

ENDING OUR ANTI-UNION FEDERAL EMPLOYMENT POLICY

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The editors invited me to offer advice to the next President. This was difficult, because a draft was due before we knew who the next President would be: In one circumstance I would advise forceful assertion of executive powers. In the other circumstance my advice might have been, "Resign! Admit Your Transgressions!"

I have had to select an area of the law, then, where the nation would benefit from the candidates of both major parties heeding the same advice. It also has the virtue of being my principal area of practice, labor and employment law.

Practitioners speak of "labor" and "employment" law as two distinct fields, with "labor" law encompassing labor-management relations—unionization, strikes, collective bargaining, and the law under the National Labor Relations Act ("NLRA")¹—and "employment" law encompassing everything else: discrimination, wage and hour regulation, occupational health and safety, wrongful termination, etc. Some practitioners still proudly identify themselves as "real" labor lawyers, by which they mean they are of the cigar-chomping, rough-and-tumble world of labor-management relations. Not for them, the delicacies of the discrimination laws and individual rights litigation. Many discrimination lawyers, meanwhile, know as much about the NLRA as your average telecommunications lawyer.

Our federal labor and employment laws and policy embody the same disjunction: Federal employment laws are written and enforced with little regard to whether the workforce they are

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1. 29 U.S.C. §§ 141-187 (2000) (codifying the NLRA, as amended).

applied to is unionized. This Article argues that this state of affairs is one unions and business—and hence, roughly speaking, Democrats and Republicans—should want to end.

I.

The NLRA was one of the first federal laws to regulate the workplace and reflects a very different approach toward regulation than federal “employment” laws. It is *constitutive*, intended to establish a framework by which employees may achieve *for themselves* the things the employment laws provide by direct intervention. Specifically, the NLRA establishes and protects workers’ right to act collectively to improve the terms and conditions of their employment. It is intended to set a rough parity between labor and management, so the two may contend on a relatively level playing field to achieve employment terms that improve the workers’ lot without bankrupting the company (what we management lawyers call killing the goose that lays the golden egg).

Federal employment laws, most of which post-date the NLRA, supply directly many of the things that labor unions strive to achieve through bargaining.² Unions bargain for increased wages, for instance; the Fair Labor Standards Act (“FLSA”) directly establishes a minimum wage and requires overtime pay at time-and-a-half for most employees working past 40 hours a week.³ Workplace safety often is an important union bargaining objective and also is the objective of the Occupational Safety and Health Administration (“OSHA”).⁴ Similarly, the Family and Medical Leave Act⁵ entitles workers to a leave of absence when the worker or a close family member has a serious health condition; collective bargaining agreements typically provide similar (or better) benefits.

Unions are among the principal advocates of employment

2. The NLRA was enacted in 1935. NLRA, ch. 372, 42 Stat. 449. The Fair Labor Standards Act (“FLSA”) is the oldest significant federal employment law. It was enacted in 1938. FLSA, ch. 676, § 1, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (2000)).

3. The minimum wage and overtime provisions are at 29 U.S.C. §§ 206 and 207 (2000), respectively.

4. 29 U.S.C. §§ 651-675, 677, 678 (2000); 42 U.S.C. 3142-1 (2000).

5. 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (2000); 5 U.S.C. §§ 6381-6387 (2000).

regulation. By raising costs for rival non-union companies, employment regulations help union companies preserve market share and thus protect union jobs and wages. Employment laws also raise the floor from which unions commence negotiations. And of course, many union leaders advocate employment regulation in the genuine altruistic belief that it will improve workers' conditions generally. There is a substantial academic literature, however, suggesting that by boosting direct employment regulation, unions gradually have put themselves out of business. The more that favorable pay, benefits, and working conditions are set by the United States Congress, the less workers see a point in paying union dues to achieve the same things.⁶ Today 9.4 percent of the private-sector workforce is unionized,⁷ compared with approximately 16.8 percent in 1983⁸ and 38 percent in 1956.⁹

