States already do this to a large degree in such diverse areas as employment discrimination, child labor, wage payment and collection, and hours and wages. Consider that sexual orientation discrimination would not be outlawed but for state and local employment laws outlawing such behavior. Should we have waited for an amendment to Title VII to provide any protection? How about the fact that low-income employees in certain states have earned additional income through living wage legislation? Should those workers have had to endure endless political debates about raising the federal minimum wage before receiving relief?

The answer is: of course not. So why shouldn't states also be able to protect workers from being harassed and intimidated by employers at work through captive audience meetings as a minimal working condition? So what if not all employees will be able to obtain this protection at one time? Isn't it better to have some protection, as opposed to none at all, while waiting for federal laws to be enacted? And let's say that an Obama NLRB comes along and overrules *Livingston Shirt* and declares captive audience meetings coercive under Section 8(c)? Are we any worse off that states have provided protection from such practices in the meantime?

In fact, many states have already considered such legislation over the last few years. Such Worker Freedom Act (WFA) legislation would ensure minimum conditions for employees interested in forming a union by outlawing employers from holding captive audience meetings during the workday.

V.

Now, it may be argued that even if state laws of the WFA-type are a good idea, they are nevertheless preempted by the current federal labor law regime. Even in light of the *Brown* decision, however, I believe WFA legislation should not be found preempted by the NLRA.

On the one hand, *Garmon* preemption is inapplicable because such laws do not interfere with employee free choice under Section 7 because they may voluntarily still choose to listen to their employer's views on unionization. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Nor do such laws permit what is impermissible for employers to do under Section 8. Although employers are permitted under Section 8(c) of the Act to freely speak in a noncoercive

matter about a union's organizing campaign, that protection does not extend to forcing employees at the pain of termination to hear those same views.

Nor should the *Machinists* preemption of the *Brown* decision apply in the workplace captive audience speech context. Unlike the state funds issue at stake in *Brown*, there is little argument that the free speech rights of employers will be impacted by WFA laws. Again, employers have the right to inform employees of their views on unionization on a voluntary basis, not to hold a proverbial gun to their head and make them listen.

In all, WFA state legislation would add an important layer of protection to employee organizational rights.

VI.

Nevertheless, under Professor Hirsch's anti-federalist views, such legislation could not exist. He and others worry that if states can pass laws like the WFA in labor-friendly states, then current right-to-work states in the South and the West will pass legislation that will make things even worse for workers. There is also something to the notion that we as academics should not choose federal or state remedies for a problem just because it squares with our political agenda.

Yet even though I believe that the federal government and the NLRB should regulate private-sector labor relations through the NLRA, there is no reason why state law cannot be an interim fix. If an Obama Board later expressly prohibits such meetings under Section 8(c), the WFA laws would be *Garmon* preempted. Similarly, state laws in this venue would not make labor law more complex as Hirsch fears if a McCain Board moves specifically to permit such captive audience meetings, which would thereby also *Garmon* preempt WFA legislation. In other words, WFA legislation would act as a significant place holder while the federal government debates the proper course and signals to the feds that resolution of this issue is ripe.

Furthermore, the costs of state WFA enactment are relatively low because it is hard to imagine how the background norms animating state contract law (or property law for that matter) could be made much more employer-friendly than they currently are (especially given present federal and state minimum conditions legislation that already exists). Employees in the United States exist in a world where employers have nearly absolute property rights to exclude unions and others from their workplaces and the employment at-will doctrine

gives employers maximum flexibility when it comes to hiring and terminating their employees.

This is not to say that the labor movement should not continue to search for a federal fix to this problem. Labor's allies in Congress have proposed in the last year alone a number of pieces of legislation to try to ameliorate the current situation and, like Professor Hirsch, I agree that with the "right" political results at the next election such labor reform may be in the offing. But again, neither a McCain Board or Obama Board decision, nor labor law reform of the NLRA itself, would be impacted by state WFA legislation in the long-term. Such state legislation would be preempted once the federal law is no longer silent on the topic.

So while we wait for federal labor law reform, states should be permitted to take up the mantle of workers' rights and engage in thoughtful, legislative experimentation. Such a move is an ironic necessity and, yes, perish the thought, consistent with notions of federalism.

