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# Revolution in Pragmatist Clothing: Nationalizing Workplace Law

Jeffrey M. Hirsch

*University of North Carolina School of Law*, [jmhirsch@email.unc.edu](mailto:jmhirsch@email.unc.edu)

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# REVOLUTION IN PRAGMATIST CLOTHING: NATIONALIZING WORKPLACE LAW

*Jeffrey M. Hirsch\**

## ABSTRACT

*Workplace governance in the United States consists of a fragmented system of rules emanating from federal, state, and local governments. This fragmentation creates an unnecessarily inefficient and suboptimal system of regulation that often makes workplace protection little more than a false promise for workers. Ironically, these problems are at least partially the result of too many disparate rules. Thus, a reduction in the number of workplace protections could improve the effectiveness of the system as a whole. Achieving that goal requires a solution that reflects the magnitude of the problem; tinkering at the margins will accomplish little. Accordingly, this Article proposes a revolutionary reform: the nationalization of workplace law. The modern, global economy no longer justifies local control over the workplace, especially given the problems with our current federalist model of regulation. Moreover, the federal government's structural advantages give it the best opportunity to push workplace law towards a more optimal level. Exclusive federal regulation will also allow for significant streamlining and simplification. These changes will increase the effectiveness of workplace laws and allow more workers to enjoy the protections that these laws promise.*

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\* Associate Professor, University of Tennessee College of Law. B.A., 1988, University of Virginia; M.P.P., 1995, College of William & Mary; J.D., 1998, New York University. I would like to thank Lynn Dancy Hirsch, Matthew Finkin, Timothy Glynn, William Herbert, Anne Marie Lofaso, Alex Long, Marcia McCormick, Dan O’Gorman, Paul Secunda, and Mike Zimmer (who also suggested the title) for their helpful comments. This Article benefited greatly from feedback generated during presentations at the University of Tennessee College of Law, the Second Annual Colloquium on Current Scholarship in Labor and Employment Law, and the Third Annual Seton Hall Labor & Employment Law Scholars’ Forum.

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## INTRODUCTION

Problems with our labor and employment (“workplace”) laws have prompted an avalanche of reform proposals over the years. The 2008 election gave such proposals more prominence, as the political feasibility of substantial workplace reform appeared higher than it had in decades. Yet, a question remains whether these proposals—even if enacted—are a waste of time. Reform proposals typically address a relatively narrow problem while ignoring the significant shortcomings of the workplace regulatory system as a whole. Without addressing these fundamental problems, even the best reforms will have little impact. Thus, this Article argues that our primary focus should be to strengthen the workplace regulatory system itself, making both existing and new laws more effective. In particular, the Article proposes a radical reform aimed at eliminating much of the complexity and inefficiency in our current system—a reform that would nationalize workplace law.

Workers in the United States possess a multitude of rights, at least in theory. Prohibitions against discrimination and retaliation, protections for whistleblowers and collective activity, and guarantees of certain wages or safety measures are but a few of the many rights that workers are supposed to enjoy. For many workers, however, these rights are illusory. Despite literally hundreds of different workplace protections emanating from federal, state, and local governments, their impact on the workplace is questionable. The irony is that it may be the sheer number and sources of these rights that are undermining workers' ability to benefit from them.

Numerous critics have argued that American workplace rules fail to achieve many of their goals.<sup>1</sup> This failure underscores the suboptimal nature of our workplace regulatory system; that is, a system in which changes could be made that would increase social welfare without imposing more costs than benefits.<sup>2</sup> One of the hallmark workplace protections—the prohibition against discrimination based on race, sex, color, national origin, and religion under Title VII of the Civil Rights Act of 1964 (Title VII)<sup>3</sup>—provides an excellent example. Evidence shows that Title VII has reduced workplace discrimination far less than intended.<sup>4</sup> Although there are several reasons for Title VII's shortcomings, the decentralized and fragmented nature of the workplace regulatory system itself is a substantial impediment to Title VII's antidiscrimination goals.

The workplace regulatory system has developed incrementally, as various levels of government have enacted new laws with little consideration for how they will work in practice. That our federalist regime has created a patchwork of overly complicated laws should come as no surprise. What is a surprise, however, is that few have questioned whether this state of affairs makes sense for workplace regulation.

The answer, according to this Article, is no—at least not in the current economy. Although state governance of the workplace made sense at one point in our history, that time has long passed.<sup>5</sup> The modern economy is global in scale, and our workplace laws should reflect that reality. Instead of acting as if workplace regulations affect only isolated, local labor mar-

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1. See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1448–90 (1996).

2. See *infra* Part II.A.

3. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

4. See *supra* note 1; Marcia L. McCormick, *The Truth is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193 (2009); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

5. But see William A. Herbert, *No Direction Home: Will the Law Keep Pace with Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery?*, 2 J.L. & POL'Y FOR THE INFO. SOC'Y 409, 455–66, 470 (2006) (arguing that states have been more responsive to privacy concerns related to new technologies).

kets, we should seek a more comprehensive and centralized regulation of our national labor market. Indeed, given the severe problems associated with our fragmented workplace regulatory system, we should nationalize workplace law, making the federal government the exclusive source of regulation. The federal government is in a better position than the states to promote our competitiveness in the global labor market and place our national interests over parochial ones. In short, rather than continuing to view the workplace as it used to exist, we should instead recognize that the federal government is the best entity to regulate the workplace as it now exists.

Proponents of federalism argue that it promises superior policymaking and protection for individual liberties. Although that promise may be fulfilled in some areas, it has fallen far short in the workplace. In contrast, centralized governance, while not perfect, is in a better position to maximize social welfare by developing a cohesive body of workplace regulations that actually deliver on their promises to workers.

Centralized control of the workplace is also likely to enhance substantive protections for the average worker. Although workers in a small handful of employee-friendly states would see a decrease in the number of their workplace rights, all United States workers would achieve gains as the remaining protections would become more effective. Additionally, a federal government with exclusive authority would likely enact more workplace protections than it does today.

Workplace rights that are part of a centralized structure would also avoid many of the complexities that undermine the effectiveness of our current system of governance. A nationalized workplace system would be easier for parties to understand; would minimize the number of workplace rules; would better integrate the rules that did exist; and would decrease the number of suits that involve different forums, different substantive and procedural standards, and different coverage rules. These improvements would make our workplace laws more effective and bring them closer to the socially optimal level.

To be sure, shifting to a centralized regime would be revolutionary and not without costs; yet, the potential benefits of such a move make it worth exploring. Other countries have nationalized workplace governance<sup>6</sup> and, although such comparisons are not perfect, they suggest that nationalizing United States workplace law may not be as risky as it appears from the American perspective. Indeed, countries with nationalized workplace

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6. See, e.g., LILIANE JUNG, INTERNATIONAL LABOUR ORGANIZATION, NATIONAL LABOUR LAW PROFILE: FEDERAL REPUBLIC OF GERMANY (2001), <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ger.htm> (noting Germany, which allows for state workplace regulation, is largely nationalized in practice); LILIANE JUNG, INTERNATIONAL LABOUR ORGANIZATION, NATIONAL LABOUR LAW PROFILE: JAPAN (2001), <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/jp.htm>.

governance—virtually all industrialized nations—have much greater protections for workers than the United States does.<sup>7</sup> That difference cannot be explained solely by federalism, but it shows that our system has not been a great boon to workers. Thus, suggestions that nationalizing American workplace law would harm workers<sup>8</sup> are exaggerated and possibly backward.

Arguments in favor of keeping or expanding the role of the states<sup>9</sup> in the workplace are especially perplexing given the undeniable problems with our current regulatory system. If the argument to nationalize workplace law was a radical proposal to improve an already successful system, opposition would be understandable. However, resisting change because of a reluctance to break away from a failed system is much harder to countenance. Nationalizing workplace law could easily fail, but given the problems of the current system, is it not worth considering?

Finally, the radical nature of the proposal to nationalize all workplace regulations is intentional. Workplace law has significant problems; thus, equally significant reforms are warranted. However, even if one objects to nationalization, the hope is that this proposal will at least spur discussion about the failures of our current system of workplace regulations and how to address them. There should be little dispute that this system could be drastically improved by reducing the inconsistencies among federal and state regulations, by making rules easier to understand, and by streamlining enforcement. Other reforms could also be part of the mix, but only if they reflect the severity of the problems currently plaguing workplace law.

Part I of this Article examines the need for a new, more holistic approach to workplace regulation, described as “regulatory pragmatism.” Part II employs this regulatory approach by providing a pragmatic critique of existing workplace laws, particularly the excessive level of complexity that hinders enforcement of those laws. Finally, Part III proposes a broad, pragmatic solution—nationalizing workplace law—that would create a more optimal level of regulation by centralizing and simplifying workplace governance.

## I. REGULATORY PRAGMATISM

Policymaking (much like legal scholarship) often focuses on theory far more than actual practice. “Regulatory pragmatism” is a system of regulatory governance that attempts to reverse that approach by shifting policy-

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7. See *supra* note 6.

8. See, e.g., Paul M. Secunda, *Workplace Federalism: The Ironic Necessity for State Protection of Workers*, 157 U. PA. L. REV. PENNUMBRA 29 (2009).

9. Local governments may have their own laws; however, for the sake of simplicity, “state” will be used to denote state and local governments unless noted otherwise.

makers' focus to the practical effects of their rules. Although theory is important, regulatory pragmatism—taking cues from legal pragmatism's approach to judicial interpretations—promotes the idea that policymakers should consider foremost the impact of their decisions.<sup>10</sup> This calculus depends less on an overarching philosophy of regulation than a reliance on disciplines such as economics, sociology, and psychology to better predict a rule's ability to achieve desired results.

A concern for pragmatism is not new, as the beginnings of the American legal pragmatism movement arose in the latter part of the nineteenth century.<sup>11</sup> This philosophy pushed for a contextual approach to regulation that would develop theories from practical experiences.<sup>12</sup> Gone would be the days where regulators began with theory in an attempt to address a problem; instead, pragmatist policymakers would examine various problems and attempts to solve them—and only then build a theory.<sup>13</sup> Currently, the dominant strain of this philosophy is “legal pragmatism,” which centers on judges' role in interpreting law. Judge Richard Posner is the most prominent jurist who adheres to this type of decision making, and his opinions often exhibit the practical concerns that legal pragmatism encourages.<sup>14</sup>

According to Professor Daniel Farber, legal pragmatism “essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy . . . .”<sup>15</sup> Pragmatism emphasizes context and the development of rules based on experience.<sup>16</sup> Yet, defining legal pragmatism may be best explained by describing what it is not.

Farber depicts legal pragmatism as part of a broader attack against constitutional “foundationalism,” which he defines as a search for a unifying principle upon which judicial decisions are based.<sup>17</sup> The problems with this approach include the creation of theories that are too abstract to decide

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10. See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 15–16 (2003); Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 139–40 (1999) (arguing for pragmatic immigration legislation that “consider[s] the foreseeable extent to which laws can improve the welfare of society”).

11. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1337 (1988).

12. SHAPIRO & GLICKSMAN, *supra* note 10, at 15–16; JOHN DEWEY, *EXPERIENCE AND NATURE* (1971).

13. J.B. Ruhl, *Working Both (Positivist) Ends Toward a New (Pragmatist) Middle in Environmental Law*, 68 GEO. WASH. L. REV. 522, 532 (2000) (book review).

14. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996); see also O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

15. Farber, *supra* note 11, at 1332.

16. *Id.* at 1335 & n.23, 1432 (citing Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28–29 (1986)).

17. *Id.* at 1334–35 & nn.17–22.

particular cases, inconsistent outcomes that occur when judges follow different theories, decisions that fail to gain respect from society, and the inability to adjust to changes in society.<sup>18</sup> Pragmatism, by contrast, is non-foundational. It recognizes the difficulties presented in the law and promotes incremental decisions that look to past experience, changes in society, and the diversity of views in society.<sup>19</sup> An important feature of legal pragmatism is its focus on the social impact of a decision.<sup>20</sup> Rather than holdings based solely on the dictates of a judge's grand theory, a pragmatic decision would take into account the effects of a case's potential outcome.

The ideas underpinning legal pragmatism extend beyond judicial decision making, or at least they should. Policymakers also should avoid adhering to a grand theory of regulation without attempting first to ground it in reality. This reality checking should be a continuous process. After the initial promulgation of a regulation, repeatedly examining its effects would provide the best measures of success in most instances. These examinations should be the basis for future regulation, whether through an entirely new scheme or an amendment to the incumbent system.<sup>21</sup>

Although it seems obvious that an effective regulation must actually achieve its goals,<sup>22</sup> that aim is often the exception rather than the rule. Workplace law is a prime example of this problem. The complex and multifaceted system of federal and state laws has produced an inconsistent and ineffective workplace governance regime. A pragmatic approach to workplace law would take into account these enforcement problems and seek reforms that would better fulfill the policy goals of the current system.<sup>23</sup>

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18. *Id.* at 1340–41.

19. *Id.* at 1342–43. Farber describes the basic question of pragmatic judicial decision making as whether an idea “works, whether it produces better results for society.” *Id.* at 1353.

20. *Id.* at 1343.

21. Environmental law scholars, in particular, have stressed the need for pragmatic approaches to regulation, such as pollution permit trading schemes that promise greater reductions in pollution at a lower cost to regulated entities. Jeffrey M. Hirsch, Note, *Emissions Allowance Trading Under the Clean Air Act: A Model for Future Environmental Regulations?*, 7 N.Y.U. ENVTL. L.J. 352 (1999); see also Ruhl, *supra* note 13, at 532 (describing environmental pragmatism as considering economic and social change, realities of nature, future consequences of decisions, and need to adapt decision-making processes).

22. See GUNNAR MYRDAL, *BEYOND THE WELFARE STATE* 93 (1960) (stating that industrialized economies should constantly attempt to simplify regulation and try to make them more effective).

23. David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL'Y J. 125 (2007); Michael J. Zimmer, Book Review, 21 COMP. LAB. L. & POL'Y J. 249, 250, 260 (2000) (reviewing BOB HEPPLER, ET AL., *EQUALITY: A NEW FRAMEWORK—REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF U.K. ANTI-DISCRIMINATION LEGISLATION* (2000) and complementing U.K. study for examining how laws actually work).



## II. A PRAGMATIC CRITIQUE OF WORKPLACE LAW

### A. *Optimal Level of Regulation*

The ultimate goal of workplace governance should be the achievement of an optimal level of regulation. Defining “optimal” is easier said than done, as determining what goals should be achieved and how to quantify them is difficult, if not impossible. However, we can describe certain characteristics by which current and proposed regulations may be measured.

An optimal level of regulation can be characterized in economic terms as the amount of regulation that maximizes overall societal welfare. This maximization point turns on whether the level of regulation is considered economically efficient. Under “Kaldor-Hicks” efficiency, the economically efficient level occurs when no change can be made that would provide more benefits to society than costs—essentially a utilitarian model.<sup>24</sup> Accordingly, an optimal level of workplace regulation is one in which no changes exist that would satisfy this cost-benefit analysis.<sup>25</sup>

Regulatory systems can deviate from this efficiency goal in at least two ways: either too much regulation or not enough. This concept of “too much” or “too little” implicates both the substance and the quantity of regulations. For example, a workplace regulatory system will be at a sub-optimal level if it could enhance social welfare by increasing the number of protections for workers or by making existing protections more expansive. These changes would provide benefits to workers and the rest of society that exceeded whatever additional costs they placed on businesses and the economy. In turn, a system could have protections that are too great in number or that impose too many requirements. In this system, the benefits to workers are less than the costs of the regulations, suggesting that a decrease in protection would move closer to the optimal level of workplace regulation.

Identifying the optimal level of workplace regulation is far more difficult than describing it. Accurately calculating the costs and benefits of workplace laws is not feasible; the benefits, in particular, often involve unquantifiable measures of utility to workers and others in society.