There is also a substantial academic literature, sympathetic to unions, which contends that the real cause of unions' decline is increased business hostility toward unions. This literature maintains that over the years "rogue employers" have perfected methods of flouting the labor laws, and thus have been able to prevent employees from organizing and, on those rare occasions when unions manage to win an election, have

6. See, e.g., Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681, 687-88 (1992) (identifying "employee opposition" as a cause for declining union membership, and citing polls indicating that workers oppose unionization because they see unions and bargaining as "irrelevant"); Henry S. Farber, Statement for the Commission on the Future of Worker-Management Relations 6 (Feb. 24, 1994) (finding a decline in employee demand for unionization and suggesting that because "government has taken over ma[n]y functions of workplace regulation that used to be the domain of labor unions exclusively. . . [u]nions may have less to offer workers today"); GAIL MCCALLION, CONGRESSIONAL RESEARCH SERVICE, UNION MEMBERSHIP DECLINE: COMPETING THEORIES AND ECONOMIC IMPLICATIONS (August 23, 1993) (identifying increased government employment regulation as a cause for declining employee demand for unionization); Stephen E. Tallent & Kathleen E. Vagt, *A Look to the Future: The Union Movement and Employment Law*, in LABOR LAW DEVELOPMENTS 1998, at 3-10 (Mathew Bender ed., 1998) (same); see also Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 204 (1991) (noting that "[n]ow that a key set of rights is provided by public law, the worker will wonder what value he obtains from representation," but suggesting that unions may add value by helping employees vindicate federal employment rights).

7. See Daniel J. Roy, *Number of Union Members Rose Slightly in 1999, But Percentage Remained Constant*, DAILY LAB. REP., Jan. 20, 2000, at AA-1.

8. See *Business Group Hits AFL-CIO, Sweeney*, DAILY LAB. REP., Nov. 5, 1996, at A-11.

9. See MCCALLION, *supra* note 6, at 1.

prevented them from achieving collective bargaining agreements.¹⁰ The playing field is not level after all, these critics argue, and the solution is to amend the labor laws to arm unions with some of the gleaming weaponry of the plaintiffs' bar, such as punitive damages.¹¹

This Article suggests that instead of attempting to revive the American labor movement by adjusting the relative might of labor and management under the NLRA, the new Administration should consider an integrated labor and employment policy that gives management *less reason to oppose* unionization. For a Republican President, this would mean viewing unionization as an alternative means of regulating the employment relationship, a means that has more in common with conservative principles of limited government than does direct intervention through employment laws. For a Democratic President, this would mean honoring a core party principle: faith in labor unions. For all of us, it would mean ending our anti-union federal employment policy.

II.

When I say federal employment policy is anti-union, I mean that federal employment laws take little account of the advantages unionization is supposed to give workers, and sometimes treat unions as *less* capable of vindicating employee

10. See Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-81 (1983); Paul C. Weiler, *Striking New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354-56 (1984). Professor Weiler also blames weak administration of the NLRA. See *id.* at 360-61. For a response to Weiler, see Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 1006 (1991) (concluding that "[t]he decline of American unions is the result of the complex interaction of a cluster of factors," including "economic environment, legal and illegal opposition of employers, the attitudes of employees, and the legal framework," and suggesting some commentators "overestimate the incidence and significance of employer lawlessness"). Weiler replies in Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991).

11. Punitive damages for discharging union organizers was proposed in an NLRA "reform" bill introduced by Senator Paul Simon in 1993. See *Simon Introducing New Bills to Reform NLRA by Increasing Penalties, Forcing Arbitration*, DAILY LAB. REP., Oct. 21, 1993, at D-6 (describing Senate Bill 1553, the Labor Relations Remedies Act); see also WILLIAM B. GOULD IV, AGENDA FOR REFORM 166 (1993) ("Double or triple back-pay awards would reduce the incentive for employers to engage in unlawful discriminatory dismissals.").

interests than individual workers acting on their own behalf.