REBUTTAL

*The True Irony of Workplace Law: Less is More*Jeffrey M. Hirsch[†]

Attempts to reform our current workplace regulatory scheme could move in two opposite directions: either add to today's byzantine system of workplace rules or dramatically simplify that system. One of the central fronts of this dispute is the states' role in governing the workplace. We could seek to expand the number of workplace rights by giving states more authority, but we should first ask whether workers would actually benefit from such a change. This question is important, for the true irony of workplace law is that increasing the number of workplace rights—particularly through state regulation—may make workers worse off.

Professor Paul Secunda and I agree on many things. Most importantly, we both believe that the law should do more for workers. Where we diverge is the solution. Professor Secunda would increase states' regulation of the workplace, allowing them to fill in gaps in federal workplace regulations. This approach would certainly create more rights for workers. But what good are those rights if workers are unable to take advantage of them? Today, many workplace rights are frequently left unfulfilled, a problem that an increased state role would exacerbate. Thus, I argue for an approach that would help employees actually enjoy the rights they have—an approach that would eliminate states' authority to regulate the workplace.

I.

The differences between our two approaches are perhaps less extreme than they first appear. In addition to sharing the same goal, I concede that my proposal is not a perfect one. As Professor Secunda accurately points out, some workers would be worse off if states no longer had authority to regulate the workplace. However, the costs to those workers would be outweighed by the benefits to other workers and the workplace regulatory system as a whole. These benefits would

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largely result from correcting serious deficiencies in the enforcement of today's workplace laws.

Many scholars—Professor Secunda and myself included—have decried the failure of a vast array of workplace laws to achieve their promise. For example, despite the explicit prohibition against employment discrimination in Title VII of the Civil Rights Act, many workers must still endure discriminatory acts at the hands of their employers. Similarly, the protections given to whistleblowers look good on paper, but amount to virtually nothing in practice. The same is true for numerous other workplace laws.

There are many causes for the deficiency of these laws, including the current presidential administration's resistance to workers' rights. But the problem is not one of politics alone. President Clinton's administration was much friendlier to workers, but our workplace laws still suffered many ills during his time in office. A more fundamental reason for this growing problem is that the sheer complexity of today's system of workplace laws makes compliance and enforcement of those laws extraordinarily difficult. Federal, state, and local governments all have a role in workplace regulation, each with its own set of laws. Moreover, these laws frequently cover the exact same type of conduct. At times, these laws are consistent, but far too often they are not.

So, why does this complexity matter? Imagine an employer that is faced with a dizzying array of statutes, administrative rules, and cases that may regulate its workplace. It requires a significant amount of resources to understand which laws apply and how to comply with them. Things are even worse for employees. It is not surprising, given employers' difficulty in understanding workplace laws, that employees are at almost a complete loss. This is particularly significant because most workplace rules require employees to initiate an action—a difficult requirement if they are not even aware of the rules or what they mean. Finally, if a dispute actually manages to result in litigation, the diverse set of workplace rules often requires multiple claims to be adjudicated in multiple forums. This duplicity is a waste of resources and, not surprisingly, creates judicial resistance to such claims. The result is a situation in which employers frequently do not comply with workplace rules, employees lack the resources to enforce their rights, and judges throw out good cases along with bad ones. In short, our workplace rules fail to accomplish their own goals.

Cutting down on this complexity is critical to the ultimate usefulness of workplace rights. Professor Secunda's proposal to increase

state governance of the workplace runs directly counter to that goal. Although the marginal effect of a single new state rule is low, the aggregate effect of numerous state-promulgated rules is great. The system is already bogged down by an overabundance of overlapping rules and forums—adding to that burden makes little sense.

This burden leads me to argue for exclusive federal control of the workplace. Admittedly, the federal government has not always been the best enforcer of workplace laws, but such imperfection is still better than today's convoluted system. Moreover, eliminating state regulation could lead to further simplification because placing all authority within one form of government provides a greater opportunity to streamline rules.

II.