The substantive coverage of workplace laws exemplifies this measurement problem, as the effects of such laws are very difficult to iso-

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24. In other words, an alternative is considered more efficient than the status quo if the winners under the alternative would be willing to compensate the losers. Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1795 (2003). Another definition is Pareto efficiency, which states that the economically efficient point is where no changes can be made without making someone worse off. See Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 7-9 (2007).

25. An optimal level of regulation can also be defined as the “point at which the marginal cost of a unit of regulation equals the marginal benefit for individuals within that jurisdiction.” John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 907-08 (2001).

late.<sup>26</sup> Many have argued both for<sup>27</sup> and against<sup>28</sup> protections for workers and this disagreement could be framed as a search for the optimal level of substantive workplace regulation. Although in comparison to other countries it appears that the United States has too few protections for workers, there is no robust empirical support for either position. Yet, this issue need not be resolved to see that nationalizing workplace law provides the best *opportunity* to achieve an optimal level of regulation. Success, even if measurable, is not guaranteed. However, as described in more detail below,<sup>29</sup> the federal government—although far from perfect<sup>30</sup>—is better equipped than the states to take into account the national economy, employer and employee interests, and overall societal welfare. Moreover, exclusive federal control would allow both employer and employee advocates to influence policy debates, thereby increasing the chance of more balanced policy outcomes.

In addition to their substance, the quantity of workplace laws also appears to be suboptimal. As the subsequent discussion illustrates,<sup>31</sup> problems caused by the surfeit of workplace rules are more readily observed than issues with their substance. Our federalist regulatory system consists of concurrent, and often duplicative, federal and state laws, enacted with little consideration of how they work together. The result is a confusing patchwork of rules that make enforcement and compliance difficult—the costs appear to be greater than whatever benefits are associated with this system. A more optimal approach would be to reduce the number of laws and make them part of a more coherent whole.

Take, for example, discrimination law. If we assume that existing substantive antidiscrimination protections are optimal, we should explore the best way to enforce those protections. Should we have federal and state governments pass their own laws, many of which have somewhat different coverage, definitions, remedies, and tribunals? Or should we instead use a single, centralized governance system that creates a more holistic set of rules and can be adjudicated in a single forum? This Article argues that the latter system is far more likely to accomplish its goals than the former.<sup>32</sup>

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26. The most work in this area has involved whether an at will or just cause default for terminations is more economically efficient. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984); Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 645–46 (1991); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1903 (1996); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 842.

27. *See supra* note 1.

28. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (Harvard University Press 1995) (1992).

29. *See infra* Part III.B.

30. Weil, *supra* note 23, at 132–33.

31. *See infra* Part II.B.

32. It is true that the number of laws could become suboptimally low. The situation is similar to

*B. Suboptimal Workplace Regulation and the Effect on Compliance and Enforcement*

Although reasonable arguments can be made as to the most appropriate level of protection for workers, there are few defenses for the fragmented structure of today's workplace regulatory system. As early as 1972, Professor Charles Morris described the system of workplace laws at that time as "one of confusion and frustration. It is a picture of inefficient administration and inadequate compliance; a jurisdictional nightmare of overlapping and conflicting decisions. There exists a tableau of never-ending campaigns to achieve accommodation among separate tribunals with related but different areas of interest."<sup>33</sup> That picture has only grown worse in the succeeding years. The number of workplace laws has increased significantly since 1972, and with these new laws have come new compliance and enforcement burdens that affect employers, employees, and judges. Although it is difficult to quantify these costs,<sup>34</sup> workplace litigation is replete with examples of complex legal schemes creating inefficiencies and barriers to enforcement. In short, the overabundance of workplace laws has created a suboptimal level of regulation. This problem is substantial and thereby warrants equally substantial reforms—reforms that would bring our workplace regulatory system closer to its optimal level by drastically simplifying and streamlining protections for workers.

Ironically, the problems with our current system may come to the fore by examining a group often ignored in debates over workplace reform: employers. In the United States, over two hundred different federal laws govern employers' relationship with their workers.<sup>35</sup> State workplace laws add to those requirements, particularly for employers with workers in multiple jurisdictions.<sup>36</sup> A further layer of complexity results from each state's

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the Laffer Curve, which states that there is an optimal level of taxation and having either too low or too high taxes will create a suboptimal amount of revenue. *See generally* James M. Buchanan & Dwight R. Lee, *Politics, Time, and The Laffer Curve*, 90 J. POL. ECON. 816 (1982). Given our current plethora of workplace laws, it is unlikely that there is a risk of too few laws in a given area.

33. Charles J. Morris, *The Case for Unitary Enforcement of Federal Labor Law—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471, 495 (1972); *see also* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1462–63 (1971).

34. One compliance study found that companies' lack of knowledge about toxic chemical reporting requirements caused a significant portion of the noncompliance with those requirements—even more than the costs of compliance. John Brehm & James T. Hamilton, *Noncompliance in Environmental Reporting: Are Violators Ignorant, or Evasive, of the Law?*, 40 AM. J. POL. SCI. 444, 467 (1996).

35. Statutes in addition to those described in this Article include the Sarbanes-Oxley Act, 18 U.S.C. § 1513(e) (2006) (protecting corporate whistleblowers); Employee Polygraph Protection Act, 29 U.S.C. §§ 2001–2009 (2006) (restricting use of polygraphs); Workers' Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101–2109 (2006) (requiring notice before major layoffs and plant closures).

36. States often have statutes similar to federal laws, particularly antidiscrimination employment laws; despite their similar goals, however, the laws are often quite different. Jarod S. Gonzales, *State*

distinct common-law doctrines governing the employment relationship.<sup>37</sup> The different substantive requirements of these laws create compliance burdens because employers must determine which rules apply and how to satisfy the ones that do.<sup>38</sup> The result is that even well-intentioned employers have an extremely difficult task in making their workplaces fully compliant.<sup>39</sup>

This problem is not merely a concern for employers, however. Employees and the public must also be wary because compliance difficulties directly impact the effectiveness of workplace protections. High compliance costs make employers unable or unwilling to fulfill their legal obligations,<sup>40</sup> meaning that workplace laws will have little value to the employees they were designed to protect or to the policies they were intended to promote.

Complexity generates additional inefficiencies. For instance, a complicated system of workplace laws puts employees—who are generally ignorant of even their most basic rights—at a serious informational disadvantage. The ability of employees to exert or trade their rights efficiently requires accurate information, as well as relatively costless enforcement and bargaining mechanisms.<sup>41</sup> More important, because most workplace laws depend on private rights of action, this informational problem creates substantial barriers to enforcement.<sup>42</sup> In short, as the system of workplace

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*Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116–20 (2007); Alex B. Long, “If the Train Should Jump the Track . . .”: *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 473–77 (2006).

37. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (implied contract); *Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (covenant of good faith and fair dealing); *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (public policy tort).

38. Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 164, 170 (2007) (stating that “parties increasingly find themselves subject to conflicting obligations” under the “possibility of multiple or alternative claims drawn from across the boundaries of the conventional work law subjects”); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 194 (2001) (“[C]osts incurred by companies . . . to comply with more and more detailed employment regulations are several times the cost of litigation and insurance when companies are sued.”); Jana E. Cuellar, Comment, *The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions*, 38 EMORY L.J. 523, 551 & n.180 (1989) (noting compliance difficulties).

39. Cf. David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 931 (2001) (“In a recent survey of corporate environmental managers, nearly half reported that their most time-and energy-consuming duty is trying to determine whether their companies are in compliance with the law, with seventy percent believing perfect compliance is impossible.”).

40. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59, 62 (2005).

41. Krueger, *supra* note 26, at 645–46.

42. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1673 (1996). Attempts to improve employer self-compliance also require effective channels of information. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 378 (2005).

rights becomes more cumbersome and difficult to understand, those rights become less effective.

### *1. A Brief History of American Workplace Law*

The fragmented nature of today's workplace regulations can be traced to the development of workplace governance itself. As the typical workplace transformed from a small, familial relationship to a larger, more impersonal setting, the laws governing work changed also. The shift in the type of work that dominated the economy was accompanied by a significant increase in workplace regulations. Yet, because these rules were often reactions to newly appreciated problems, they were enacted with little thought about how they fit together.

The modern conception of employment as a contractual relationship is a relatively recent idea. Prior to the Industrial Revolution, work was largely performed on a very small scale.<sup>43</sup> These small agricultural or commercial entities typically had only a couple of workers and were largely governed as a familial master-servant relationship.<sup>44</sup> The duties that both the master and servant owed the other were characterized more by public policy than by contract.<sup>45</sup>

This situation changed with the onset of the Industrial Revolution and its larger, mechanized workplaces. The familial relationship broke down as the number of workers at a given location expanded dramatically.<sup>46</sup> Increased competition meant that employers chafed at their duty to keep workers employed for a certain amount of time.<sup>47</sup> Employees, in turn, reacted to their new, harsher workplaces by using more collective activity to seek better working conditions.<sup>48</sup> At the same time, American courts began embracing the concept of individuals' freedom of contract, which was ultimately embodied in the employment "at will" rule—a doctrine that permits either party to end the employment relationship for any or no reason.<sup>49</sup> This doctrine spread rapidly from the late 1800s until it was the

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43. HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 1.03, at 9 (2007); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

44. PERRITT, *supra* note 43, § 1.03, at 9 (citing PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 123–24 (1969)); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980) [hereinafter Note, *Protecting At Will Employees*]; Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1513 (1980)).

45. PERRITT, *supra* note 43, § 1.03, at 9–10

46. *Id.* at 11.

47. *Id.*

48. *Id.* at 11–12; Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 24–25 (2006) (describing employment law transformation as population became more industrial).

49. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519–20 (Tenn. 1884), *overruled on other grounds*,

default in virtually every state by the 1930s.<sup>50</sup> Much of the modern era of employment law may be viewed as the development of exceptions to the at-will rule, which remains the default in all but one state.<sup>51</sup>

The initial growth in these workplace regulations occurred largely through federal action and judicial opinions dealing with union activity; for the most part, states became involved much later.<sup>52</sup> Many of the early workplace protections involved federal employees.<sup>53</sup> For instance, the 1883 Pendleton Act tore down the patronage system by, among other things, requiring merit-based hiring.<sup>54</sup> It was not until 1912, however, that the federal workplace abandoned the at-will rule by permitting terminations only for “just cause.”<sup>55</sup> These civil service protections were strengthened by various measures over the next several decades.<sup>56</sup>

The federal government, with some states joining in, also began regulating collective activity—albeit with initial resistance from the courts. In the early 1900s, the Supreme Court held that various federal and state statutes which prohibited discrimination based on an employee’s union status unconstitutionally interfered with employers’ and employees’ right to freedom of contract.<sup>57</sup> This line of reasoning, however, was not limited to cases involving collective activity. Indeed, many of the Court’s repeated rejections of New Deal legislation in the 1930s involved workplace regulations, such as those setting work conditions and maximum work hours.<sup>58</sup> During this period, the Court’s holdings left states with a larger role in regulating the workplace, which they exercised sparingly.<sup>59</sup> Federal workplace legislation again became prominent once the Court finally changed course, a change that occurred in 1937 through its approval of the National Labor Relations Act (NLRA),<sup>60</sup> which created a broad federal governance of collective activity that preempted most state regulation.

Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 356 (2002).

50. Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453 (2008); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 700 (1994).

51. Montana has enacted a statute prohibiting most terminations that are not made without “good cause.” Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (1987).

52. TOMLINS, *supra* note 43, at 372–81 (describing rare early state cases awarding damages for workplace injuries).

53. *Bush v. Lucas*, 462 U.S. 367, 381–86 (1983) (describing early federal employment reforms).

54. Pendleton Act, 22 Stat. 403 (1883).

55. Lloyd-LaFollette Act, 37 Stat. 539, 555 § 6 (1912).

56. *Bush*, 462 U.S. at 385–86; Note, *Protecting At Will Employees*, *supra* note 44, at 1619–68.

57. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915), *overruled in part* by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Adair v. United States*, 208 U.S. 161 (1908), *overruled in part* by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

58. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935).

59. For example, fifteen states had created minimum wage protections by 1929. Bok, *supra* note 33, at 1422.

60. 29 U.S.C. §§ 150–169 (2006); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)

Later, prohibitions against workplace discrimination began to appear. With few exceptions,<sup>61</sup> the federal government again led the way through various laws and executive orders,<sup>62</sup> finally culminating in the landmark Title VII of the Civil Rights Act of 1964.<sup>63</sup> States did not entirely stand on the sidelines, however. Although the federal government implemented the initial measures, over half of the states had some form of antidiscrimination legislation by the time of Title VII's passage.<sup>64</sup>

Finally, in the latter half of the twentieth century, state common law began establishing exceptions to the at-will default. Although a few cases decades earlier had provided damages for terminations,<sup>65</sup> it was not until the 1970s that states began establishing recognized causes of action for employees who would otherwise be unprotected by the at-will rule. These causes of action included the contract-based theories of implied job protection<sup>66</sup> and the duty of good faith and fair dealing.<sup>67</sup> To a lesser extent, states also allowed tort claims in certain circumstances, particularly under a theory that the employer acted contrary to public policy.<sup>68</sup>

Although states have helped develop workplace law,<sup>69</sup> the federal government has often taken the leading role. The federal government's early initiative on workplace issues is particularly notable given questions surrounding its ability to regulate the workplace now. This history also undermines the argument that state authority over the workplace is necessary to allow for experimentation and development of workplace laws.<sup>70</sup> Indeed, as illustrated below, concurrent federal and state governance has led to a near dysfunctional enforcement system that leaves workers with more empty promises than actual protections.

## 2. Multiple Claims and Standards

One of the principal shortcomings of today's workplace laws is the multifaceted nature of adjudications. The expansion of the number of

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(upholding NLRA's constitutionality).

61. See N.Y. EDUC. LAW, § 569 (1924) (prohibiting sex-based pay discrimination for teachers).

62. See, e.g., Unemployment Relief Act of 1933, 48 Stat. 22 (1933); Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941) (prohibiting discrimination by war contractors); Exec. Order No. 8587, 5 Fed. Reg. 4445 (Nov. 7, 1940) (prohibiting discrimination in federal civil service).

63. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

64. PERRITT, *supra* note 43, § 10.05, at 19.

65. See *supra* note 52.

66. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

67. *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

68. *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (awarding tort damages to employee fired for serving on jury duty). *But see* *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983) (refusing to recognize public policy tort). Some earlier courts treated public policy claims as contract-based. See generally *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

69. For example, President Roosevelt looked to New York's workplace regulations when establishing New Deal policies. See FRANCES PERKINS, *THE ROOSEVELT I KNEW* (1946).

70. See *infra* note 160 and accompanying text.

claims and substantive standards necessary to resolve a workplace dispute has created a similar increase in the cost of compliance and enforcement. This represents a suboptimal level of regulation, as there are reforms that could achieve the same, or more, protections for workers with far fewer compliance and enforcement costs.

Employers again provide a useful vantage. As the number of laws governing the workplace has increased, the burden on employers has increased as well. Each new law is accompanied by a new set of rules, legal standards, and court interpretations. Even when a law is similar to an existing one, employers—as well as employees—must be mindful of their frequently disparate requirements.<sup>71</sup> This burden is important, for it directly affects employers' ability and willingness to comply with those laws. If employers fail to achieve a significant degree of compliance, the purposes of those laws are left unfulfilled. Moreover, as Professor Clyde Summers once warned, increasing the number of workplace rights tends to “hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery.”<sup>72</sup> Subsequent years have proven him correct.

The myriad of claims and standards that may apply to a given set of facts have a significant impact on the enforcement of workplace rights. An isolated workplace dispute can produce numerous different claims, each with its own particular set of standards and enforcement schemes. Moreover, even a single allegation—a discriminatory failure to promote, for instance—often implicates multiple claims and standards because both federal and state law apply.<sup>73</sup>

The quantity of workplace rules and the possibility of multiple claims are not the only problem. Many workplace laws focus on two fundamentally different approaches—individual versus collective workplace rights.<sup>74</sup> At times, these approaches involve directly conflicting requirements, making it more costly for employers to comply with the rules, adjudicators to decide cases, and employees to understand the rules.<sup>75</sup>

There appears to be little advantage to this cacophony of rules, which makes the substantial costs of this system all the more difficult to accept.