Employees often know better than Washington bureaucrats how to improve their workplace: This Republican-sounding principle animated the most ambitious OSHA enforcement program of the Clinton Administration. In 1997 OSHA unveiled its "Cooperative Compliance Program" ("CCP"), which offered companies a sharply reduced likelihood of inspection if they adopted a set of safety measures not currently required by existing OSHA regulations.¹² The central measure gave employees a leading role in identifying and correcting workplace hazards.

This "Cooperative Compliance Program" improperly sought to force new obligations on employers without notice and comment rulemaking (employers dubbed it the "*Coercive Compliance Program*"), and for that reason was invalidated by the D.C. Circuit.¹³ But the program was right in its premise that workplaces where employees are empowered to address safety and health conditions are less in need of government scrutiny. Exempting such workplaces from neutral inspection programs (such as CCP purported to be¹⁴) is especially sensible since those inspections programs are not OSHA's only means of targeting employers for inspection—employees can also trigger inspection by complaining to OSHA of unsafe conditions.¹⁵ Thus, unionized employees whose workplace was fully exempt from programmed OSHA inspections could still summon OSHA inspectors if the company failed to address safety problems the union identified.

12. See *U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 208-09 (D.C. Cir. 1999) (discussing the "Cooperative Compliance Program").

13. See *id.* at 212-13. The Clinton Administration also prepared a proper rule that would have required the "comprehensive safety and health programs" sought to be imposed by CCP, but the rule was never issued for comment. See *Statement of Regulatory Priorities*, 62 Fed. Reg. 57,089 & 57,107 (Dep't of Labor Oct. 29, 1997) (identifying a safety program rule among the Department's regulatory priorities).

14. The industry challengers contended that because CCP used particular information on individual companies to target them for inspection, it was not a neutral inspection plan and could not be justified under the relaxed Fourth Amendment standard for "administrative" searches. Instead, industry argued, CCP had to satisfy normal standards of probable cause. The court did not reach this argument because it invalidated CCP on the procedural grounds identified above. See *U.S. Chamber of Commerce*, 174 F.3d at 208.

15. See 29 U.S.C. § 657(f)(1) (2000).

OSHA's CCP program did not seem to recognize that a company with a labor union might already, for decades, have had just the sort of effective employee involvement in safety that CCP was intended to foster. The program allowed no presumption that unionized companies already had employee involvement in safety, for instance, even though workplace safety is a basic union objective. And the program set out a blueprint for employee safety programs that seemed unaware of methods of employee participation that had worked for sixty-five years under federal *labor* law. When CCP was stayed by the D.C. Circuit and later struck down, OSHA reverted to a programmed inspection plan that focused heavily on companies that *were* unionized—at least thirteen facilities of Ford Motor Company were targeted, for instance.¹⁶ How odd for OSHA to concentrate so heavily on one of the most successfully unionized companies in the country, a company regarded as having developed an especially sophisticated safety program with its union.

In fact, however, it is quite common for federal employment laws to give little if any consideration to unions' capacity to regulate employer behavior. A few examples:

- The OSH Act contains a whistleblower protection provision that prohibits employers from discriminating against an employee for making a complaint to OSHA.¹⁷ Regulations implementing the provision suggest that if an employee complains of retaliation to OSHA *and* to his union, the agency should consider awaiting the outcome of the labor-management dispute resolution process. If that process is "fair and regular" and its result consistent with the OSH Act, OSHA is to consider deferring to the result.¹⁸ I have handled numerous whistleblower cases under the OSH Act, and virtually every time pointed the agency to its own regulations and urged that it defer to a labor-management grievance and arbitration process. The agency has never agreed. One investigator told me the policy was to defer to the grievance

16. See Amended Motion of Ford Motor Company for Leave to Intervene, U.S. Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (No. 98-1036).

17. 29 U.S.C. § 660(c) (2000).

18. 29 C.F.R. § 1978.112 (2000).

and arbitration process only if the employee consented. This is deference to the *employee*; it shows no respect for unionization or the process employees collectively have put in place to protect their rights.