Professor Secunda, while conceding that federal control of an increasingly global workplace makes sense, argues that states still have much to contribute to workers' rights. Evidence of these contributions are fleeting, however. To be sure, states such as California have more progressive workplace regulations than could be realistically enacted by the federal government. But numerous states have far more regressive rules. Indeed, as bad as federal governance of the workplace has been at times, many states have exhibited substantially more hostility to workplace rights. Making matters worse, these regressive state rules often take the place of federal protections because pro-employer lawmakers can use the crutch of states' rights to resist federal reforms.

One way to address this problem would be to use a ratchet approach, in which the federal rules act as a floor that states could exceed. This approach would likely achieve the greatest level of workplace rights, although employees' ability to enforce those rights is questionable. Further, it is possible that if the federal government had exclusive authority over the workplace, it would provide more protection than it does now, as the theoretical possibility of state regulation would no longer exist. However, even if eliminating state governance would decrease the number of workplace rights, that decrease must still be weighed against the costs of a fragmented workplace regulatory system. Any one state law has a low cost. But aggregating those marginal effects greatly increases the impact.

III.

A possible benefit of state control is the classic experimentation theory of federalism, which suggests that the “best” policies will percolate in the states and be adopted nationwide. However, it is apparent that there is no such percolation with regard to workplace regulation, despite a long history of state governance. Although some bills first appear in the states, they typically address old questions. For example, the Worker Freedom Act (WFA) bills that Professor Secunda advocates are technically new, but they go to the legality of captive audience speeches—a question that labor law has struggled with for decades. Moreover, states generally pick from a menu of well-established regulatory options, rather than act as testing ground for truly novel ideas. The formulation of state workplace regulations looks like a typical struggle among political actors, not a laboratory experiment.

The importance of politics in determining workplace rules has long been a constant, both at the federal and state level. This reality is not only an impetus behind Professor Secunda’s proposal, but an impediment to it as well. As he notes, the current presidential administration has been no friend to workers. Given the administration’s stance, why would it give states more power to undermine its policy goals? Expanding state authority in an attempt to increase workers’ rights is likely to succeed only where it is least needed—in a federal government where lawmakers are already welcoming of such rights.

Further, focusing workplace regulation in one system would give worker-side groups a better opportunity to sway the political debate, no matter which party is in power. Currently, only employers have the resources to maintain a significant lobbying presence at every level of government that enacts workplace rules. Employers will always have more resources, but focusing workplace regulations at the federal level would at least allow worker-side groups to be in the game.

Finally, Professor Secunda’s reference to *Chamber of Commerce v. Brown* illustrates the danger of expanding state authority over the workplace. If he is correct that *Brown* and the NLRA’s preemption doctrines do not foreclose state WFA statutes—and I am not sure that he is—then he is proposing to add significant complications to union organizing disputes. Currently, the NLRA’s robust preemption means that the NLRB controls virtually all aspects of the organizing process. Thus, if the parties argue that the other side used improper tactics, such as retaliatory terminations or overly coercive captive audience

meetings, the NLRB adjudicates all of those allegations in a single proceeding. To be sure, the NLRB adjudicatory process could be improved, as it often takes longer than it should and lacks remedies sufficient to deter much unlawful conduct; however, adding state laws to the mix is not the solution. Indeed, Professor Secunda's support for state WFA statutes runs counter to one view of the NLRB's unwillingness to proscribe captive audience meetings—that they are a normal and acceptable part of a union campaign. Although I do not agree with that view, allowing states to fill in this “gap” may be ignoring that there really is no gap to be filled. More significantly, state WFA statutes would make the resolution of union election disputes more difficult.

In contrast to the NLRB's current control over union elections, imagine the same campaign dispute in a state that passed a WFA statute (Professor Secunda's state of Wisconsin is a possible option, unlike my state of Tennessee which would be more likely to ban unions if it were given the authority to do so). For instance, imagine that a union lost an election and alleges that the employer used unlawful terminations or captive audience meetings to intimidate workers. However, this time, the dispute is split between two forums. The NLRB retains jurisdiction over the NLRA allegations, but now an entirely new claim exists. The parties must litigate that claim in a state forum, but how would that litigation fit with the NLRB case? The parties could easily be in a situation in which the state forum finds that the captive audience meetings violated the WFA statute, but the NLRB finds that the meetings did not violate the NLRA. From the employees' perspective, the WFA victory provides little solace because the NLRB would not overturn an election based on an action that violates state law but is permitted under the agency's interpretation of the NLRA. Therefore, unless the WFA statute has significant fines, what good is it other than to make election litigation more complicated?