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71. Morris, *supra* note 33, at 491 (“[Federal workplace law is] analogous to the six blind men touching and describing an elephant. The subject matter . . . tends to be viewed as fragmented, unrelated parts, each bearing a different label . . .”).

72. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 19 (1988).

73. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006); N.Y. HUMAN RIGHTS LAW § 296 (McKinney 1993).

74. See *infra* note 93.

75. Ann. C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 606 (1994) (discussing conflict between employees' NLRA right to request representation in disciplinary interview and employers' interest in investigating possible Title VII violations).



Take, for example, one of the more commonly disputed workplace actions: the termination of an employee. Depending on the facts, the employee could pursue a wide variety of claims under both federal and state law.<sup>76</sup> Possible state statutory claims include—but are by no means limited to—antidiscrimination laws, whistleblower laws, and the antiretaliation provisions of other state workplace laws.<sup>77</sup> The number of these statutory claims is growing, as state legislatures have become increasingly active in expanding their governance of the workplace.<sup>78</sup> Moreover, state common law provides additional causes of actions, including contractual claims such as breach of contract and breach of the covenant of good faith and fair dealing, and tort claims for violations of public policy, defamation, fraud, and intentional infliction of emotional distress.<sup>79</sup> Relevant federal statutes may include antidiscrimination laws such as Title VII, the Americans with Disabilities Act (ADA),<sup>80</sup> and the Age Discrimination in Employment Act (ADEA).<sup>81</sup> The employee could also make a retaliation claim under those laws and others, such as the Family and Medical Leave Act (FMLA),<sup>82</sup> Fair Labor Standards Act (FLSA),<sup>83</sup> Employee Retirement Income Security Act (ERISA), and Occupational Safety and Health Act (OSHA).<sup>84</sup> If the employee was terminated for engaging in union or other collective activity, the NLRA may also be implicated. Further, if the employee worked for a public employer, there exists potential constitutional claims, including free speech, freedom of religion, due process, equal protection, and the right against unreasonable searches and seizures.<sup>85</sup> In short, a single workplace action as commonplace as a termination can give rise to a wide variety of claims, which are often difficult and costly to litigate.

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76. See, e.g., *Arnett v. Aspin*, 846 F. Supp. 1234 (E.D. Pa. 1994) (permitting discrimination claim based on both age and sex).

77. See, e.g., N.Y. HUMAN RIGHTS LAW § 296 (antidiscrimination); TENN. CODE ANN. § 50-1-304 (whistleblower and retaliation). This increase may be partially in response to a lack of federal activity.

78. *States Enacted More Labor Legislation in 2007, Including Wage, Immigration Laws*, 27 Daily Lab. Rep. (BNA), at A-11 (Feb. 11, 2008) (noting that 46 states had enacted new workplace statutes in 2007); see also Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008) (arguing that states may increasingly attract business by promoting their employment law).

79. Kathleen C. McGowan, Note, *Unequal Opportunity on At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 149-64 (1998) (describing variety of state approaches to employment at will).

80. 42 U.S.C. §§ 12101-12213 (2006).

81. 29 U.S.C. §§ 621-634 (2006).

82. *Id.* §§ 2601-2654.

83. *Id.* §§ 201-219.

84. *Id.* §§ 651-678.

85. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (free speech); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (search and seizure); see also Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008).

The costs of this complexity extend beyond the litigation context. The sheer number of rules that overlap the federal and state systems, as well as within each system, creates significant compliance costs.<sup>86</sup> Consider an employee who is injured at work. Such an employee will likely be entitled to benefits under the state workers' compensation system.<sup>87</sup> In addition, the employee may also be entitled to leave or accommodations under the ADA<sup>88</sup> and the FMLA.<sup>89</sup> The injury may also involve violations of OSHA.<sup>90</sup> Each of these statutes, however, has different coverage provisions, so an employer must first determine whether the statutes apply to its workforce in general or to the specific employee in question.<sup>91</sup>

Once the employer determines that an employee is covered by certain laws, the difficulties continue. The employer must then ascertain whether the employee is actually entitled to any benefits under those laws, while also being careful not to take any actions that appear to retaliate against the employee for taking advantage of those benefits.<sup>92</sup> Further, if the workplace is unionized, accommodation of the employee could conflict with seniority provisions of a collective-bargaining agreement, threatening future litigation.<sup>93</sup>

Adding to the complexity is the possible involvement of different jurisdictions with inconsistent laws.<sup>94</sup> Indeed, companies employing workers in multiple states face particularly significant compliance problems.<sup>95</sup> Holding everything else equal, employers with business in multiple states

86. See *supra* note 38; Susan J. McGolrick, *Employee Rights: Overlap of ADA, FMLA, Workers' Comp Challenging to Employers, Attorney Says*, 151 Daily Lab. Rep. (BNA), at C-1 (Aug. 7, 2001) ("[E]mployers must consider the differences between the statutes and avoid assumptions that compliance with one is compliance with all.").

87. Nikita Williams, Note, *HIV as an Occupational Disease: Expanding Traditional Workers' Compensation Coverage*, 59 VAND. L. REV. 937, 941 (2006).

88. 42 U.S.C. § 12112(5)(A) (2006).

89. 29 U.S.C. § 1612 (2006).

90. *Id.* §§ 655, 656.

91. See *infra* Part III.B.1.a.

92. For example, an employee's injury may be covered by workers' compensation and qualify for leave under the FMLA, yet not be serious enough to qualify as a disability under the ADA.

93. *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757 (1983); Hodges, *supra* note 75, at 603-08.

94. Cf. *Immigration Advocates Urge Enactment of AgJOBS to End Shortage of Farmworkers*, 203 Daily Lab. Rep. (BNA), at A-10 (Oct. 22, 2007) ("Immigration activists decried Congress' failure to legislate immigration reform, noting that local governments are trying to fill the void by enacting 'a patchwork' of 'inconsistent' ordinances that are 'disruptive' to local labor markets, particularly in agriculture . . .").

95. According to the Census Bureau, in 2002, 0.88% of all firms with paid employees operated in more than one state and approximately 1.5% operated in more than one metropolitan area. U.S. CENSUS BUREAU, COMPANY SUMMARY: 2002, 1366, 1368, Appendix A-1 (2006), available at <http://www.census.gov/prod/ec02/sb0200cscosumt.pdf>. However, approximately 17% of all establishments are owned by firms that operate in multiple states (20% in more than one metropolitan area), and approximately 45% of all U.S. employees work for firms operating in more than one state (50% for firms in more than one metropolitan area). *Id.* Thus, although the number of multistate firms is small, the problems they face have a disproportionate impact on the workplace because they employ almost half of all U.S. workers.

would prefer uniform regulations to control their costs of compliance.<sup>96</sup> Yet under today's workplace regulatory system, such employers are required to comply with not only federal requirements, but also the different rules associated with every state in which they have employees.<sup>97</sup>

Finally, workplace claims often implicate unique enforcement schemes that require administrative, judicial, or arbitral procedures—or a mixture of all three. Thus, the employer must be knowledgeable about the requirements and precedent of several different forums, even for a case involving a single set of facts.<sup>98</sup>

Differing claims and standards affect employees as well. Most obviously, if employers find it difficult to navigate the maze of workplace rules, relatively unsophisticated and uninformed employees will find it far more arduous. This creates an information asymmetry that makes enforcement extremely difficult and undermines the economic efficiency of the regulatory system itself.<sup>99</sup> The difficulty in understanding the complex system of workplace laws has a further impact. Like employees, jurors and, at times, judges often balk at the level of complexity presented in workplace cases, making attempts to enforce workplace rules much harder. For example, one study found that employment discrimination cases involving multiple claims have a significantly lower rate of success.<sup>100</sup>

Part of the reason for this finding may be the type of judicial hostility exhibited in *Harrington v. Claiborne County Board of Education*.<sup>101</sup> The district court in *Harrington* had taken seriously the Eleventh Circuit's earlier statement that it "deplored muddled complaints in employment discrimination and civil rights cases and urged district courts to 'take a firm hand' in ensuring efficient and clear proceedings on claims deserving trial."<sup>102</sup> Among other things, the district court's *Harrington* decision—with

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96. Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1356 (2009).

97. Lawrence Allen Vranka, Jr., Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607, 626 (1989); cf. Peter M. Panken & Stacey M. Babson-Smith, *Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures*, in EMPLOYMENT AND LABOR RELATIONS LAW FOR THE CORPORATE COUNSEL AND THE GENERAL PRACTITIONER 259 (ALI-ABA Feb. 15–17, 2007), available at SM031 ALI-ABA 249 (Westlaw) (discussing difficulties faced by multistate employers in writing employment manuals).

98. See *infra* Part II.B.2; Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 608 (2005).

99. Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 97 (2008).

100. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1456–59 (2009) (finding that employers won summary judgment in 96% of employment discrimination cases involving multiple claims, in contrast to other studies showing employers' general employment discrimination summary judgment rates to be approximately 70–75%, and suggesting reliance on multiple claims is viewed as a sign that those claims are weak).

101. 251 F.3d 935 (11th Cir. 2001), cited in Kotkin, *supra* note 100, at 1461–62.

102. *Id.* at 938.

the Eleventh Circuit's subsequent approval—required plaintiffs alleging multiple claims of employment discrimination to either accept a bifurcated trial addressing each ground separately or to argue an “intersectional” claim of discrimination that identifies a subclass of discrimination, such as a Muslim woman or a Catholic man.<sup>103</sup> The Eleventh Circuit's explicit complaint about complex employment discrimination claims, in addition to special rules limiting employees' ability to choose how they pursue their claims, exhibits a level of judicial hostility that must be taken into account in any reform efforts.

Recent employment discrimination data reveal the extent of this complexity problem. Even within a specific area of workplace law, the number of cases involving multiple theories has increased over the last fifteen years. One study has shown that the number of discrimination claims contained in each charge filed with the Equal Employment Opportunity Commission (EEOC) has grown from 1.13 claims per charge in 1993 to 1.23 claims per charge in 2006.<sup>104</sup> Although these numbers indicate that a large number of cases involve no more than a couple of different claims, over half of all discrimination charges filed with the EEOC still involve multiple claims—each of which raises the potential for varying requirements or standards.<sup>105</sup> Studies of cases that are actually litigated in federal court find evidence of even more complexity.<sup>106</sup>

No legal regime can completely eliminate judicial resistance to claims that allege, often accurately, that an adverse employment decision was the result of several unlawful factors. However, a new approach to workplace regulation could significantly reduce this hostility by simplifying and streamlining workplace claims. For example, by applying a single reasonable business justification rule to all terminations or by using a single legal framework for all claims within a single case, the overall complexity of workplace cases would decrease.<sup>107</sup> This decrease would likely prompt a similar reduction in the judicial hostility to workplace claims in general. The result would be a higher success rate for workplace claims, as meritorious cases are less likely to be swept away in attempts to relieve overloaded dockets.

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103. *Id.* The Eleventh Circuit reversed the district court's holding that an employer could choose the order in which the plaintiff had to present each individual claim to the jury and its holding that an employer would be entitled to attorney's fees if it won even one of the separate issues. *Id.*

104. Kotkin, *supra* note 100, at 1451–52. All Title VII claims must be filed with the EEOC as a “charge” before being filed in court. *See* 42 U.S.C. § 2000e-5 (2006).

105. *Id.* at 22.

106. *Id.* at 18 (citing Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005) (finding that 58% of sampled cases involved multiple claims)).

107. Hirsch, *supra* note 99, at 93.

It is no surprise that today's workplace laws are often ineffective in accomplishing their goals.<sup>108</sup> The costs of complying with the varying rules are significant. Moreover, employers must account for the possibility that its competitors may simply choose to ignore some requirements—often a feasible option given the hurdles that employees face in enforcing the laws.<sup>109</sup> The result is that the policies of today's workplace laws are undermined by their sheer number and complexity. This problem has created a suboptimal level of regulation that should be remedied by decreasing the number of workplace laws and simplifying the ones that remain.

### 3. *Multiple Forums*

The existence of multiple rules governing the workplace creates duplication and confusion not only in the standards that employers must follow, but also in the manner in which claims are adjudicated. In particular, the forums in which a worker must enforce various claims are often different and may include a federal court, a state court, a federal administrative agency, a state administrative agency, or an arbitrator.<sup>110</sup> This fragmented adjudicatory system is burdensome for employers, which must become familiar with the wide array of possible forums. Even worse is the real possibility that an employee will be required to pursue claims involving the same set of facts in different forums.<sup>111</sup> This duplication is characteristic of a suboptimal enforcement system, as it wastes adjudicatory resources, imposes extra costs on employers and employees, and delays resolution of workplace disputes.

The Supreme Court case of *University of Tennessee v. Elliot* provides a good example of the problems caused by multiple forums.<sup>112</sup> The plaintiff in *Elliot* was a black employee who alleged that the university's proposal to terminate him was based on racial discrimination.<sup>113</sup> The employee requested a state administrative hearing on the proposed action and, before the hearing started, he also filed a lawsuit in federal district court claiming violations of Title VII; Sections 1981, 1983, 1985, 1986, and 1988;<sup>114</sup> and the First, Fourth, and Fourteenth Amendments.<sup>115</sup> The em-

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108. Befort, *supra* note 49, at 397 (“[L]egal rules governing the employment relationship consist of a crazy quilt of regulation emanating from a variety of sources—federal and state, legislative and judicial. These regulations . . . bear little relationship to one another beyond having applicability in the workplace setting.”).

109. Hodges, *supra* note 98, at 614.

110. Befort, *supra* note 49, at 398; *see also* Ford v. Revlon, Inc., 734 P.2d 580, 586 n.1 (Ariz. 1987) (discussing plaintiff who pursued both state and federal lawsuits for same factual dispute).

111. PERRITT, *supra* note 43, § 11.03, at 15 (citing cases); Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499, 502–04 (1997) (same).

112. 478 U.S. 788 (1986).

113. *Id.* at 790.

114. 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988.

ployee lost in the administrative proceeding, but rather than appealing, simply continued to pursue his federal lawsuit.<sup>116</sup> The district court granted summary judgment for the university, holding that the administrative decision should have preclusive effect against the lawsuit; however, the Sixth Circuit reversed.<sup>117</sup> The Supreme Court agreed with the Sixth Circuit that the unreviewed administrative decision could not have preclusive effect over the employee's Title VII claims,<sup>118</sup> but held that the decision could preclude the employee's other civil rights claims.<sup>119</sup>

The problem is not with the Court's holding, which was a reasonable interpretation of the relevant provisions. Rather, the issue is that these related laws had such differing standards—standards that, by their nature, are often dispositive to a case. The time and resources used in the administrative proceeding eliminated one set of claims in the lawsuit, but the judicial litigation continued as if the state agency and its decision never existed. This makes no sense, particularly because there seems to be no policy justification for precluding some of these claims, but not others. There was one central dispute in *Elliot*: did the university seek to terminate the employee because of performance problems or because of racial animus? Parties should be able to—indeed, should *have* to—resolve such issues in a single forum.<sup>120</sup>

The *Elliot* case highlights the possibility that multiple forums are not only inefficient, but may also result in conflicting results. A case in which that possibility became a reality is *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*.<sup>121</sup> The Supreme Court in *W.R. Grace* held that a court could not overrule an arbitrator's award of backpay for a termination that violated a collective-bargaining agreement, even though the termination was made pursuant to a conciliation agreement with the EEOC.<sup>122</sup> In other words, the employer had settled a Title VII claim with the agency entrusted to enforce that act, but the employer

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115. *Elliot*, 478 U.S. at 791.