- The Fair Labor Standards Act—which governs minimum wages and overtime—also generally is applied without regard to whether the compensation plan at issue is established unilaterally by the employer, or instead is the product of negotiation with, and perhaps the insistence of, a labor union. I helped defend an aerospace manufacturer a few years ago in a putative class action by engineers who claimed the company had erred in classifying them as “professionals” exempt from the overtime requirement of the FLSA. Labor Department regulations require that exempt professionals perform professional duties and be paid on a “salary basis.”¹⁹ These engineers performed professional duties, and under their

19. The overtime requirement and professional exemption are at 29 U.S.C. §§ 207 and 213(a)(1) (2000), respectively. Labor Department regulations requiring professionals to be paid on a salary basis are at 29 C.F.R. §§ 541.312 & 541.118 (2000). Note that the Labor Department has no authority to *require* payment on a salary basis; its statutory authority is merely to *define* what it means to be an exempt professional. *See* 29 U.S.C. § 213(a)(1) (2000). By making payment on a salary basis part of the *definition* of an exempt professional, however, the Department effectively has required that professionals (and executives and administrative employees) be salaried—the penalty for non-compliance is that exempt status is lost and the company owes often considerable backpay. This salary-basis requirement increasingly is at odds with how professionals wish to be compensated, as more and more seek part-time arrangements, stock options, and the like.

This appears to be a common problem in administrative law: An agency’s *definitional* authority to determine the *coverage* of a regulation functions as *de facto* *regulation* of those who properly are—and wish to remain—outside the regulation’s ambit. This *de facto* regulation sometimes operates as to matters well outside the agency’s statutory mandate. In further defining what it means to be an exempt, “salaried” employee, for instance, the Labor Department has developed intricate requirements that professionals (and executives and administrative employees) be paid for jury duty and part-day absences, *see* 29 C.F.R. § 541.118(a)(4) (2000), even though the governing statute regulates only *how much* employees are paid *when they work*. Consider also the Transportation Department’s proposed amended “hours of service” rules: The Department’s statutory authority is to regulate the hours that truckers drive, in order to avert accidents caused by fatigue. The Department sensibly recognizes that some companies do little driving and therefore warrant less scrutiny—but in defining *which* companies will receive less scrutiny, the proposed rules restrict those companies’ ability to drive the longer hours permitted to long-haul truckers even when unusual circumstances demand it. *See* 65 Fed. Reg. 25540, 25603 (proposed May 2, 2000) (to be codified at 49 C.F.R. § 394.149(b)). This exceeds the agency’s regulatory authority.

collective bargaining agreement they received salaries as high as \$120,000. The agreement also provided overtime pay, but at a straight-time rate rather than at time-and-a-half as the FLSA requires for non-exempt workers. The plaintiffs claimed that *because they were paid overtime, they were not truly "salaried" professionals but were non-exempt workers entitled to overtime at time-and-a-half.* That is, plaintiffs' claim was that because they were paid overtime, their rights had been violated. Had their union not successfully bargained for overtime, they literally would have had no complaint at all.

The court dismissed the case on the ground that plaintiffs' receipt of overtime pay over and above their generous salaries did not spoil their exempt status.²⁰ It would have been equally sensible, and more direct, for the court to rule that workers could not collectively challenge a generous compensation package they previously collectively had bargained for through their certified representative. Current law does not permit such an argument, however.²¹

- Under the civil rights laws, pre-dispute arbitration agreements entered into by employees individually are given *more force* than similar agreements negotiated by powerful labor unions acting on employees' behalf. In *Gilmer v. Interstate/Johnson Lane Corp.*,²² the plaintiff sued his employer for age discrimination. The employer objected that the plaintiff, as a condition of employment, had contracted to *arbitrate* discrimination claims. The Supreme Court agreed and enforced the arbitration agreement. Every federal appellate circuit to consider the issue but one—the Ninth Circuit²³—has extended *Gilmer's* holding to Title VII and other discrimination laws.²⁴ Such pre-dispute arbitration agreements are now in wide use,

20. See *Boykin v. Boeing*, 128 F.3d 1279, 1281-82 (9th Cir. 1997).

21. The FLSA does make some modest allowance for collectively bargained wages and hours. For instance, it provides an exemption from overtime requirements for employees whose collective bargaining agreements provide they will not work more than 1040 hours in a 26-week period. See 29 U.S.C. § 207(b)(1) (2000). More leeway for union-negotiated compensation plans is warranted.