IV.

Federalism is not a theory that requires adherence for its own sake. Devolving authority to states is intended to provide benefits. Where those benefits are unable to offset the costs involved with state governance of an area, federalism should take a backseat to a different form of policymaking.

Few areas illustrate the costs of federalism more than workplace law. The complexity and confusion caused by multiple sources of law undermines the very purpose of those laws. We should not, then, add

to the problem by giving states more authority, even if the current political situation makes that strategy tempting. We should instead remember that political power is fleeting and devise a system of workplace governance that is focused on the government best situated to regulate that area and most likely to create a system that accomplishes its goals. The federal government's regulation of the workplace has been far from perfect, but it is a far better choice than fifty different state regimes.

CLOSING STATEMENT

More of Less: The Limits of Minimalism and Self-Regulation

Paul M. Secunda

The battle lines have been sufficiently drawn in this Debate on the appropriateness of state regulation of the workplace. I favor states playing a gap-filling role in workplace regulation where federal law is absent or silent and as part of their traditional role in legislating minimum condition laws to protect workers from inhumane working conditions. Professor Hirsch, on the other hand, seeks the complete eradication of all state workplace regulation and advocates an exclusive federal law regime. His hope is that such a new system will actually make workers better off because they will more easily be able to enforce their remaining rights in a less complex regulatory world.

The problem, however, is not one of complexity, but that federal agencies charged with carrying out the current law have neither the financial resources, the political will, nor the administrative tools to implement, enforce, and adjudicate these laws. Eradicating state authority over the workplace will not only fail to solve the present-day enforcement issues that Professor Hirsch and I agree are very real, but will also leave workers even more vulnerable to abuse as a result of fewer employment protections.

I.

Rather than reiterate points already made in the Opening Statements, I thought it would be useful to illustrate my concerns about increased abuse of workers in an exclusive federal regime by taking Professor Hirsch at his word and carrying out a thought experiment. In this hypothetical world, only federal workplace laws exist. Nevertheless, the federal government continues to prove unwilling and unable to protect the basic rights of workers through laws like the NLRA, ERISA, and OSHA. States have now, however, been field preempted out of the workplace regulation game.

What approaches are left for governmental decision makers who still cannot adequately enforce these employment laws? One possible approach is suggested by a number of legal scholars who have advocated for a third way of workplace regulation: new governance or self-

regulation. Its governance model is one of flexibility, adaptability, and non-coercive “soft” law. Some of these types of schemes already exist in the real world and one such model has already been implemented for over twenty-five years by the Occupational Safety and Health Administration (OSHA) in the form of the Voluntary Protection Programs (VPP).

Through this real-world example, this Closing Statement seeks to define the limits of the minimalist approach that Professor Hirsch and the new governance theorists prefer under the rubric that “less is more.” An examination of VPP, however, establishes the consequent need for state workplace regulation.

II.

In *Setting the Agenda for New Governance Research*, Professor Orly Lobel describes a “new governance” model having organizing principles “consisting of increased participation of nonstate actors, public/private collaboration, diversity and competition, decentralization and subsidiarity, integration of policy domains, flexibility and noncoerciveness (‘soft law’), adaptability and learning, and finally, legal orchestration.” Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 498 (2004). Professor Lobel’s goal is to set up new governance theory as a “third way” that transcends the current dichotomy between command-and-control regulation and complete deregulation. Although she applies her paradigm to different areas of law, for the purposes of this debate, I focus on the application of this governance model to the workplace.

First, to be fair, there does not seem to be a unified set of prescriptions that the new governance model requires in the workplace and Lobel emphasizes that its application is context-sensitive to the legal problem being addressed. Indeed, she identifies the constant call for renewal from within the model to be a key feature and stresses that flexibility and “soft law” should not be confused with a voluntary system.