116. *Id.* at 792.

117. *Id.*

118. *Id.* at 795 (citing 42 U.S.C. § 2000e-(b)(5) (requiring EEOC to give “substantial weight”—not preclusive effect—“to final findings and orders made by State or local authorities in proceedings commenced under State or local . . . law”)).

119. *Id.* at 797.

120. Another example is *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125 (6th Cir. 1971), in which the employee first had his termination litigated as an unfair labor practice charge under the NLRA, which the NLRB rejected. *Id.* at 127. Based on the exact same set of facts, the employee then pursued a Title VII claim with the EEOC and then in federal court. *Id.* The Second Circuit ultimately affirmed the district court's refusal to give the NLRB decision preclusive effect against the lawsuit, noting that adjudications had significant differences—primarily that the NLRB looked only to whether the NLRA, not Title VII, was violated. *Id.* at 128–29.

121. 461 U.S. 757 (1983).

122. The EEOC agreement required the company to maintain the existing proportion of women during layoffs, which contradicted the collective-bargaining agreement's seniority provision. *Id.* at 760.

still faced liability because that settlement violated its contract with a union. To be sure, this situation was in part the employer's own doing.<sup>123</sup> Yet, the fact remains that multiple forums and conflicting statutory policies made this case far more complex than necessary.

As *W.R. Grace* illustrates, the presence of a union further complicates workplace cases. For example, if an employee alleges that she was terminated because of her union activity and race, the number of forums rapidly multiplies.<sup>124</sup> The employee or, in rare occasions, the EEOC must pursue the race claim under Title VII in state or federal court. The union claim is possibly governed under two different regimes. It will, at a minimum, fall under the NLRA's administrative process. The NLRB's General Counsel has sole authority to seek enforcement of the NLRA and all such cases are initially adjudicated before the same agency.<sup>125</sup> Moreover, if there is a collective-bargaining agreement, the union or employee would likely allege that the termination violated that agreement. Attempts to enforce a collective-bargaining agreement requires one of two additional forums—an arbitration claim or a federal district court suit under Section 301 of the Labor-Management Relations Act.<sup>126</sup> Thus, this single termination could lead to litigation in one or more of five distinct forums.

One could argue that different forums make sense if the various adjudicators have special expertise in their respective jurisdictions. This argument is often used to justify administrative litigation, such as the NLRB's adjudication of NLRA claims.<sup>127</sup> Even taking that argument as true—and the NLRB's history raises substantial doubt about whether its specialization provides benefits that outweigh its costs<sup>128</sup>—the marginal benefit of a specialized adjudicator is overwhelmed by the aggregate costs of multiple forums.<sup>129</sup> Workplace disputes do not always develop neatly under one set of specialized rules or another. The employment relationship is complicated; thus, workplace disputes are often impossible to classify as a single type of claim. Moreover, many currently existing forums do not involve

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123. *Id.* at 767 (“The [employer] committed itself voluntarily to two conflicting contractual obligations. When the Union attempted to enforce its contractual rights, the [employer] sought a judicial declaration of its respective obligations under the contracts. During the course of this litigation, before the legal rights were finally determined, the [employer] again laid off employees and dishonored its contract with the Union. For these acts, the [employer] incurred liability for breach of contract.”).

124. Morris, *supra* note 33, at 484–85.

125. NLRA cases are first adjudicated by an administrative law judge (ALJ); a challenge to an ALJ's determination goes before a panel of NLRB members and subsequent appeals go to a federal appellate court and, possibly, the United States Supreme Court. 29 U.S.C. §§ 159–160 (2006).

126. *Id.* § 185.

127. Paul M. Secunda, *Toward the Viability of State-Based Legislation To Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 232 (2008).

128. *See infra* note 267.

129. *See, e.g.*, David L. Gregory, *Unsafe Workplaces, Injured Employees, and the Bizarre Bifurcation of Section 7 of the National Labor Relations Act*, 111 W.VA. L. REV. 395 (2009) (discussing problems with NLRB's failure to regulate claims by employees injured at work or victims of sexual harassment).

any specialization.<sup>130</sup> Instead, the numerous sources of workplace laws are often the sole reason that a dispute may require multiple forums. The complexity and waste of resources that this fragmented enforcement system entails demands a more simplified scheme.

#### 4. Statutory Confusion

The costs associated with the multitude of workplace laws is compounded by the confusion present in each one individually. Any given law has its own peculiar ambiguities and complexities.<sup>131</sup> No matter how pragmatic the policymaking, issues such as pleading requirements, burdens of proof, summary judgment standards, affirmative defenses, and remedies make litigation far from simple. Multiplying those challenges by the number of federal and state laws that currently exist creates a system that is not only complicated, but also prevents many employers and employees from being aware of those laws' basic rights and requirements.<sup>132</sup> Given the difficulties inherent in any one law, the few benefits that may be associated with this degree of statutory specialization are outweighed by the costs required to enforce these laws, particularly when several different laws are implicated by a single workplace dispute. This suboptimal structure can be improved by simplifying the standards of each law and, where appropriate, using the same standards for multiple laws.

Unnecessarily confusing standards undermine parties' ability to understand, comply with, and enforce workplace rules, thereby rendering them far less effective than they were intended.<sup>133</sup> This confusion hurts most the individuals those rules were designed to protect—employees. In addition to problems with employer compliance and judicial enforcement, employees' inability to understand their rights severely undermines the efficacy of workplace laws. An empirical study by Professor Pauline Kim on employees' knowledge of their legal protections reveals the significance of

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130. See *supra* note 126 and accompanying text.

131. See, e.g., Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 644 n.129 (2000) (describing difficulties facing Vidalia onion growers in understanding and complying with federal employment and immigrations laws) (citing U.S. GEN. ACCT. OFFICE, Pub. No. GAO/HEHS-98-236R, H-2A AGRICULTURAL GUESTWORKER PROGRAM: EXPERIENCES OF INDIVIDUAL VIDALIA ONION GROWERS 15 (1998), available at <http://archive.gao.gov/paprpdf2/161115.pdf>).

132. For example, one employer has stated that “[i]t is difficult enough these days to comply with the wealth of laws affecting business when you know what they require. It is almost impossible to do so when you do not know and cannot find out what they ultimately require.” Dana M. Muir, *From Yuppies to Guppies: Unfunded Mandates and Benefit Plan Regulation*, 34 GA. L. REV. 195, 240 (1999) (quoting *Kastler on Delegation of Authority to IRS*, PENSION & BENEFITS DAILY (BNA), Nov. 26, 1984).

133. Cf. Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013 (2003) (arguing that simplifying tax code would increase compliance).



this problem.<sup>134</sup> According to Kim's study, approximately eighty percent of employees incorrectly believed that their employers could not legally terminate one employee to hire another at a lower wage, and nearly ninety percent had the mistaken belief that they could not be fired because their employers wrongly thought they had engaged in misconduct or because their employers personally disliked them.<sup>135</sup> Because most workplace laws depend to a large degree on employees' initiating and often pursuing enforcement on their own,<sup>136</sup> this information gap is critical. An employee who is unaware that her rights have been violated will obviously be unable to exercise those rights.

Employees' lack of knowledge also has a negative effect on employment generally. This information asymmetry creates a market failure that results in an economically inefficient surplus of labor and corresponding decrease in wages and benefits. Employees' erroneously expansive view of their workplace rights means that they are more willing to work than they would be if they knew the true nature of their rights.<sup>137</sup> The result is an excessive supply of labor, which lowers employees' compensation. Similarly, if employees incorrectly believe that they have certain rights, employers have little incentive to compete with each other to attract workers by actually providing those rights.

The complexity within each individual law compounds the enforcement problems of the workplace governance system as a whole. A law will fail to achieve its policy goals if employers, employees, and judges find it difficult to understand the law's requirements. This issue is ripe for reform, as clarifying these laws would achieve significant gains while incurring few costs—thereby increasing the optimality of the entire workplace regulatory system.

### 5. *Adjudication Costs*

As noted, the patchwork of federal and state workplace laws and their various enforcement schemes have created a system in which a single set of facts often leads to multiple claims brought in multiple forums.<sup>138</sup> This

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134. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997); see also Mark V. Roehling, *The "Good Cause Norm" in Employment Relations: Empirical Evidence and Policy Implications*, 14 EMP. RESPS. & RTS. J. 91 (2002) (describing numerous studies showing employees' erroneous view of their discharge rights); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 214–15 (2001).

135. Kim, *supra* note 134, at 133–34.

136. Brake & Grossman, *supra* note 1, at 862 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174–75 (2d Cir. 2005) ("Title VII combats unlawful employment practices . . . principally through reliance on employee initiative.")).

137. Hirsch, *supra* note 99.

138. See *supra* Part II.B.3.

suboptimal complexity is costly and makes enforcement of those laws far more difficult than necessary.<sup>139</sup> The result is that employees must confront an unenviable and expensive decision of which claims to pursue and in which forum.<sup>140</sup> Employers, in turn, are unable to anticipate where their workplace decisions may end up being challenged.<sup>141</sup> Adjudicating these complicated claims also imposes significant costs on judicial and administrative systems.<sup>142</sup>

In addition to these costs, the mere perception that litigation is expensive interferes with the enforcement of workplace claims. Employers perceive the costs of workplace litigation to be much higher than they actually are, which artificially lowers demand for labor.<sup>143</sup> A major factor in this problem is employers' inability to properly account for the risk of monetary judgments; a simpler enforcement system would enable employers to better understand the true costs of workplace litigation and bring their demand for labor closer to the economically efficient level.<sup>144</sup> This increase in labor demand would lead to higher rates of employment and compensation.

These extraneous adjudication costs could be viewed as reasonable if they were accompanied by equivalent benefits. However, that does not appear to be the case. Even ignoring the costs associated with parties' inability to judge the expense of workplace litigation, our current system of workplace governance creates an adjudicatory system that is far more costly than necessary. Although there may be some isolated exceptions,<sup>145</sup> the multiple claims and forums required for workplace cases have little to no benefit. Moreover, for low-wage employees, virtually all litigation is beyond their reach, thereby making most workplace protections illusory. Thus, reform attempts should attempt to streamline adjudication and provide less expensive forums for certain cases.<sup>146</sup> The benefits of such changes would likely overwhelm any accompanying costs.

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139. See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 170 (2007).

140. See PERRITT, *supra* note 43, § 1.8, at 17.

141. See, e.g., *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (discussing termination case in which employee pursued state public policy tort claims following rejection of federal claims under Mine Safety and Health Act and NLRA, and attempt to arbitrate claim under collective-bargaining agreement), *overruled on other grounds by Brentwood v. Boeing Co.*, 1999 U.S. App. LEXIS 506, (9th Cir. Jan. 7, 1999); Krueger, *supra* note 41, at 646 (noting problems with current common law system's ex ante uncertainty).

142. See Kotkin, *supra* note 100, at 1459-63.

143. JAMES N. DERTOUZOS & LYNN A. KAOLY, RAND INST. FOR CIVIL JUSTICE, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY 51-52, 62 (1992).

144. Employers include potential litigation costs as part of the marginal cost of using another unit of labor. Thus, if litigation costs are perceived to be higher, labor costs will also be viewed as higher and labor demand will decrease below the economically efficient level—that is, the level that would exist if employers had an accurate view of litigation costs.

145. See *infra* notes 267-268 and accompanying text.

146. See *infra* note 242 and accompanying text.

### III. A PRAGMATIC APPROACH TO REGULATING THE WORKPLACE: NATIONALIZING WORKPLACE LAW

#### *A. Pragmatism and Optimal Workplace Regulation*

The policymakers who implemented our current patchwork of workplace laws largely ignored the compliance and enforcement costs of this system, emphasizing the theoretical benefits of regulations rather than their actual impact.<sup>147</sup> What is needed is a deemphasis of this theoretical approach in favor of a pragmatic one—an approach that would focus primarily on the ability of workplace laws to achieve their goals. Regulations would be based not on their theoretical promise, but rather on their likely outcomes and interactions with the entire workplace regulatory system.

The advantages of regulatory pragmatism do not depend on the existence of certain workplace rights. Instead of contemplating *what* rights should exist, this policy-making theory asks first *how* society should attempt to achieve an already-determined set of rights. This is not to say that identifying and advocating certain protections is not a worthy endeavor, as there are a multitude of valuable proposals to expand workers' rights.<sup>148</sup> Yet, regulatory pragmatism intends to fill the gap that results when debates over the social value or cost of various workplace rules ignore their practical effects. This gap has left many of the social policies at the heart of today's workplace laws unfulfilled—a serious shortcoming that regulatory pragmatism could help rectify.

A pragmatic reform of workplace regulation could take as many forms as there are laws. Yet, because problems with the current system are widespread, an expansive approach is warranted. In particular, this Article proposes to fix the broken workplace governance system through a dramatic centralization and compression of workplace laws. This reform would nationalize workplace law by replacing state authority over most workplaces with exclusive federal regulation. The new national workplace regime would further improve the suboptimal nature of today's fragmented enforcement system through an aggressive streamlining of workplace laws; creation of a new, specialized workplace court; and centralization of administrative authority within a single agency. These changes would de-

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147. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007) (showing that whistle-blower statute failed to fulfill expectations).

148. One of the most far-reaching and heralded of these proposals—albeit one that was not adopted—was the final report of the Commission on the Future of Worker-Management Relations. U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLAP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS – FINAL REPORT (1994), available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2/](http://digitalcommons.ilr.cornell.edu/key_workplace/2/).

crease the costs of compliance,<sup>149</sup> lower the barriers to enforcement, and improve the effectiveness of dispute adjudication.<sup>150</sup>

For example, as described in more detail elsewhere,<sup>151</sup> an exclusive federal workplace regime could replace the myriad rules governing the end of the employment relationship with a single reasonable business justification requirement for all terminations. This universal termination rule would likely achieve greater social benefits than the laws it would supplant. Employment discrimination under Title VII provides a perfect illustration. Although perhaps counterintuitive, the termination rule's reasonable business justification requirement would achieve greater reductions in employment discrimination by eliminating the backlash that has created hostility and resistance to Title VII discrimination claims. The termination rule's simplification of employers' duties and employees' enforcement burdens would further reduce discrimination. In short, by implementing a simple, universal standard that would apply equally to all employees, the new termination rule could reduce employment discrimination more than the numerous federal and state termination laws that currently exist.

To be sure, the proposal to nationalize workplace law is even more ambitious than the universal termination rule and unlikely to be fully enacted, at least in the near future. That infeasibility is not a fatal shortcoming, however. To the contrary, an aggressive examination of workplace laws may spur new insights into problems that more narrow reforms overlook.<sup>152</sup> The general pragmatic recommendations of the proposal are important in their own right. Even if we do not fully remove state authority over the workplace or consolidate all federal laws, any reduction in the number of claims resulting from a single dispute would be beneficial. Similarly, where multiple laws are implicated, reducing unnecessary differences and the need to litigate in multiple forums would also provide greater clarity for parties and enhanced enforcement for the laws themselves. The hope is that, if nothing else, the general principles underlying the proposal to nationalize workplace law will prompt regulatory reform that makes our current system more effective.

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149. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (emphasizing that Congress intended Title VII to be enforced primarily through cooperation and voluntary compliance).

150. *Morris*, *supra* note 33, at 475.

151. *Hirsch*, *supra* note 99.

152. This examination could occur via an expert panel, similar to the Dunlop Commission. *See supra* note 148; *see also* Andrew B. Coan, *Minimalism in Legal Scholarship: A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 103 (Stanford Law, Working Paper No. 1005430, 2007) (arguing that "examining deep questions in a fresh context can cast them in a revealing new light" and criticizing "minimalist scholarship" which, by "refusing to confront deep theoretical questions[,] can seriously limit the interest of the remaining avenues for discussion . . . [and] can make superficial explanations appear more compelling than they really are while obscuring important deep theoretical alternatives").