22. 500 U.S. 20 (1991).

23. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998), *cert. denied*, 525 U.S. 996 (1998).

24. See *Desiderio v. NASD, Inc.*, 191 F.3d 198, 203 (2d Cir. 1999) (collecting cases).

as businesses seek to resolve employment disputes more expeditiously and with less cost for all parties.

Normally employees sign such pre-dispute arbitration agreements when they are hired, with little deliberation or negotiation. Those who criticize using the agreements to exclude civil rights plaintiffs from court contend there is unequal bargaining power between the lone employee who may desperately need the income and, on the other hand, a large company with (supposedly) numerous qualified applicants from which to choose. Suppose, then, that a mandatory arbitration agreement is not entered into as a condition of employment, and suppose it is not entered into by a lone, unrepresented employee but by a labor union thousands of members strong with the capacity to inflict a punishing strike if the company does not come to terms—well, in that event, the agreement is wholly unenforceable in nearly every federal court in the country.²⁵

The source of this rule is *Alexander v. Gardner-Denver Co.*,²⁶ a 1974 Supreme Court decision rooted in a distaste for arbitration in general and unions in particular. (1974 may have marked a low point in the nation's confidence in labor unions, and a high point in courts' estimation of their own role in addressing discrimination.) The Fourth Circuit considers *Gardner-Denver* to be overruled by *Gilmer*,²⁷ the Supreme Court dodged the issue in a 1998 decision.²⁸ Thus, we have the circumstance that an

25. Of the federal courts of appeals to consider the issue, only one, the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996), has ruled that a union agreement may subject discrimination claims to mandatory binding arbitration. See *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 565 (2000) (collecting cases).

26. 415 U.S. 36 (1974).

27. See *supra* note 25.

28. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 75-77 (1998) (reviewing a Fourth Circuit decision requiring an employee to arbitrate his discrimination claim pursuant to a collective bargaining agreement). The unanimous Court declined to address whether *Gilmer* overruled *Gardner-Denver*. See *id.* at 77. The Court merely said that if it were to rule that unions could "waive" a "judicial forum" for discrimination claims, then this (hypothetical) rule would require any such "waiver" to be "clear and unmistakable." *Id.* at 79-80. The Court found that the purported waiver in the union contract at issue was not clear and unmistakable, and applying the hypothetical rule it had not yet adopted—declined to order arbitration. *Id.* at 81-82. This awkward decision suggests that a number of Justices are prepared to expressly overrule *Gardner-Denver*, an issue

agreement achieved by a labor union—which the NLRA and theories of collective action presume to be a far more effective negotiating agent than an individual employee—is *not* enforceable; but an agreement signed by an individual employee as a condition of employment—which the employee presumably give little attention at the time of hiring—is enforceable.

The D.C. Circuit recently took this perverse jurisprudence to its logical conclusion, holding that because unions cannot negotiate enforceable pre-dispute arbitration agreements for discrimination claims, such agreements are not a mandatory subject of bargaining with a union.²⁹ Therefore, the court ruled, an employer can enter such agreements directly with union members, over the union's objection and despite the labor laws' strong prohibition on "direct dealing" with unionized employees.³⁰ How odd, that mandatory arbitration of discrimination claims has been approved and even encouraged by courts for a decade, but is not trusted in the context where employment dispute arbitration arose and has its richest history.

III.

My advice for the next President, then, is the following: End our anti-union federal employment policy; trust labor unions a bit more.

The exemption of union companies from employment regulation should not be total. But at minimum, exemption should be considered from programmed OSHA inspections and from the intricate overtime requirements of the FLSA. In addition, union-negotiated agreements to arbitrate discrimination claims ought to be given at least as much effect as the same agreements entered into by individuals.³¹

that is likely to confront the Court again soon.