Nevertheless, I believe that the practical result of this increased call for decentralization, flexibility, and soft law approaches to the workplace will be the further aggrandizement of employer power at the expense of employees. The administrative model that Lobel envisions, and to which the Hirsch exclusively federal regime will likely lead, is one that relies on a flexible, opt-in employment regulation system. Employers are given some incentive to comply with the law and

to implement internally best practices, but in these programs there appears to be lack of voluntary participation and program costs that exceed expected benefits. Instead of leading to more effective self-policing of the workplace by employers, this formalization of informal workplace practices suffers from self-selection bias and inefficient prioritization of limited agency resources.

III.

Consider one of the practical examples that Professor Lobel sets forth in the employment context and keep in mind how it would operate in the minimalist model of regulation that Professor Hirsch favors. Lobel has argued for the expansion of governance-based approaches to worker safety and health while simultaneously expanding targeted enforcement in the context of federal OSHA regulation.

Under the VPP, which has existed in one form or another at OSHA since 1982, labor, management, and the government work together to create a collaborative system for ensuring workplace safety and health. More specifically, the program requires employers to meet certain performance-based criteria for a managed safety and health system. For example, VPP participants must achieve illness and injury rates at or below the national average for their industries. Perhaps not surprisingly then, VPP work sites have more than fifty percent below the average missed-days-from-work-rates than similar organizations in their industries.

In return for participation in VPP, employers are supposed to benefit through fewer injuries and illnesses in the workplace and therefore, lower workers compensation premiums and fewer days missed by employees at work. Perhaps more importantly and concretely, from participating employers' point of view, is that VPP members are removed from OSHA's programmed inspection list, which means their workplaces will only be inspected by OSHA if there is an accident or an employee files a complaint. Moreover, OSHA does not issue citations for standard violations by VPP participating employers as long as they are corrected. Once certified, most VPP employers are inspected every three to five years to see if they are still in compliance.

This cooperative approach seeks to give incentive to employers to self-report by eliminating statutory penalties. At the same time, the hope is that self-complying employers will take some of the strain off of OSHA in implementing and enforcing workplace safety and health law and allow the agency to focus on higher risk industries. In short,

this program trusts employers to do the right thing from a safety and health perspective voluntarily.

Nevertheless, the VPP program suffers from some significant problems. Even Lobel recognizes the danger inherent in relying too much on employer cooperation and not enough on enforcement, especially when these cooperative programs develop in a primarily voluntary manner. In such instances, these cooperative workplace programs can become window dressing on a safety and health workplace epidemic facing low-wage workers who engage in some of the most hazardous jobs.

Three primary reasons explain the program's dysfunction. First, voluntary compliance programs are not cheap, and OSHA has been spending more of its ever-decreasing budgets on these programs in the last number of years as part of a larger deregulation movement by the Bush administration. Second, companies that already care about safety and health issues self-select into the VPP program because they know their illness/injury rates are below the national average for their industry, so why not get the seal of approval from OSHA while avoiding routine inspections and some citations? Third, even with the tremendous surge of participants in the VPP program over the last eight years, with numbers more than doubling, there still are only two thousand participants out of the approximately seven million workplaces covered by OSHA.

All of these issues together suggest that these same VPP companies would have met these standards anyway without the additional incentive and that the agency may be throwing money into a scheme that does not increase the overall rate of compliance with OSHA regulations. In fact, OSHA has fewer resources to ensure compliance with law by the vast majority of employers in this country, which means more workplaces are escaping even routine inspection by OSHA and more workers are subject to increased safety and health risks in the workplace.

All told, the use of the VPP program by OSHA casts substantial doubt on the efficacy of new governance approaches. After years of self-reflexive experimentation with the VPP process, there is no empirical evidence that it has made workplace safety and health regulations less complex or more easily enforceable (one of the benefits Professor Hirsch seeks with the elimination of state regulation). Indeed, to the extent that OSHA no longer provides a public forum to address the most common workplace safety and health issues for VPP employers, this governance approach also takes away from account-

ability and transparency in the workplace at a time in our country's history when such public goods are at a premium.