A pragmatic nationalization of workplace law would require two major transformations: “vertical integration” and “horizontal integration.” Vertical integration would take away regulatory power from state governments and centralize it at the federal level. Horizontal integration would assimilate various rules at a single governmental level, such as merging all federal workplace rules into a unitary “federal workplace code.” Either vertical or horizontal integration individually would move our workplace regulatory system closer to the optimal level; yet vertical integration is the important—and more radical—first step. Only after workplace law is nationalized can we realize the full benefits of horizontal integration, for it is much easier to streamline and condense legal schemes within a single jurisdiction. Consequently, this Article’s primary focus will be the benefits and process of vertical integration.

## *B. Vertical Integration: Nationalizing Workplace Law*

### *1. A Pragmatic Approach to Federalism*

Federalism, perhaps more than any other political theory, exemplifies the need for regulatory pragmatism. Since the early days of the United States, proponents of federalism often cited the theory as an overriding policy concern that should govern outcomes at the expense of other considerations.<sup>153</sup> This purported affinity for federalism<sup>154</sup> is the antithesis of regulatory pragmatism; the theory of state policymaking has become the controlling idea, no matter its efficacy in a particular instance. The failure to consider the practical effects of federalism in different areas is disturbing, for the decision between federal or state regulatory authority is likely to have profound implications.

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153. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2548 & n.18 (2005) (citing and criticizing examples). One exception is Frank Cross’s evaluation of federalism’s and decentralization’s impact on corruption and quality of government services. See Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002) (concluding that federalism is associated with more corruption and poorer quality services, while decentralization, which is independent of federalism, is associated with the opposite).

154. The same criticism could be leveled against opponents of federalism as they also seem more concerned with achieving specific outcomes than a general concern whether control resides in state or federal government. See Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1307 (1999) (“[F]ederalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself.”); Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 897 (2006) (arguing that “many appeals to federalism are merely rhetorical tactics within a broader political strategy”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 931 (1994); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 911 n.26 (2006) (“[W]e should bring a healthy skepticism to claims about federalism given that political actors frequently deploy arguments about federalism as a means of advancing their substantive policy agendas.”).

A pragmatic regulatory approach to this decision should examine the advantages and disadvantages of a fragmented versus centralized system of regulation.<sup>155</sup> This approach has been entirely absent from the current system of workplace laws, which are the product of haphazard regulations by various jurisdictions.<sup>156</sup> The result is an overly complex enforcement scheme that has repeatedly prevented workplace laws from achieving their goals.<sup>157</sup> This is no surprise, because a robust state governance regime almost by definition increases the complexity and inconsistencies in the law, particularly where non-preemptive federal standards also exist.<sup>158</sup> Providing the federal government with exclusive authority would eliminate much of this harmful complexity.<sup>159</sup> The question, therefore, is whether these costs of workplace federalism are outweighed by its benefits.

Proponents of federalism make several different claims about the theory's benefits. These purported advantages include the assertions that federalism leads to better policy by allowing experimentation at the state level,<sup>160</sup> better reflects differences across communities,<sup>161</sup> makes abuse less likely by diluting power,<sup>162</sup> and draws more people into the political process.<sup>163</sup> The Supreme Court has at times also defended federalism as a

155. Ann Althouse has made a similar argument, albeit in a different context, suggesting that differing views of federalism on the Supreme Court “may find common ground by analyzing the relative capacities of the different governmental institutions involved in federalism issues.” Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1021 (1993); see also Super, *supra* note 153, at 2549 (arguing that policymakers and scholars should look more closely at how fiscal federalism works).

156. See *supra* Part II.B.1.

157. See *supra* Part II.A; Hodges, *supra* note 98, at 602 (emphasizing the “difficulties inherent in patchwork regulation by state and federal statutory and common law”).

158. See, e.g., Louise McIntosh Slaughter, *Genetic Testing and Discrimination: How Private is Your Information*, 17 STAN. L. & POL'Y REV. 67, 79 (2006) (arguing for a federal genetic antidiscrimination bill and noting that “over thirty states have passed laws dealing with some aspect of genetic discrimination, but they are a patchwork of different definitions, standards, and remedies”).

159. Joan T. A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform The Answer?*, 34 WAKE FOREST L. REV. 1083 (1999) (arguing that exclusive federal workers' compensation scheme would be superior to current state regulation); Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L. J. POCKET PART 225 (2008), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/taking-states-out-of-the-workplace/>.

160. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932); see Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521–23 (1976). But see Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1591–97 (1994) (arguing that state experimentation will not usually occur).

161. Gregory, 501 U.S. at 458 (holding that federalism “will be more sensitive to the diverse needs of a heterogen[e]ous society”).

162. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (J. Cooke ed. 1961); THE FEDERALIST NO. 51, at 351 (James Madison) (J. Cooke ed. 1961); Althouse, *supra* note 155, at 988 (noting Supreme Court's defense of federalism as means to enhance democratic self-governance by diffusing power).

163. Gregory, 501 U.S. at 458; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 75 (1991); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–5 (1988) (summarizing arguments). Another potential advantage of federalism could be states' role as a catalyst for federal action on more controversial

means to ensure that individual rights are protected against an overcentralization of power.<sup>164</sup> Yet this defense of federalism, like the others, does not acknowledge that there are times when the theory fails—sometimes miserably.<sup>165</sup> Instead, the Court frequently endorses federalism based more on theory than its actual effects.

For example, in *Gregory v. Ashcroft*,<sup>166</sup> the Court ruled against state judges who challenged a state constitution's mandatory retirement rule as a violation of the ADEA. The Court stated that federalism's principal benefit is its ability to guarantee individual liberty.<sup>167</sup> However, as Professor Ann Althouse has noted, "[r]ather than siding with individual rights on a case-by-case basis, the *Gregory* Court adopted a long-range strategy. The *Gregory* Court chose to invigorate the states in a grand balance of power, trusting that over time benefits would flow to individuals."<sup>168</sup>

This approach to federalism is misguided. Educated guesses about the result of a particular theory is a necessary aspect of decision making, but the Court's blind reliance on the belief that federalism will enhance individual rights was specious. At the same time that it was denying the *Gregory* plaintiffs' individual liberty claims, the Court made little provision for the possibility that federalism might fail to promote individual liberties in all instances.<sup>169</sup> The Court stated that it was not following federalism for federalism's sake; however, those words mean little if it refuses to consider whether state autonomy over a given area is likely to result in promised benefits.<sup>170</sup> This is an important question because it is hard to accept that federalism is the key to guaranteeing individual liberties given states' abysmal track record in defending such liberties.<sup>171</sup>

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measures. See *infra* Part III.B.3.b.

164. *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

165. See *infra* note 171; Cross, *supra* note 154, at 1306–07 (1999) ("Federalism's role in American history as a stalking horse for racism is infamous. Southern states invoked states' rights in an effort to preserve first slavery and then segregation."). Although Justice Brennan long argued that states have an important role in filling gaps in the federal government's protection of individual constitutional rights, he also stressed the need for strong federal enforcement. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

166. 501 U.S. 452 (1991).

167. *Id.* at 458.

168. Althouse, *supra* note 155, at 1009.

169. See *infra* note 171.

170. Cf. Althouse, *supra* note 155, at 1021 ("Serious scrutiny of the state courts' work ought to precede deference" to those courts.).

171. PETER SCHUCK, *THE LIMITS OF LAW* 94 (2000) (stating that federalism has "nourished some of America's most repellent and repressive political regimes"); Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1235 (2001); see also Theodore W. Ruger, *New Federalism: Introduction*, 16 WASH. U. J.L. & POL'Y 89, 91 (2004) (describing states' opposition to "emancipation, antidiscrimination laws, [and] wages-and-hours legislation" and states'

In spite of the purported advantages of federalism, one could argue that this form of governance inhibits solutions to national problems and allows states to pursue policies that are anathema to the rest of society.<sup>172</sup> A more pragmatic approach—one that looks to the history of states' respect for individual liberty and considers the likely effects of state regulation—would do much to avoid such problems.

To be sure, predicting policy outcomes is not an exact science.<sup>173</sup> However, even an attempt at prediction would likely remedy many existing problems and result in better policy decisions. One example of a pragmatic look at federalism is the work of Professor Frank Cross. He has emphasized that many of federalism's purported benefits actually relate to decentralization which, perhaps ironically, is more prevalent in nonfederalistic countries.<sup>174</sup> Cross also appropriately questions whether the benefits attributed to federalism and decentralization actually exist in the real world, and his attempt to find empirical support for these claims is exactly the type of pragmatic approach that workplace policymakers should adopt.<sup>175</sup>

Although there is little data on federalism's effect on workplace laws, the theoretical advantages of federalism do not appear to have come to fruition in the workplace.<sup>176</sup> To the extent that federalism may provide some benefit, that positive effect seems to be outweighed by the costs incurred by the complexity that accompanies state regulation of the workplace.<sup>177</sup> The reality is that the current federalist approach to workplace regulation is a relic that has no place in the modern economy.

## 2. *A National Workplace Law for a National (and International) Economy*

At least four general approaches to apportioning regulatory authority between federal and state governments exist: exclusive federal authority;

support for "slavery, segregation, child labor and underenforcement of domestic violence laws"); Super, *supra* note 153, at 2614 (noting that states have hidden biases against programs intended to serve low- and middle-income people).

172. See *infra* notes 182–189 and accompanying text.

173. Super, *supra* note 153 at 2553–54 (discussing the shortcomings in applying "comparative process theory" of federalism, which argues that responsibility should be allocated to state or federal governments based on which system generates the best outcomes, to fiscal policy).

174. Cross, *supra* note 153, at 19–21, 27–29, 46–49.

175. Cross, *supra* note 153, at 52–57; Cross, *supra* note 153, at 59 ("[D]ecisions about federalism . . . should be grounded in a pragmatic assessment of their consequences. Dedication to preservation and empowerment of state sovereignty, in its own intrinsic right, is insupportable, and the presumption should be to the contrary.").

176. Admittedly, this conclusion is based on theory more than is ideal. However, pragmatic evaluation of policy does the best it can with the available information—the key is maintaining enough flexibility to change course should better information arise that undermines earlier determinations.

177. See *supra* Part II.B.



exclusive state authority; concurrent state and federal authority; and exclusive federal authority over some areas, with exclusive state authority over others. Our current workplace regulatory system is a mix of the latter two options—combining concurrent jurisdiction in some areas with exclusive control by either federal or state governments over others. As noted, this system has led to numerous problems, prompting the need to seek a better form of regulation. A more pragmatic solution would be the first approach, as exclusive federal authority over all workplace matters provides the best hope for achieving the optimal level of regulation and enforcement.

In the past, relying on state regulation of the workplace made sense, as the economy was dominated by small businesses and agriculture—entities that were truly local in scope.<sup>178</sup> However, such workplaces play a far smaller role in the current economic environment. Many employers are at least regional, if not national or international, in scope.<sup>179</sup> Even many local employers have workers who cross state lines to make sales or engage in other business. Except for truly small and local employers, which are already exempted from most federal workplace laws, there is little reason for workplaces to be governed by the states. Indeed, there are many reasons why modern workplaces should not be subjected to state regulation, particularly the costs of redundant or inconsistent rules.<sup>180</sup> Exclusive federal regulation would eliminate such inefficiencies and provide more effective governance.<sup>181</sup>

State regulation of the workplace also causes economically inefficient externalities that may result in a “race to the bottom”<sup>182</sup> that hurts not only workers, but state and national economies as well. Many states compete with each other by lowering labor costs to attract employers. This strategy comes as no surprise, for companies generally seek locations that offer lower labor costs, including less labor regulation.<sup>183</sup> Yet, more important than the actual impact of labor costs on firm decision making is the perception among state policymakers that labor costs are important to attract-

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178. See *supra* Part II.A; Befort, *supra* note 49, at 385–86.

179. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 696, 699 (1994) (stating that the U.S. “economy became a national economy during the late nineteenth century,” when at-will employment gained widespread acceptance).

180. See *supra* Part II.B.2.

181. *But cf.* DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE DECISIONS IN AN UNCERTAIN WORLD* 180–83 (1999) (arguing for environmental deregulation).

182. Bales, *supra* note 50 (discussing inter-jurisdictional employment standards competition, including states’ use of at-will doctrine to attract capital).

183. Laura Bloodgood, *Inbound and Outbound U.S. Direct Investment with Leading Partner Countries*, J. INT’L COM. & ECON., Aug. 2008, at 63, 68; Geoffrey Kercksmar, *Protecting the Golden Goose: Canadian Union Security Agreements and Competitiveness in the Age of NAFTA*, 15 DICK. J. INT’L L. 593, 608 (1997) (discussing firms’ concern with labor costs and citing evidence that half of American companies view state right-to-work laws as necessary to locate in particular state).

ing business.<sup>184</sup> As long as these policymakers hold this belief, and experience shows that many do,<sup>185</sup> then their workplace regulations will reflect that belief as well.

Although possibly successful in the short term, this strategy is destined to fail—with negative consequences for the nation as a whole. Even the state with the cheapest labor costs in the United States will never be able to compete on those terms globally.<sup>186</sup> A large number of countries are able to offer significantly lower labor costs than any American state; thus, states that compete for business on this ground will at most be more attractive to companies that have already decided to stay in the United States. That small benefit is outweighed by the detrimental effects of selling the state as a source of cheap labor.<sup>187</sup> Far better would be to take advantage of the United States' comparative advantage—skilled labor. States that stress education and high-quality standards of living will be able to attract and train better workers, and it is those states that will be able to compete globally in the long run.<sup>188</sup> The cheap-labor states may have gained jobs from other states in the short term, but they are chasing a shrinking market. Many types of low-skilled jobs will continue to move overseas, and states that have a disproportionate share of those jobs will find themselves with far poorer employment prospects than the high labor cost states they initially “beat.”<sup>189</sup> A national workplace policy would avoid much of this race-to-the-bottom problem by eliminating interstate labor-cost competition.<sup>190</sup>

States also fail to consider the costs of their decisions to the nation as a whole. The spillover effects caused by a state's failure to invest in high-

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184. Cf. Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271, 348 (1997) (noting that state officials' perception that strong environmental enforcement drives out businesses matters more than actual effects on business migration).

185. Glynn, *supra* note 78 (noting that some states try to use their regulation, or lack thereof, of noncompetition agreements to attract business); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 990–97 (1995).

186. Larry Swisher, *House Democratic Leaders Vows To Address Impacts of Globalization, Offshoring of Jobs*, 134 Daily Lab. Rep. (BNA), Jul. 13, 2007, at A-11 (quoting Princeton economist Alan Blinder: “Because routine, impersonal service jobs that can be done anywhere in the world will be at risk of moving to other countries, many of the most valuable skills for the jobs that remain will require interpersonal skills, problem-solving abilities, and creativity.”); *see also* Bales, *supra* note 50 (discussing U.S. options to compete in global labor market).

187. Bales, *supra* note 50; *see also* John Leland, *As Iowa Job Surplus Grows, Workers Call the Shots*, N.Y. TIMES, May 31, 2008, at A14 (describing workers leaving Iowa because of low wages).

188. Peter S. Goodman, *In N.C., A Second Industrial Revolution; Biotech Surge Shows Manufacturing Still Key to U.S. Economy*, WASH. POST, Sept. 3, 2007, at A1 (stating that successful manufacturing in the U.S. relies largely on goods and processes requiring higher skilled labor).

189. Bales, *supra* note 50; *cf.* Cross, *supra* note 153, at 15–18 (arguing that the environmental race-to-the-bottom argument has some merit, but is complicated).

190. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 408 (1997).

skill job training are externalities that justify a national policy.<sup>191</sup> These externalities represent a suboptimal level of regulation because policymakers implement regulations based only on the costs to their state rather than to the entire country. Federal policymaking, however, necessarily considers national costs, thereby avoiding these economically inefficient policies.