29. See *Air Line Pilots Ass'n*, 199 F.3d at 485.

30. See *id.* at 486. In unsuccessfully seeking Supreme Court review of the D.C. Circuit's decision, the union noted that it would be "far more consistent with the fundamental goals of both [the labor laws] and the federal anti-discrimination statutes" to enable unions to negotiate pre-dispute arbitration agreements for discrimination claims. Petition for a Writ of Certiorari at 13, *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 2000) (No. 00-260).

31. In an article proposing a variety of labor law reforms, Professor Samuel Estreicher argued that a similar loosening of employment regulation of unionized

Can unions be trusted to handle discrimination claims? I believe so. Indeed unions face incentives that arguably are better for employees than the financial incentives of plaintiffs' lawyers. Plaintiffs' attorneys ordinarily receive the bulk of their compensation as a percentage of the award or settlement. This creates an incentive to seek a high monetary award in lieu of other forms of relief. As enacted, Title VII espoused a primary aim of conciliation and putting victims of discrimination back to work, but that aim often is lost in a world where most discrimination claims are handled by lawyers who stand to gain more if the employee receives cash in lieu of reinstatement. I litigated one federal discrimination case where the plaintiff could not get along with her supervisor and was seeking a position in another division of the company. Shortly after her lawyers came on the scene, however, she quit her job, claimed she was forced out, and sued for constructive discharge. The constructive discharge claim was potentially more valuable to the lawyers than resolving the workplace

companies would "enhance the benefits that collective bargaining can offer for comprehensive resolution of employment disputes." Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 844-48 (1996). He suggested that "it may be appropriate to allow the workers as a group, acting through their union, to trade [FLSA wage and hour] protections, at least to some extent, for other terms considered more advantageous to their interests." *Id.* at 848. For instance, "salaried status without overtime might be preferred if it also meant greater flexibility in work schedules." *Id.* He also recommended binding arbitration of discrimination claims, provided the employee is given a chance to make an "election of remedies." *Id.* at 846-47.

Similarly, MIT Professor Thomas Kochran, President of the Industrial Relations Research Association ("IRRA"), has suggested that in the case of "responsible" employers with labor unions or other effective means of employee representation, the government should "provide more flexibility" in achieving "labor policy objectives." Kochran identified safety and health, wage and hour, family and medical leave, and nondiscrimination as regulatory areas where this flexibility would be appropriate. Thomas A. Kochran, *Building a New Social Contract at Work: A Call to Action*, in PROCEEDINGS OF THE 52ND ANNUAL MEETING 17-18 (IRRA 2000); see also William J. Kilberg, former Solicitor of Labor, Statement Before the Dunlop Commission on the Future of Worker Management Relations (February 24, 1994) ("if it wishes to give a shot in the arm to unions . . . , the Commission must consider relief from myriad federal and state rules for employers whose employees are represented by truly independent parties."). *But see* Livadas v. Bradshaw, 512 U.S. 107 (1994). *Livadas* illustrates the Supreme Court's occasional suggestion that unionized companies alone *must* be doubly regulated, once by their union and again by the government. The defendant state agency had adopted a policy of not prosecuting wage payment claims by employees protected by a collective bargaining agreement, if the agreement enabled employees to challenge the denial of wages through arbitration. The Court held this violated 42 U.S.C. § 1983.

dispute, but it proved insupportable and the plaintiff was left with a negligible settlement. By contrast, I have arbitrated a number of discrimination claims under a collective bargaining agreement that incorporates federal discrimination laws by reference. In those cases the lawyers had been retained by the union on an hourly basis, and they made sincere and persistent efforts to achieve reinstatement (as well as backpay) for the employee.³²

To be sure, some unions have had a history of discrimination and it is reasonable to question whether they always will exert themselves on behalf of women and racial minorities alleging discrimination. Unions have made great progress in integration, however, just as American business has. Perhaps more to the point, unions face serious penalties for sloughing off claims on account of the grievant's race or sex or the like: Unions owe a "duty of fair representation" to their members, and may be sued under federal law for failing to vigorously process grievances for discriminatory reasons.³³ Union representatives are quite mindful of that constraint; some confess to erring on the side of prosecuting grievances they believe are without merit to avoid suit for violating the duty of fair representation. In the words of one union officer:

[I]f somebody comes in and writes a grievance, whether I believe it is contractually correct or not . . . , I will process that grievance, or other grievances, because No. 1, if I don't they'll sue me, and No. 2, quite honestly, I can pass that grievance that I feel has no merit up the food chain. It goes to the grievance panel.