IV.

So what is the connection between Professor Hirsch's minimalist approach and the new governance one of Professor Lobel? Although Professor Hirsch does not discuss the merits of the new governance approach (and perhaps his Closing Statement will challenge my view that his regulatory regime will inevitably lead to dependence on new governance-based programs), his reliance on a minimalist scheme will likely require the use of governance approaches to make up for the lack of effective command-and-control enforcement at the federal level. Indeed, as Professor Cynthia Estlund has elaborated upon, there has been a growing trend among employers to adopt this self-regulation model in all areas of employment law. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005). I fear the federal-only regulated workplace envisioned by Professor Hirsch will devolve into a system in which employers internalize regulatory enforcement and thereby exacerbate the vulnerability of workers who increasingly lack a collective voice within these companies.

At the end of the day, workers need more protection in the workplace, not less. Yet fewer laws, all at the federal level, insure less formalized protections and more dependence on employers acting out of altruistic motives and not just trying to get away with as much as possible. I, for one, do not believe that adequate incentives currently exist in federal law for noncompliant employers to act substantially on their employees' behalf. When push comes to shove, and employees face employer intimidation when attempting to organize the workplace or an employee files claims of sexual orientation discrimination not covered by federal law, I would prefer employees have the concrete ability to bring a claim under state or local law, even given the problem of accessibility to adjudicative forums that may arise.

V.

In *The Big Squeeze*, Steve Greenhouse recently described the lack of respect that American employees receive in the workplace. STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* 142-45, 207-09 (2008); Steven Greenhouse, *Too Much Squeezing and Too Little Respect*, TODAY'S WORKPLACE, <http://>

www.todaysworkplace.org/2008/09/01/too-much-squeezing-and-too-little-respect. Examples included a Wal-Mart cashier who had managers that were so stingy about bathroom breaks that some cashiers ended up soiling themselves, a computer engineer who was laid off while his eight-year-old was visiting on Take Your Daughter to Work Day, and a software engineer who was suddenly fired along with seventeen other engineers and told that, if they wanted any severance pay, they had to train the workers from India replacing them. Of course, there are a myriad of even more examples of employees at all levels suffering from similar and worse affronts.

In this environment, workers should not be forced to exclusively depend on federal work laws that are out-dated for our globalized workplace (i.e., NLRA), under-utilized because of a lack of resources and questionable priorities (i.e., OSHA), or just plain cruel in their implementation because of the lack of remedial alternatives (i.e., ERISA). Nor should workers have to rely on vague promises that federal workplace regulation will someday get better. Employees will not regain respect from their employers through such a self-regulatory scheme. They need all the help they can get in this employment-at-will, right-to-work world. And if the needed regulation is only available through the states, then so be it.

CLOSING STATEMENT

Paper Rights or Real Rights?

Jeffrey M. Hirsch

Paper rights or real rights? That is the choice to be made between adding to the already large number of complex and ineffective workplace rights or trying to find a different approach that gives employees what they have been promised. Both Professor Secunda and I seek to enhance workplace protections for employees and—on paper—his argument for allowing states to enact gap-filling rights makes sense. But I fear that this additional authority would increase employers' and the judiciary's already significant hostility to workplace rights, and further hinder employees' ability to understand and enforce those rights.

My primary assertion is that we need first a different means to enforce current workplace goals, not a reshaping of the goals themselves. I am sympathetic to Professor Secunda's desire to expand workers' substantive rights, but that argument puts the cart before the horse. Simply adding more laws is unlikely to achieve the desired effect. We should instead create a less complex system that actually enforces the rights that exist.

Professor Secunda responds with a hypothetical federal regime that relies heavily on voluntary compliance. Certainly this is a possibility that would likely undermine employees' rights. However, it is not one that I have advocated. Indeed, I have strongly argued for a far different approach: a regulatory regime that relies on private rights of action and provides more incentives for these claims than exist under many of today's workplace laws.

I.