Structural differences between federal and state governments also weigh in favor of a national approach to workplace regulation. Most state legislator positions are part-time; thus, state policymakers possess far less time, resources, and expertise than their full-time federal counterparts.<sup>192</sup> The federal government, although far from perfect, is also more transparent and accessible than most state governments—and thereby more accountable.<sup>193</sup> This transparency and accessibility is especially beneficial for groups, such as employee advocates, which have fewer resources than their opposition.<sup>194</sup> Employers will always be able to influence every level of government that has control over their interests, whether federal or state. In contrast, employee-side groups have far fewer resources. By focusing policymaking in one jurisdiction, employee advocates would be able to participate in all workplace policymaking, rather than forfeiting certain state decisions because of resource-allocation concerns. The resources available to each side will never be equal, but concentrating decision-making authority in the federal government would at least allow all sides to be in the game.

Certain types of workplace regulations also involve very high fixed costs that are much better suited to centralized regulation. Safety and health regulations, in particular, often demand extensive research and investigation. The federal OSHA statute has a host of problems,<sup>195</sup> particularly a lack of adequate funding, but it is difficult to imagine that state governments could do better.<sup>196</sup> Indeed, a federalist approach to OSHA regulations would incur a significant waste of resources. It makes no sense to have multiple regulators investigate the same workplace health and safety risks; it is far more efficient to have a single, central authority perform

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191. *Id.* at 407.

192. Andrew Stengel et al., *Still Broken: New York State Legislative Reform* (2008), [http://www.brennancenter.org/content/resource/still\\_broken\\_new\\_york\\_state\\_legislative\\_reform\\_2008\\_update/](http://www.brennancenter.org/content/resource/still_broken_new_york_state_legislative_reform_2008_update/); cf. McCormick, *supra* note 4, at 207–08 (citing problems with states' enforcement of anti-discrimination laws).

193. Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009); *Legislative Reform*, 40 SAN DIEGO L. REV. 67, 73–74 (2003).

194. *But see* Hodges, *supra* note 98, at 603 (noting that major changes raise risks for groups with fewer resources).

195. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1080–81 (2005).

196. States currently possess limited authority to regulate workplace health and safety. RICHARD A. BALES, JEFFREY M. HIRSCH, & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 252–53 (2007).

that task.<sup>197</sup> Even with a high level of information sharing among states—which is unrealistic to expect—different regulators will be forced to repeat research and to devise often complicated rules governing these workplace risks. There may be some advantage to dissimilar regulations in different jurisdictions, but these benefits are likely outweighed by their costs. Moreover, in the limited circumstances where dissimilarity makes sense, federal policymakers could allow for some variance among jurisdictions.

### 3. *The Failed Promise of Workplace Federalism*

The proposal to nationalize workplace law has already prompted criticism. Some objections seem to be motivated primarily by a fear of the unknown—an expected reaction given the revolutionary nature of the proposed change, yet not one that should stand in the way of possible improvements.<sup>198</sup> Others defend our current system as providing the best chance for expanding workers' rights, an argument that is tied to the purported advantages of federalism.<sup>199</sup>

Although many theories have been raised in support of federalism generally,<sup>200</sup> two of the primary rationales for workplace federalism are that the best policies arise from states experimenting with different workplace laws and that state regulations can provide a political catalyst to speed enactment of federal workplace laws.<sup>201</sup> Those theories may be persuasive in some areas of the law; however, their benefits are far harder to see in the workplace.

#### *a. Laboratory Theory*

A major argument in favor of workplace federalism is that state regulations can act as experiments that ultimately result in better policymaking.<sup>202</sup> Yet, evidence that such experimentation actually occurs in workplace law is wanting. Although state workplace regulations have spread nationally at times, more often than not states simply choose from a menu of preexisting options depending on their political composition at the

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197. An alternative would be a central research agency that shares information with state regulators. However, that requires a higher level of information sharing and state-level expertise than is realistic.

198. See *supra* note 6 and accompanying text.

199. *Secunda, supra* note 8; *infra* notes 269–272 and accompanying text; cf. JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900–1918* (1968) (describing the railroads' ability to obtain less restrictive federal regulations to replace state rules).

200. *Supra* notes 160–164 and accompanying text; Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 *HOUS. L. REV.* 349, 354–59 (2007) (discussing benefits of workplace federalism).

201. Other purported advantages of federalism, including opening up the political process, have less relevance in the workplace. See *supra* notes 160–164, 192–197 and accompanying text.

202. See *supra* note 160.

time. Some exceptions exist,<sup>203</sup> but they are too rare to outweigh the complications caused by state governance. Further, workplace federalism may also suppress the development of laws at the federal level.<sup>204</sup>

More generally, Professor Susan Rose-Ackerman has argued that there are two major problems with the experimentation theory of federalism.<sup>205</sup> The first is a free-rider problem caused by jurisdictions' preference to borrow the innovations or experiments of other jurisdictions rather than incur the expense of implementing their own.<sup>206</sup> This problem is particularly acute where information about another jurisdiction's innovation is cheap to obtain, such as with public laws and regulations.<sup>207</sup> This results in a suboptimal level of innovation unless some central authority can enact measures to overcome this collective-action problem.<sup>208</sup>

The second issue is an agency problem in which incumbent policy-makers, who are typically risk averse, may be unwilling to engage in experiments that would benefit the jurisdiction as a whole.<sup>209</sup> The possibility of free-riding makes policymakers in federalist systems more risk averse than unitary systems because the opportunity to copy innovations means that the public will prefer the policymaker to free ride rather than risk their own resources.<sup>210</sup> This problem prevents a jurisdiction from capturing all of the societal gains of innovation, thereby resulting in underinvestment and a suboptimal level of innovation.<sup>211</sup>

Although Rose-Ackerman's critique of federalism has not gained traction in many quarters, recent work by professors Brian Galle and Joseph

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203. See *infra* note 229.

204. See *infra* note 227.

205. Susan Rose-Ackerman, *Risk Taking And Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

206. *Id.* at 604. "Innovation" refers generally to new policies while "experimentation" refers to different means of implementing a given policy. For the sake of simplicity, this Article will use "innovation" to include both ideas.

207. Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 U. KAN. L. REV. 541, 545 (1995) (describing the inability to "patent" corporate law innovation and protect them from copying by other states); Galle & Leahy, *supra* note 193, at 1351.

208. Galle & Leahy, *supra* note 193, at 1335–36.

209. Rose-Ackerman, *supra* note 205, at 614–15. Galle and Leahy raise the possibility that self-serving policymakers could provide net social gains by disregarding their constituents' risk aversion, but argue that policymakers are likely to be more, not less, risk averse than the public. Galle & Leahy, *supra* note 193, at 1371–75. A similar problem is common in firms, where managers may have interests that differ from those of shareholders or the firm as a whole. See Jennifer Arlen & Deborah M. Weiss, *A Political Theory of Corporate Taxation*, 105 YALE L.J. 325, 337–38 (1995); John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 35 (1986); Manuel A. Utsert, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 571 (1995).

210. Galle & Leahy, *supra* note 193, at 1370. Galle and Leahy note the "empirical observation that marginal innovation [the amount of innovation added by a new jurisdiction] appears to diminish as the number of jurisdictions increases." *Id.* at n. 81.

211. In some areas, such as law governing corporate charters, some of these problems can be overcome if there is an advantage to being the first to implement an innovation. See Glynn, *supra* note 78. However, there is little competitive benefit to being the first to innovate in workplace law.

Leahy has breathed new life into the idea that federalism does not necessarily lead to more experimentation.<sup>212</sup> Galle and Leahy synthesize a long history of research on innovation in decentralized systems to test Rose-Ackerman's thesis. Their central conclusion is that Rose-Ackerman was justified in doubting federalism's ability to spur innovation.<sup>213</sup>

Although state governments innovate, according to Galle and Leahy, "they are unlikely [to do so] in all instances at the optimal social level, or in a way that captures the true benefits of experimentation."<sup>214</sup> Suboptimal levels of innovation are most likely to occur where innovation is useful to other jurisdictions, there are inexpensive means to gain information about others' innovations, and it is cheap to copy such innovations.<sup>215</sup> All of these conditions apply to workplace law. Regulations are matters of public knowledge, and the differences in workplace conditions among states are small enough to make the borrowing of policies worthwhile.

This inability to achieve an optimal level of innovation may warrant a centralized, federal system of regulation that can correct the market failures of state governance. Although one can point to examples of state workplace innovation, these examples do not undermine the idea that the level of such innovation falls below what an ideal central regulator would enact.<sup>216</sup> Federal governance, of course, is not ideal. However, Galle and Leahy argue that federal governance is in a better position to achieve or approach an optimal level of regulation, not that it will do so in every instance.<sup>217</sup> That is the exact point of the proposal to nationalize workplace law: the federal government is better situated to achieve an optimal level of workplace innovation and regulation than are state governments. Even if federal governance does not result in the best outcome in every instance, exclusive federal authority provides the best chance for our workplace governance system to approach the optimal level of regulation.

Further, if real experimentation is to occur, at least one jurisdiction must adopt a policy that looks less likely to be successful.<sup>218</sup> But this is unlikely to occur even in a federalist system, as the political costs of such risk-taking are too high. In contrast, a central authority could force such experimentation among its subdivisions.<sup>219</sup> This problem is reflected in

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212. Galle & Leahy, *supra* note 193; *see also* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 924–26 (1994) (noting that a unitary government could encourage experimentation among sub-units).

213. Galle & Leahy, *supra* note 193, at 1398–1400.

214. Galle & Leahy, *supra* note 193, at 1338 n.19.

215. Galle & Leahy, *supra* note 193, at 1399–1400.

216. *See* Galle & Leahy, *supra* note 193, at 1343 n. 37.

217. Galle and Leahy also recognize the shortcomings of federal regulation and raise the possibility that private firms or hybrid state/private entities may provide a beneficial alternative. Galle & Leahy, *supra* note 193, at 1400.

218. Rubin & Feeley, *supra* note 212, at 925.

219. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimental-*

workplace law, where there is not a wide assortment of state rules. More often than not, states simply choose from a limited set of existing policy choices based on their political demographics, rather than an attempt to innovate.<sup>220</sup> Accordingly, the workplace law differences among states generally do not represent true innovation or an attempt to discover the best policy.

Even where workplace innovation does occur, it is quite limited and is often located in larger states and municipalities.<sup>221</sup> This is likely due to the economies of scale in acquiring the expertise needed to create innovative policy.<sup>222</sup> Thus, there are still suboptimal levels of innovation among the substantial number of states too small to afford true innovation. In contrast, the federal government has a broader expertise and larger bureaucracy than any state and is therefore in the best position to innovate.

### *b. Political Catalyst Theory*

Where state regulation is most likely to have a positive effect is in laying the groundwork for new laws, particularly controversial ones.<sup>223</sup> By incrementally enacting measures in smaller geographical areas, state governments could lessen resistance to certain regulations, which would ultimately result in the passage of federal legislation more rapidly than under a nationalized workplace system. A recent example is the attempt to ban employment discrimination based on sexual orientation.<sup>224</sup> There is a plausible argument that the experience of a handful of states is helping the development of federal law that would ban sexual orientation discrimination at work.<sup>225</sup> It is unclear whether the federal government is acting at the same speed it would have absent these state laws—indeed, although sexual orientation discrimination has been prohibited in the federal workplace for many years,<sup>226</sup> there is still no federal protection that applies to private employers—but it is fair to say that states' experiences will

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*ism*, 98 COLUM. L. REV. 267, 314–23 (2008) (suggesting ways to prompt local experimentation).

220. Galle & Leahy, *supra* note 193, at 1368 (discussing states' tendency to "pluck what seem to them to be the lowest hanging new fruits, rather than sorting among all of the available alternatives to select the most appealing").

221. For instance, California is generally considered to have relatively expansive protections for workers.

222. Galle & Leahy, *supra* note 193, at 1367.

223. See generally Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

224. Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 Nw. U. L. REV. COLLOQUY 209, 209–10 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/43/LRColl2008n43Hendricks.pdf> (describing recent legislative action to enact the Employment Non-Discrimination Act (ENDA)).

225. Of course, Congress has yet to pass ENDA, and the fact that its prospects are looking better is more the result of changes in federal politics than state policymaking.

226. Exec. Order No. 13,160, 65 Fed. Reg. 39775 (June 23, 2000).

make any future federal legislation easier. However, shortening the timeline for the development of a few laws does not mean that workplace federalism makes sense generally.

It is also possible that, absent state authority in this area, the federal government may have been more aggressive about developing protections for sexual orientation. Take, for example, the statement of one senator in defense of Congress's rejection of the Employment Non-Discrimination Act (ENDA) of 1996, which would have added sexual orientation to Title VII's protected classes:

If this Congress had adopted ENDA, we would have ended State experimentation and forced one uniform solution—punitive damages and all—onto every State. Rejecting ENDA is the choice that leaves the States free to adopt whatever policies they choose. Thus, from a federalism perspective, ENDA was an intrusion on the States' ability to make choices . . . .<sup>227</sup>

This statement serves as a useful reminder that concurrent state legislation does not necessarily result in more workplace protections. It is impossible to know whether legislators who cite states' rights arguments are truly supporting state autonomy rather than merely using that argument as a convenient political tool. Yet eliminating concurrent federal and state governance would also eliminate the ability of policymakers to use state law as an excuse not to enact national workplace legislation.

It is important to note as well that a centralized government can often move faster and more effectively than a federalist system, particularly in reaction to changing circumstances. The FMLA is a good example of the federal government, while not the first jurisdiction to act, taking the lead in implementing broad family and medical leave protections for workers. Although some state measures existed before the FMLA, they were significantly more limited than the federal act.<sup>228</sup> Indeed, Congress's action was the catalyst for most of the FMLA-like state laws that exist today.<sup>229</sup>

227. 142 CONG. REC. S12015-01, S12016 (Sept. 30, 1996) (statement of Sen. Abraham).

228. *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 733-34 (2003) (noting women-only childcare leave policies and lack of family leave requirements). *But see* Henry Drummonds, *Beyond the Employee Free Choice Act Debate: Unleashing the States in Labor-Management Relations Policy*, 19 CORN. J. L. & PUB. POL'Y 83, 118-19, n.188 (2009) (citing the FMLA as one example of the advantages of state authority).

229. *Nev. Dept. of Human Res.* 538 U.S. at 732-33 (citing S. Rep. No. 103-3, at 20 (1993), and S. Rep. No. 102-68, at 77 (1991)). A notable counter example is state employment protection for disabled private-sector workers. *See* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001); *see also* William A. Herbert & Amelia K. Tuminaro, *The Impact of Emerging Technologies in the Workplace: Who's Watching the Man (Who's Watching Me)?*, 25 HOFSTRA LAB. & EMP. L.J. 355, 365-66 (2008) (discussing state genetic discrimination laws). *But see supra* note 158.



Finally, if Congress implemented the proposal to nationalize workplace law, it could do so in a manner that takes advantage of states' ability to act as a catalyst. Congress would need to affirmatively preempt various areas of state workplace law to avoid leaving regulatory gaps in areas that the federal government has not yet addressed. During this transition phase, state regulation in a given area would continue to develop until the federal government takes over. Moreover, the federal government could allow limited instances of state regulation in areas in which it believed that experimentation would be especially beneficial.<sup>230</sup> Only a national workplace regime can take into account such circumstances while eliminating many of the problems associated with our current federalist model of workplace regulation.

### *C. The Federal Workplace Code*

The manner in which Congress would nationalize workplace law is of obvious importance. The effect of such a monumental change would depend on, among other things, decisions about which legal claims would be nationalized, how the federal government would exercise its expanded authority, and how such claims would be adjudicated. These questions are complex and warrant an article unto themselves. What follows, therefore, is merely the broad outline of a possible nationalized workplace regulatory system.