...

Q [Arbitrator]: Maybe you've missed your calling. I think you should become a lawyer.

32. See generally John Sweeney, Address to American Bar Association Labor and Employment Law Section, in *DAILY LAB. REP.*, July 12, 2000, at E-44. Sweeney commended unions' ability to combat employment discrimination and vindicate other federal employment rights, noting, in contrast, that government "has not been and will not be able to effectively enforce employment laws," and that "limited resources, lack of legal sophistication and fear limit the effectiveness of private enforcement." *Id.* "While labor laws and employment laws may occupy separate sections of the statute books, they can be kept apart only in law school classrooms," Sweeney urged. *Id.*

33. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967).

A: No, sir. You all are all nice folks, but I spend more time with you than I care to.³⁴

A union discriminating against a member because of race or sex may also be sued under Title VII.³⁵

With respect to exemption from OSHA regulation, a different objection might be raised: What do unions know about permissible exposure limits for toxic substances and other difficult scientific questions, on which OSHA has (some) expertise? A regime that gave employers and unions more latitude under the safety and health laws need not *require* unions to eschew federal regulations, however. The union could still negotiate for the workplace to be covered by specific OSHA regulations, for instance, but might provide that OSHA rules incorporated by reference in the collective bargaining agreement would be enforced by the union through the agreement's processes, rather than by the agency through federal enforcement actions. Or, the degree of exemption could be varied, depending, for instance, on the obviousness of the hazard being regulated. At minimum, it would seem there is little value to OSHA conducting "random" inspections of unionized workplaces: The union is there to identify safety and health problems, take them up with the employer and then, if a satisfactory resolution is not achieved, either to arbitrate the claim (if covered by the collective bargaining agreement) or to complain to OSHA as a last resort.³⁶ This approach would preserve OSHA's resources and enable it to concentrate on other, non-union companies; would credit the agency's belief that companies with employee involvement in safety are less in

34. Transcript on file with author.

35. See 42 U.S.C. 2000e-2(c) (2000).

36. A different problem that should not be overlooked, however, is unions' occasional abuse of federal enforcement authority. Consider ousted Teamsters President Ron Carey, articulating to company management his opposition to their decision to discipline a Teamster member for unsafe conduct: "You think you're so safety conscious—we'll see how f**king safety conscious you are. I'll have OSHA in here seven days a week just to break your balls! . . . I'm going to f**k with you every way I can think of." Transcription on file with author; see also GENERAL ACCOUNTING OFFICE, OSHA INSPECTIONS AT ESTABLISHMENTS EXPERIENCING LABOR UNREST 7 (August 31, 2000) (reporting that "[t]he OSHA inspection rate at establishments that experienced labor unrest during fiscal years 1994 through 1998 was 6.5 times higher . . . than at establishments that did not experience such unrest").

need of inspection; and would show appropriate respect toward American labor unions and our federal *labor* law.

And if some day unions became so attractive that employers formed phony ones to stave off federal regulation, labor law provides an answer to that too: The NLRA prohibits employers from propping up "company-dominated" unions in lieu of the real thing.³⁷

CONCLUSION

Labor unions are not perfect. Full exemption of unionized companies from federal regulation would be a mistake. There are additional factors to be considered before implementing even the modest exemptions sketched out above. But those in government who profess confidence in labor unions need to consider how federal employment law could better reflect that faith. And those in government who advocate less federal regulation, and more local control, need to consider how unions could help bring that about.

37. See 29 U.S.C. § 158(a)(2) (2000).