Professor Secunda warns that exclusive federal governance will "inevitably lead to dependence on new governance-based programs." These programs move away from traditional command-and-control governance by embracing flexible and noncoercive attempts to achieve self-compliance. As Professor Orly Lobel's work in this area reveals, there are both benefits and costs to such governance. Professor Secunda argues that a move away from command-and-control governance would result in worse conditions for employees. Although I

recognize the importance of some encouragement of employer self-compliance through nonpunitive means, I agree with Professor Secunda that such measures should not replace more traditional workplace regulations. That is why, in a current working paper, my proposal for exclusive federal regulation of the workplace uses an enforcement model that firmly relies upon private rights of action. Professor Secunda, in short, has attacked a straw man that I have not advocated and that is not an inevitable result of exclusive federal authority.

In my arguments for reshaping workplace law at the federal level, I have promoted a simpler, more understandable system of enforcement. However, that simplification does not abandon litigation. To the contrary, I have proposed a system that would primarily rely on private rights of action brought in federal court, possibly a new specialized labor and employment court. Indeed, my belief that litigation is the best means of enforcement even leads me to reject a growing trend of encouraging private arbitration of workplace disputes. The new “soft-law” type of enforcement measures that worries Professor Secunda could not be further from my intention.

Moreover, noncoercive enforcement measures are not an inevitable result of federal governance. These alternatives are still novel and their use has not been widespread in either state or federal workplace regulations. Even if something as radical as giving the federal government exclusive authority over the workplace occurred, there is no reason to think that the traditional governance approach would change. Professor Secunda’s own examples prove the point. He notes two federal statutes with strong federal preemption—the NLRA and ERISA. Although both statutes have their share of problems, neither relies in any meaningful way upon noncoercive enforcement schemes. Which federal statute does rely upon such measures? It is OSHA, which happens to be a statute that allows for concurrent state regulation. Although OSHA has a preemption clause, states may get permission to enforce federal safety and health regulations in the private sector, and almost half of them have taken advantage of this option. Thus, if voluntary compliance is the natural result of any enforcement scheme—and I do not believe that it is—current experience shows that it is more likely to result from joint federal-state control, not exclusive federal authority.

Professor Cynthia Estlund’s work impliedly supports this idea. As Professor Secunda notes, she has described employers’ growing use of self-regulation. Yet, Professor Estlund also emphasizes that “[t]he

move toward self-regulation has not made major inroads on the basic federal labor standards statutes themselves. Still, state and federal regulatory agencies have begun to experiment with forms of self-regulation within the confines of these command-and-control statutes.” Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 342-43 (2005) (footnotes omitted). It appears that state governance presents as much, if not more, risk of noncoercive enforcement than federal governance.

II.

Although I disagree with his analysis, I appreciate Professor Secunda’s discussion of noncoercive enforcement measures, as it is exactly the type of conversation that I hoped my initial proposal would initiate. My frustrations with the almost single-minded focus on substantive provisions—despite obvious failures with the system as a whole—is what led me to ask whether we might do better. The substantive arguments are important. However, they are severely circumscribed if they remain part of a broken enforcement scheme.

In asking what we can do to improve enforcement of workplace laws, I have presumed a fixed level of workplace protection that is equivalent to the status quo. That is not to say that I approve of the status quo; rather, I think we should address the enforcement problem before worrying about specific substantive issues. There are reasonable disagreements as to the best way to improve enforcement, but my belief is that exclusive federal control would better achieve our current workplace goals.

Although eliminating state governance would directly simplify enforcement, exclusive federal authority would also allow for other improvements to the enforcement regime. Thus, my proposal identifies several areas in which the patchwork of workplace rights and standards can be simplified, even within a single system. For instance, I recommend placing all workplace laws under a single statute. Importantly, this scheme would, as much as possible, establish a unitary set of rules for all workplace claims. No longer would a worker have to worry about differences in each law’s statutes of limitations, burdens of proof, definitions, and a host of other provisions.

Moreover, fewer laws could actually produce greater protections. For example, as I have explained elsewhere, one could replace all current laws affecting terminations with a unitary business-justification requirement. The change would dramatically reduce the number of

provisions regulating the end of the employment relationship. Yet, in doing so, it could actually strengthen the policies of those provisions by establishing a single, relatively uncomplicated rule for terminations. Such a rule would make it easier to recognize and challenge terminations that were based on discrimination or other illicit reasons, while also reducing the hostility that often stands in the way of such claims.