As briefly described below, this federal workplace code would literally cover all workplace issues by replacing all statutory, administrative, and common-law workplace rules from all jurisdictions, whether federal or state. The transition to a federal workplace code need not, and should not, be instantaneous. Preemption of state law would occur in phases to avoid creating legal vacuums in areas where there is currently no federal law and, in isolated circumstances, would allow for some state governance.<sup>231</sup>

The federal workplace code would also involve a serious attempt to horizontally integrate nationalized workplace rules. The various standards, definitions, procedures, and other aspects of those rules would be streamlined as much as possible. Although some particularly unique areas would require specific requirements, most areas could be merged. Moreover, authority to interpret and enforce the new code would fall to a single federal administrative agency, while attempts would be made to simplify adjudication of disputes and to broaden access to the adjudicatory process.

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230. For example, states may have acquired expertise in differences between western and eastern coal deposits that require unique mine safety regulations. *Cf.* William S. Mattingly, *If Due Process is a Big Tent, Why Do Some Feel Excluded From the Big Top?*, 105 W.VA. L. REV. 791, 801 (2003) (noting change in health risk to miners because of shift from eastern underground mines to western strip mines).

231. *See id.*

### 1. Which Law To Nationalize?

The first issue for the new federal workplace code is to identify which state laws it would nationalize. The quick answer is virtually all of them. One of the main advantages of vertical integration is to bring the large and diverse set of laws regulating the workplace under one regulatory umbrella. Making the coverage of the new federal workplace code as broad as possible would also provide more opportunities to horizontally integrate laws.

The most obvious areas for coverage are those claims that strike at the heart of the employment relationship. These areas include all current federal workplace laws, such as those dealing with discrimination, collective action, wage and hour claims, and employee benefits. However, areas that only affect the workplace tangentially, like Social Security law, need not be included under the federal workplace code.

State law is a more vexing question. State claims directly related to the workplace are obvious candidates for preemption—including state-level discrimination and wage and hour laws, the at-will default and its exceptions,<sup>232</sup> unemployment insurance,<sup>233</sup> and workers' compensation.<sup>234</sup> Other areas may be relevant in the workplace, but are not primarily workplace laws. These indirect workplace claims include common law torts—such as defamation, intentional interference with business relations, and intentional infliction of emotional distress—as well as trade secret and other intellectual property regulations. Although there is a risk of unnecessarily interfering with these areas of state law, the federal code should include such claims as they apply to the workplace absent a specific reason not to do so. Failing to nationalize these areas would maintain some of the confusing myriad of laws plaguing the current system of workplace rules. Moreover, courts have struggled to apply these laws to the workplace, often creating special rules for such cases.<sup>235</sup> Thus, there is little lost and much to be gained by simply carving out these special workplace rules from each area of law and including them in the federal workplace code.

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232. See, e.g., Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2007) (establishing limited just-cause termination requirement).

233. Unemployment insurance programs were created under the auspices of the federal government, but are operated by the states. See Bales et al., *supra* note 196, at 180-81.

234. State employees would also be included. See Hirsch, *supra* note 99, at 117-18 (discussing application of unitary federal rule to state employees without running afoul of sovereign immunity interests).

235. See, e.g., Whittaker v. Care-More, Inc., 621 S.W.2d 395, 397 (Tenn. Ct. App. 1981) (refusing to apply covenant of good faith and fair dealing to employment contract).

## 2. *Horizontal Integration: Streamlining Workplace Law and its Enforcement*

After eliminating state authority over the workplace, one of the most important changes wrought by the new federal workplace code would be to consolidate and streamline workplace rules and their enforcement. Although there are limits to the degree of simplification possible, the level of duplication and other inefficiencies that exist today leave plenty of opportunities. The most fruitful areas for this horizontal integration include statutory differences involving substantive standards, procedural rules, and coverage issues.

One of the more confusing elements of workplace litigation is that different claims, even if they involve similar issues, often require significantly different analyses. The new federal code could dramatically streamline workplace litigation by giving most claims the same standard for issues such as the level of causation, the burdens required of each party, and affirmative defenses. Procedural issues are ripe for consolidation as well. Even if a dispute centers on a single event—a termination, for instance—there may be several different statutes of limitation, filing requirements, and other procedural requirements, depending on the alleged claims. Most of these differences impose costs on parties, yet have few benefits.

The disparate coverage standards under today's workplace laws are perhaps the best example of this problem. Issues such as the definition of an employer or employee differ significantly depending on the claim. Thus, in a case involving the same employer and a single set of facts, a worker may be considered a covered employee for one claim but not another. Although there may be support for some of these differences,<sup>236</sup> the small benefit gained by expanding or contracting these definitions in certain contexts pales in comparison to the costs that result from this lack of consistency.

For example, the three primary federal antidiscrimination laws have small but important differences in their small-employer exemption. Title VII and the ADA apply to employers with fifteen employees, while the ADEA requires twenty employees.<sup>237</sup> Even if one considered age discrimination to be less serious, there is little to be gained from the relatively small difference among the minimum number of employees—yet there is much to be lost. These antidiscrimination statutes are similar in their general regulatory approach. It does not make sense, therefore, to require

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236. *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1543–45 (7th Cir. 1987) (discussing need for more expansive definition of “employee” under FLSA). FMLA leave requirements may also impose such a significant toll on truly small employers that a broader employee or employer exclusion may be justified. 29 U.S.C. § 2612 (2006).

237. 29 U.S.C. § 630(b) (2006) (ADEA); 42 U.S.C. § 2000(b) (2006) (Title VII); 42 U.S.C. § 12111(5) (ADA).

employers with fifteen to nineteen employees to comply with Title VII and the ADA, but not the ADEA. Indeed, the difficulties in complying with the ADA's reasonable accommodation requirements would suggest that of the three statutes, the ADA would be most likely to exempt small employers.<sup>238</sup> Thus, the federal workplace code could improve this suboptimal situation by making all, or nearly all, workplace rules apply to the same employers—for instance, by exempting all firms with less than five employees.<sup>239</sup> This change would improve compliance and enforcement of workplace rules, while imposing few additional costs.

Finally, the workplace code could integrate and improve the means of adjudication and administration. The multiple forums often required to resolve a distinct workplace dispute is a significant problem that could be eliminated by creating a single adjudicatory body. Some form of federal Article III court, whether a general court or a specialized workplace court,<sup>240</sup> probably provides the best level of expertise and protection for parties, although other models—such as arbitration—could work as well.<sup>241</sup>

Our current adjudicatory model also creates an access problem in which many low-wage workers are unable to litigate their claims. There is no easy solution to this problem, as even arbitration can be costly. However, a new federal workplace regime could address this issue as part of the substantial reforms necessary to nationalize workplace law. There are no magic bullets, but one option would be to establish workplace small claims courts, perhaps in conjunction with the more formal specialized workplace court. These courts could also emphasize mediation, but still allow a judge to resolve a dispute in a short hearing that dispenses with the

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238. Cf. Robert Blackburn & Mark Hart, *Employment Rights in Small Firms: Some New Evidence, Explanations and Implications*, 32 INDUS. L.J. 60, 65 (2003) (describing survey showing that British employment statute imposed disproportionate compliance costs on small employers).

239. This threshold would exclude approximately 11% of all firms in the United States and 5% of all employees. U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE: 2004, Table 2(a) (2007), available at <http://www.census.gov/epcd/www/smallbus.html>. Policymakers could make limited exceptions to this exclusion, such as ensuring that all employees are covered by minimum wage guarantees.

240. See *infra* notes 284–285 and accompanying text; Hodges, *supra* note 75, at 623–24 (discussing effectiveness of arbitration as an alternative method for resolving labor claims); Morris, *supra* note 33, at 499–500, 505. Mexico, for instance, gives its labor courts exclusive jurisdiction over all disputes between employers and employees. Ziad Raymond Azar, *Bankruptcy Reform in Mexico: A Study of Old and New Insolvency Proceedings*, 31 INT'L BUS. L. 131, 132 (2003); see also Guy Davidov, *Unbound: Some Comments on Israel's Judicially-Developed Labor Law*, 30 COMP. LAB. L. & POL'Y J. 283 (2009) (discussing Israel's National Labour Court). But see James J. Brudney et al., *Judicial Hostility Towards Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1763–64 (1999) (questioning whether specialized court provides more benefits than costs).

241. Hirsch, *supra* note 99, at 124–26; see Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK OF THE ECONOMICS OF LABOR AND EMPLOYMENT LAW (Michael L. Wachter & Cynthia L. Estlund, eds. forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1656618](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656618).

time and expense of attorney-conducted litigation.<sup>242</sup> Although this type of dispute resolution is not as thorough as formal litigation, it is far better than what most low-wage employees get now—nothing.

Horizontal integration promises more effective compliance and enforcement of workplace rules. By eliminating much of the complexity that exists in today's workplace cases, integration can reduce the costs of employer compliance with the rules, the hurdles to employees' understanding of their protections, and the inefficiencies in adjudicating claims.<sup>243</sup>

#### *D. Doomed by History?: Past Nationalization Attempts*

The proposal to nationalize workplace law raises reasonable questions about the federal government's ability to exercise such power. A logical focus of this inquiry is to examine two major federal workplace laws that currently preempt most state regulations: ERISA and the NLRA.<sup>244</sup> Neither statute is the paradigm of success, as they suffer at times from complicated statutory provisions and poor enforcement—failures that serve as a warning about the risks of nationalizing the entire workplace law system. Yet, such problems do not necessarily undermine the argument for nationalization. No regulatory system is without fault, so it is no surprise that major statutes such as ERISA and the NLRA have problems. The more important question is whether, despite their faults, ERISA and the NLRA are superior to state regulation over their respective areas. Although impossible to determine with certainty, federal preemption in these areas appears to be more favorable than the alternative.

##### *1. Employee Retirement Income Security Act: Too Little Preemption?*

Regulation of pensions and other employee benefits is a relatively new phenomenon. Save for some isolated cases and statutes, there had been no serious attempt to regulate employee benefits at the federal or state level until Congress enacted ERISA in 1974.<sup>245</sup> Policymakers realized that a unitary national standard was needed to protect promised employee bene-

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242. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 20-22 (1984).

243. Cf. Congressman Michael A. Andrews, *Tax Simplification*, 47 SMU L. REV. 37, 48 (1993) (stating that "[e]mployers, especially small employers, find it difficult to comply with the complex laws governing pension plans for their employees. Since establishing or continuing a plan is voluntary, this complexity deters some employers from establishing pension plans and also causes others to terminate existing plans.").

244. The NLRA does not apply to public employees. 29 U.S.C. § 152(2) (2006).

245. 29 U.S.C. §§ 1001-1461 (2006) (preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" regulated by ERISA). Instead of United States Code citations, this article will refer to the original act's sections, such as "ERISA § 514," rather than "29 U.S.C. § 1144(a)."

fits; thus, ERISA's preemption of state governance was a major justification for the act.<sup>246</sup>

The problems with the regulation of employee benefit plans prior to ERISA are a microcosm of the problems with today's workplace laws. Prior to ERISA, regulation of pensions and other benefits was haphazard. For the most part, pre-ERISA employee-benefit regulation consisted of disparate rules emanating from various state court decisions.<sup>247</sup> The federal government encouraged private retirement plans through tax incentives and favorable labor law rulings that gave unions increased opportunities to implement such plans.<sup>248</sup> Yet, federal regulation of those plans was limited. Congress enacted several statutes that regulated various aspects of employee benefits, but only in a piecemeal fashion.<sup>249</sup> The result was that, despite some limits,<sup>250</sup> employers and unions had a significant degree of freedom in how they established and administered plans. However, this freedom came with costs. Employers and unions had no restrictions on the terms they created for pension plans, nor did they have to ensure that the promises they made were secure.<sup>251</sup> Eradicating the inevitable abuses of this freedom became one of the major goals of ERISA.

The incomplete patchwork of state employee-benefit rules was another concern of Congress when it enacted ERISA and its broad preemption of state regulation. Indeed, the legislative history surrounding ERISA's preemption provision explicitly emphasized the importance of centralizing regulatory power within the federal government and avoiding disparate state rules governing employee benefits.<sup>252</sup>

Opposition to ERISA from employers and unions had been fierce, but quickly dissipated once the threat of increased state regulation became

246. James Wooten has written an informative account of the history of ERISA preemption. See James A. Wooten, *A Legislative and Political History of ERISA Preemption*, Part 2, 14 J. PENSION BENEFITS 5 (2007); James A. Wooten, *A Legislative and Political History of ERISA Preemption*, Part 1, 14 J. PENSION BENEFITS 31 (2006); see also JAMES A. WOOTEN, *THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004); James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23, 34–43 (1978); Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (1999).

247. Wooten, *Part 1*, *supra* note 246, at 31.

248. Wooten, *Part 1*, *supra* note 246, at 32.

249. See, e.g., Labor-Management Relations Act, 29 U.S.C. § 186 (1947) (regulating union-run employee benefit plans); Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301 (repealed 1974) (mandating disclosure and filing requirements for employee benefit plans).

250. Wooten, *Part 1*, *supra* note 246, at 32 (noting antidiscrimination and reporting requirements).

251. Wooten, *Part 1*, *supra* note 246, at 32.

252. H.R. CONF. REP. NO. 1280, 93d CONG., 1974 U.S.C.A.N.N. 5038, 5162 (stating that “provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce”); 120 CONG. REC. 29,928, 29,933 (1974) (statement of Sen. Williams) (“It should be stressed that [ERISA is] . . . intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.”); see generally Vranka, *supra* note 97, at 613–14.

real.<sup>253</sup> Although some states had begun to promulgate limited regulations of pensions prior to ERISA's enactment, they were the rare exceptions to a generally laissez-faire regulatory stance.<sup>254</sup> By the early 1970s, however, more state courts and legislatures began considering, or actually engaging in, pension governance.<sup>255</sup> Groups that initially opposed federal regulation then had a new, greater concern: the possibility of inconsistent state pension requirements.<sup>256</sup> That threat extended to welfare plans, which states had also started to express an interest in regulating.<sup>257</sup> Ultimately, the fear of state regulation was significant enough to shift employers' and unions' support.

Despite, or perhaps because of, its promise of unifying employee benefit law, ERISA has faced widespread criticism. That criticism includes many of the problems associated with today's workplace regulatory system, such as unnecessary complexity and ineffective enforcement.<sup>258</sup> Yet, even if all of those criticisms are true, ERISA is not necessarily a failure. Indeed, the proper comparison is not ERISA's performance vis-à-vis an ideal framework. Rather, pragmatic policymaking should evaluate whether ERISA does a better job protecting employee benefits than the system it replaced or the system that would have existed if ERISA had not been enacted. In spite of its problems, ERISA's elimination of state authority over employee benefits seems to have been a wise policy decision.

Many of the criticisms of ERISA are targeted to shortcomings related to its substantive provisions.<sup>259</sup> Those problems only serve to strengthen the argument for preemption. It is possible that some states could have done a better job than Congress in establishing employee benefit rules. It is also a near-certainty, however, that some states would have done worse. The result would be a wide variety of rules—some better, some the same,

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253. Wooten, *Part 1, supra* note 246, at 34. Unions that were not primary plan administrators were supportive of federal pension regulation. Wooten, *Part 1, supra* note 246, at 33.

254. Wooten, *Part 1, supra* note 246, at 34.

255. Wooten, *Part 1, supra* note 246, at 34.

256. Wooten, *Part 2, supra* note 246, at 10 (quoting legislative history); see also Wooten, *Part 1, supra* note 245, at 34 (citing legislative history describing dangers of state regulation); Note, *Self-Insured Employee Welfare Plans and the 501(c)(9) Trust: The Specter of State Regulation*, 43 U. CIN. L. REV. 325 (1974).

257. Wooten, *Part 2, supra* note 246, at 10. "Welfare plans" refers to plans "established and maintained by employers to provide benefit programs that include health, disability, and life insurance; training programs; reimbursement for day care centers; scholarship funds; and prepaid legal services." Bales et al., *supra* note 196, at 199 (citing ERISA § 3(1)).

258. Edward A. Zelinsky, *The New Massachusetts Health Law: Preemption and Experimentation*, 49 WM. & MARY L. REV. 229, 231-34 (2007) (describing ERISA preemption analysis); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 476-77 (2004) (arguing that "inflexibility, impenetrability, and administrative costs associated with ERISA's defined benefit minimum funding rules are, for many employers, a significant deterrent to establishing or continuing defined benefit plans, particularly when those rules are contrasted with the greater flexibility, transparency, and simplicity of the rules governing profit-sharing plans").

259. See *supra* note 258.

and some worse than ERISA. No matter ERISA's weaknesses, one set of flawed regulations is far better than the multiple, often equally flawed, regimes that would have resulted in its absence. This is all the more true given that multi-state benefit plans would have faced regulation from numerous jurisdictions.

A further criticism of ERISA is the difficulty in interpreting its preemption provision.<sup>260</sup> Although one of the purposes of ERISA's preemption language<sup>261</sup> was to minimize disputes over the degree to which state actions conflict with ERISA, litigation over that issue has been significant.<sup>262</sup> Again, taking that criticism as valid, ERISA still appears to provide a net benefit because such disputes probably impose far fewer costs than the myriad of disparate state rules that would exist without ERISA preemption.

Admittedly, it is virtually impossible to quantify these costs and benefits. However, it is hard to believe that the additional litigation required to resolve preemption questions is greater than the costs associated with each state having its own employee benefit rules.<sup>263</sup> Indeed, one could interpret ERISA's experience as a failure to make its preemption strong enough, as most questions arise because ERISA permits some state governance.<sup>264</sup> Remove that authority and the preemption issue becomes far less troublesome.

The experience of ERISA serves as both a warning and a hope. Despite the many criticisms of ERISA preemption, the important question is whether allowing state regulation would create a better governance system. It is impossible to predict with certainty, but Congress's concern about a patchwork of state laws was probably well-founded. As an aide to Senator Javits, the prime sponsor of ERISA, warned: "if the States are to legislate in this field . . . only chaos can result."<sup>265</sup> It is difficult to imagine that a multitude of state rules governing various types of pension and

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260. See *supra* note 258.

261. ERISA § 514.

262. Wooten, *Part 1*, *supra* note 246, at 31.

263. It is possible that an employer could simply comply with the most burdensome state regime, but likely differences in reporting and other administrative requirements still creates unavoidable conflicts.

264. ERISA § 514.

265. Wooten, *Part 1*, *supra* note 246, at 34 (quoting *Private Pension Plan Reform: Hearings Before the Sen. Comm. on Finance*, 93d Cong., 1031 (1973) (statement of Frank Cummings)). Edward Zelinsky has argued that ERISA should be amended to allow for more state experimentation with health care regulation and that Section 514 should be repealed to "abolish altogether the jurisprudence of ERISA preemption." Zelinsky, *New Massachusetts Health Law*, *supra* note 258, at 233; see also *id.* at 276–87. He argues for a repeal of ERISA preemption to "avoid the definitional and borderline problems inherent in [the current] more limited exemption from ERISA preemption for state health care laws." *Id.* at 81. Nationalizing workplace law would obviate Zelinsky's concerns by broadly eliminating state authority over the workplace, thereby avoiding more specific questions about which areas still retain governance authority.



welfare plans would be a preferable solution to a comprehensive federal approach—even one as imperfect as ERISA.

## 2. *National Labor Relations Act v. the Ratchet Approach*

The other major example of federal workplace preemption is the governance of private-sector labor law under the NLRA. The Supreme Court has long interpreted the NLRA as having a strong preemptive effect—albeit one that, unlike ERISA, is not explicit.<sup>266</sup>

The reasoning for providing the NLRB exclusive authority to enforce the NLRA is the agency's expertise, yet criticism of its performance has been extensive.<sup>267</sup> The NLRB's limited remedial authority, significant delays in processing cases, and blatant politicism have all served to undermine the NLRB's credibility and its ability to enforce the NLRA's goals. It is understandable, therefore, that this dissatisfaction has led some to look to states as an alternative. However understandable, this argument is ill-advised. Although enforcement is a serious problem, particularly after a recent series of NLRB decisions favoring employers,<sup>268</sup> increased state regulation is unlikely to improve enforcement of the NLRA's goals; indeed, it is likely to make matters worse.

Several commentators have recently argued for increased state authority of labor relations, most notably Harvard economist Richard Freeman.<sup>269</sup> Professor Freeman asserts that state regulation will generally result in more union protections. Yet, it seems more likely that the change would hurt unions. To be sure, certain states such as California would move in a

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266. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990). The Court has recently confirmed the strength of the NLRA's implied preemption in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (holding that NLRA preempts California legislation prohibiting employers from using state funds to deter or promote unionization).

267. See Complaint to the ILO Committee on Freedom of Association by the AFL-CIO Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act 10–41 (ILO Case No. 2608, filed Oct. 25, 2007), available at [http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/\\$File/ILOcomplaint.pdf](http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 268–74 (2008).

268. See, e.g., *In re Dana Corp.*, 351 N.L.R.B. No. 28 (2007) (easing restrictions on decertifying voluntarily recognized unions); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1133607](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133607) (describing cases).

269. Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Laws?*, in Proceedings of the 58th Annual Meeting, Labor & Employment Relations Association Series (2006), available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/freeman.html>; see also Drummonds, *supra* note 228 (arguing for more state control over labor law, in part because shared state and federal authority has long been the norm and it allows for more experimentation, flexibility, and voice); Secunda, *supra* note 127 (arguing for more state authority to prohibit workplace captive audience meetings).

more pro-union direction.<sup>270</sup> But many other states would implement more pro-employer measures.<sup>271</sup> Although Freeman argues that matters cannot become much worse in those states, one should not underestimate the imagination of pro-employer policymakers. In areas in which the NLRA does not apply, such as labor activity involving state employees, a large number of states have refused to impose a duty to recognize unions or to protect employees' ability to engage in collective activity without employer retaliation. Indeed, many of those states have actively limited employee rights, including one of the central federal labor protections—the right to strike.<sup>272</sup>

Arguments such as Freeman's are shortsighted. Although the political landscape may look bleak at times for pro-employee advocates, that landscape is almost guaranteed to change.<sup>273</sup> The inevitable shift of political winds should make us reticent to trap ourselves in a policy designed for a political environment that will invariably cease to exist. Instead, we should focus on which entity is best suited to regulate the workplace over the long-run. Concentrating on regulatory competence may sacrifice some desired policies in the short-term, but will likely result in a more optimal set of workplace laws over time.<sup>274</sup>

It is true that if the singular goal was to maximize the promulgation of employee rights,<sup>275</sup> an alternative “ratchet” or gap-filling approach would be best. Under this approach, federal regulation would create a minimum floor of rights to which states could add, but not take away.<sup>276</sup> This approach views exclusive federal authority as detrimental because it deprives workers of the benefits of laws in more employee-friendly states such as California.<sup>277</sup> Although California employees would likely gain with increased state regulation, those benefits also involve costs associated with increased complexity and inefficient enforcement—costs borne not just by California employees, but by employees nationally.<sup>278</sup> It is difficult, if not

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270. See, e.g., *Brown*, 128 S. Ct. 2408.

271. Weiler, *supra* note 38, at 180 (describing “right to work” laws, which allow employees to pay no dues to a union that represents them).

272. Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM 313, 313–14 (1993) (noting that most states prohibit public employee strikes).

273. For example, Freeman released his paper in January 2006, when the NLRB had an active pro-employer majority. Months later, more union-friendly Democrats gained control of Congress. Then, only two years later after Freeman's paper, the Democrats controlled Congress and the White House.

274. See *supra* notes 178–197 and accompanying text.

275. Although the NLRA places employees' right to engage in collective action as its main goal, protecting business and the national economy are also significant aims. See *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

276. See Sperino, *supra* note 200, at 354–55.

277. Others have argued more generally that the ratchet approach may provide the best chance to reach an optimal mix of rights by allowing the federal government to set a minimum threshold, while permitting states to exceed that level if deemed appropriate in that jurisdiction. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 520 (2002).

278. See *supra*, Part II.B, III.A.1.

impossible, to determine the net result of enhanced state labor regulation; however, benefitting employees of a few states at the expense of employees in other states seems like a poor choice.

It is ironic that attempts to reform the NLRA could introduce one of the few problems that the act has not yet encountered. Federal labor law has been mostly immune from the problems implicated by concurrent federal and state governance over other areas of workplace law. It would be ill-advised to introduce such problems to the labor realm via the ratchet approach and its additional layer of regulations. Indeed, increased complexity could hinder workers in labor-friendly states from fully enjoying the new rights created under the ratchet approach. In contrast to focusing on relatively well-off employees, improving enforcement of existing rights would better ensure that workers in employer-friendly states actually receive the protections that society deems important.<sup>279</sup>

In short, enhancing protection for workers is an admirable goal, but not if such enhancement fails to provide real benefits. The inability of our current workplace laws to achieve their stated goals suggests that merely adding to existing protections would deliver far less than promised. Ensuring that workplace laws actually accomplish what they say seems a more effective path than simply concentrating on the number of laws that exist.

In addition, resisting a single-minded concern with one party's interests is an important facet of regulatory pragmatism. Solely focusing on expanding workers' rights—just like a narrow concern with employer interests—is a poor way to regulate. Even policymakers sympathetic to the need of workers must take into account other parties' concerns. Employer interests cannot be ignored, for generating too much employer hostility will undermine even the best-laid plans to expand workers' rights.<sup>280</sup>

Instead of expanding state authority in what is likely a failed attempt to address the NLRA's shortcomings, an opportunity exists to improve labor law governance as part of a more expansive reformation of workplace law. The proposed federal workplace code would address many of the current problems with the NLRA's enforcement. For instance, the NLRA's anemic remedies would be replaced with the new federal code's remedial structure, which would include compensatory and punitive damages, and possibly fines. The only monetary award currently available to the NLRB is backpay—fines, compensatory damages, and punitive damages are not permissible.<sup>281</sup> Allowing these traditional damage awards, as well as fines in cases where such damages are inappropriate,<sup>282</sup> would eliminate em-

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279. JOHN RAWLS, *A THEORY OF JUSTICE* 152–57 (1971) (describing “maximin” theory that social welfare is best served by a policy that maximizes the worst, rather than the average, outcome); *see also* Weil, *supra* note 23, at 127.

280. Hirsch, *supra* note 99, at 139–42 (discussing Title VII backlash).

281. 29 U.S.C. § 160(c) (2000); Estlund, *supra* note 267, at 1552.

282. An employer's failure to bargain with a union is an example of a serious unfair labor practice

ployers' ability in many cases to violate the NLRA without facing any monetary penalty other than their own litigation costs.<sup>283</sup>

The workplace code's improved adjudicatory system would also enhance enforcement of labor rights.<sup>284</sup> Increased damages that would attract more attorneys, as well as a new forum for workplace claims, would provide employees more opportunities and incentives to challenge unlawful employer practices.

Further, adjudicating labor cases under a specialized workplace court system would eliminate the wasted resources and inconsistent results that can occur when disputes involve issues that fall both inside and outside of the NLRB's jurisdiction. For example, under current law, allegations that an employer terminated employees because of their union activity and race could not be adjudicated in a single proceeding. The NLRB has exclusive authority to determine the union animus claim, but could not address the racial discrimination claim.<sup>285</sup> In contrast, a unified workplace court could address all of these claims in a single proceeding.

The NLRB's exclusive enforcement of the NLRA has been far from perfect. Yet, permitting state governance is no solution. To the contrary, a better option would be to strengthen federal control over labor and other workplace regulations. Although some employees would benefit from increased state authority over labor law, far more employees would enjoy the improved enforcement that would result from the new federal workplace code's reforms.

In the end, however, anecdotes about past legislative experiences have limited persuasiveness either for or against workplace federalism. The problem with such anecdotes is that they extrapolate the experiences of a federalist regulatory model to a proposed national model. In other words, the experiences under today's system of concurrent federal and state governance have limited relevance to what would happen if states no longer had a role in workplace governance; those experiences cannot predict what a federal government with exclusive control would have done. A better comparison is to other nationalized workplace regimes—a comparison that

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in which damages are unavailable. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). Similarly, even current monetary damages in termination cases—which consist solely of backpay—may be small if the employee is able to find similar-paying work quickly. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316–17 (D.C. Cir. 1972) (discussing interim earnings deduction).

283. Estlund, *supra* note 42, at 390 (describing importance of private workplace litigation in reforming public enforcement). The workplace code's termination rule would make a reinstatement order more viable. *See supra* note 99 and accompanying text; Hirsch, *supra* note 99, at 145 (explaining that unjust dismissal protection counters the fact that most employees do not stay long after returning pursuant to a reinstatement order).

284. *See supra* notes 240–242 and accompanying text.

285. Similarly, a termination may raise possible violations of both the NLRA and a collective-bargaining agreement. The NLRB has sole authority to find NLRA violations, while federal courts have sole jurisdiction over claims alleging breaches of collective-bargaining agreements. 29 U.S.C. § 185(a) (2000); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

suggests that a nationalized system would not be ruinous and would instead likely produce a more efficient and effective system of workplace rules.<sup>286</sup>

#### IV. CONCLUSION

Our current workplace regulatory scheme is broken. It consists of an unnecessarily confusing and ineffective patchwork of laws that often leaves workers with little more than empty promises. A problem of this significance warrants an equally significant solution—the nationalization of workplace law.

Much of the problem with today's workplace laws is that they have developed virtually independent of each other. With few exceptions, these laws were implemented by federal or state governments at various points in time as a response to an immediate policy concern. That regulatory approach can be appropriate, but it raises the possibility—one that has repeatedly been realized in the workplace context—that policymakers will fail to consider each new law's interaction with the existing framework. The aggregate effect is a broad system of laws that ultimately collapses under the weight of its own complexity.

This complexity inhibits parties' understanding of workplace rules, as well as attempts to enforce them. For instance, voluntary compliance is a central goal of most workplace laws, yet even good faith employers face significant costs in trying to understand and follow all of the relevant requirements. Employers' difficulties in understanding the multitude of complicated workplace rules is dwarfed by the problems encountered by employees, who have far less time, resources, and knowledge than their employers. This information problem cripples employees' ability both to understand what rights they possess and to seek enforcement even when they are aware of unlawful activity. Enforcement of workplace protections is no better, as a single set of facts can produce multiple claims, under multiple jurisdictions, and in multiple forums. Given these problems, it is no surprise that most workplace laws have been a disappointment.

This complex and inefficient system of workplace laws is suboptimal, as there are many reforms that could produce far more benefits than costs. Because the shortcomings of this system are so severe, what is needed most is a radically new approach to workplace regulation. Policymakers should use a more pragmatic method that would consider how all of the various workplace laws fit together and what is needed to make their enforcement more effective. The proposed nationalization of workplace law would be a broad culmination of such an approach.

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286. See *supra* note 6.

The nationalized federal workplace code would achieve more effective compliance and enforcement through a dramatic simplification of existing rules. It would vertically integrate those rules by completely replacing state authority over the workplace with exclusive federal control. The code would also horizontally integrate workplace rules by consolidating requirements where possible, simplifying rules that must stand on their own, and implementing a unified enforcement and administrative scheme. The result would be a new workplace regulatory system that is far easier to understand, to follow, and to enforce than existing law.

Nationalization is no panacea, of course, as it could end up imposing more costs than benefits. However, even if policymakers are too wary to enact this ambitious reform, any attempt to engage in more pragmatic decision making would move workplace regulation closer to its optimal level. Seemingly small improvements, such as consolidating certain federal and state claims, reducing disparate enforcement requirements, and making more consistent definitions across various laws would produce substantial gains. In contrast, policymakers' continued refusal to recognize that the goals of today's workplace laws are collapsing under their own weight threatens to accelerate that disturbing trend. It is only by comprehensively and pragmatically addressing these problems that our system of workplace laws will deliver on its many promises.