I would also place authority to administer this statute with a single agency. Eliminating the current alphabet soup of agencies with authority over the workplace would help make workplace rights more consistent and avoid the problems that can occur when an agency with a very narrow specialty deals with a case touching on broader issues. Take, for example, the NLRB's latest attempt to determine whether non-unionized employees enjoy the same right under the NLRA to have a co-worker present during an investigatory interview that unionized employees' possess. In reversing its previous position that non-unionized employees have that right, the NLRB relied on employers' need to conduct investigations of sexual harassment. If the NLRB had any significant experience with such claims, it may have recognized that no serious conflict existed between an employer investigating claims of harassment and an employee electing to have a co-worker present for an interview. A single agency with authority over all workplace claims would be in a much better position to handle the large number of workplace disputes that implicate a variety of policy concerns.

Finally, and most important to Professor Secunda's argument, I advocate a litigation-based enforcement approach. Although I would accept the use of today's judicial system for resolving the new workplace claims, I recommend the creation of a specialized, Article III labor and employment court. Such a court provides the benefits of an Article III tribunal while avoiding today's unfortunate reality, in which many judges exhibit not only an ignorance of the underlying policies of workplace laws, but an outright hostility to such claims. The number of claims and their complexity are a large part of this problem; thus, by simplifying these claims and removing them to a specialized court, the judicial impediments to the enforcement of workplace rights will be dramatically lessened. However, this change, as well as those accompanying the unitary law and agency, would not be possible under a system where state and local governments continue to possess significant authority over the workplace.

III.

The question of whether and how to increase the number of workplace rights is important. Yet it is a secondary concern. Increasing workplace protections via a broken system creates false hope and ultimately leaves workers with few if any gains. Instead, we should strive to fix the broken enforcement framework and then worry about expanding rights. To do otherwise only serves to remind us of what we could have achieved if we had resisted yet another shortsighted change and instead sought to harmonize our regulation of the workplace.

Ultimately, both Professor Secunda and I believe that the federal government currently fails to provide enough protections for workers. He believes that this performance is unlikely to improve and, even if it does, giving states increased authority would help address whatever shortcomings exist. The costs associated with a further fragmentation of workplace law makes me disagree. I acknowledge that, on paper, Professor Secunda is correct and that there is a danger that a pro-employer federal government could use its exclusive authority to drop the level of protections below a critical threshold. However, the possible gains of a more streamlined and effective workplace regulatory system seem worth that risk.

Moreover, I do not think the potential trade-off is particularly large, as I am extremely doubtful that increased state regulations would help much. Only a small handful of states have actively increased workplace protections. In contrast, most states either do little more than mirror the federal status quo or aggressively favor employer interests over those of workers. In short, even if Professor Secunda is correct that federal agencies “carrying out the current law have neither the financial resources, the political will, nor the administrative tools to implement, enforce, and adjudicate these laws,” it is important to remember that state legislatures and agencies have even fewer of these characteristics.

The crux of Professor Secunda’s argument is that the imperfect solution of fragmented state gap filling is better than nothing. For some workers, at least in the short term, he is no doubt correct. But that strategy may be short-lived. It would continue to apply small bandages over significant problems—bandages that give federal policymakers an excuse not to seek a real solution. It would also represent yet another example of incremental policymaking that has produced the current patchwork of workplace laws that Professor Secunda agrees is broken.

Why not, instead, look holistically at workplace laws and try to devise a system that works better? My sense is that exclusive federal governance is the best strategy. But even if one disagrees with my specific proposal, that does not mean that a different solution is not available. What seems clear, however, is that simply tinkering with our current system is the one strategy that is doomed to failure. Even if we expand the number of workplace rights on paper, past experience has shown repeatedly that such an expansion often does not lead to significantly better conditions for workers. We should therefore aim for a system that does what it says, rather than continually providing false hope. In short, if the choice is between paper rights and real rights, I'll take the latter.

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