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# YALE LAW & POLICY REVIEW

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## Discovering “Immemployment” Law: The Constitutionality of Subfederal Immigration Regulation at Work

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## INTRODUCTION

As the immigration debate rages in the United States, a growing number of state and local governments have enacted laws sanctioning employers who employ undocumented immigrant workers and requiring employers to use an electronic employee-verification system (referred to collectively as “subfederal employer-sanctions laws”).<sup>1</sup> Over the past few years, there has been a tug-of-war about whether state and local governments may enact employer-sanctions laws<sup>2</sup> without running afoul of the Constitution’s Supremacy Clause.<sup>3</sup> One federal

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1. State legislatures passed twenty-one employment-related immigration laws in 2009 and twenty-seven employment-related immigration laws in 2010. *2010 Immigration-Related Laws and Resolutions in the States (January 1-December 31, 2010)*, NAT’L CONF. ST. LEGISLATURES (Jan. 5, 2011), <http://www.ncsl.org/default.aspx?tabid=21857>. While the focus here is on subfederal employer-sanctions laws, it is important to note that these laws are often one aspect of broader subfederal legislative initiatives that also “contain a combination of provisions: they make English the ‘official language’ of the municipality, eliminate gathering places for day laborers, . . . restrict unauthorized immigrants’ access to public benefits, and prevent unauthorized immigrants from renting housing.” Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 57 (2009). Nonetheless, “[v]irtually every state and local . . . ordinance features employment restrictions as its centerpiece.” *Id.* at 111.
  2. See, e.g., Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 605 (2010) (“Over the last few years, there has been much ferment over the role of state and local governments in immigration and immigrant law.”).
  3. U.S. CONST. art. VI, cl. 2. There are often other legal theories simultaneously advanced in these cases. For a case involving a Supremacy Clause argument as well as a due process argument, see *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), *amended and superseded on denial of reh’g* by 558 F.3d 856

district court and three federal courts of appeals have considered the issue and have come to contrary conclusions.<sup>4</sup> The U.S. Supreme Court is considering the constitutionality of Arizona's employer-sanctions law during its 2010-2011 Term.<sup>5</sup> This Article addresses the unresolved Supremacy Clause question about the constitutionality of subfederal employer-sanctions laws from an entirely new vantage point.

Thus far, court battles and scholarship about this Supremacy Clause issue have turned on how to interpret the preemptive force of a federal immigration law: the Immigration Reform and Control Act of 1986 (IRCA).<sup>6</sup> IRCA sanctions employers who knowingly hire or employ undocumented workers,<sup>7</sup> and requires employers to use either the I-9 employee-verification procedure or an electronic employee-verification system ("E-Verify").<sup>8</sup> It also forbids employees from knowingly using fraudulent documents to gain employment.<sup>9</sup> Because the U.S. Constitution's Supremacy Clause requires subfederal laws to yield to federal law in circumstances when the two are in conflict,<sup>10</sup> there is a legitimate question as to whether a federal employer-sanctions law (IRCA) preempts subfeder-

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(9th Cir. 2009), *cert. granted sub nom. Chamber of Commerce of the United States v. Candelaria*, 130 S. Ct. 3498 (2010).

4. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) (finding the local law to be preempted by federal immigration law); *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) (finding preemption); *Chicanos Por La Causa*, 558 F.3d 856 (finding no preemption); *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (finding no preemption).
5. *Chicanos Por La Causa*, 558 F.3d 856, *cert. granted sub nom. Chamber of Commerce of the U.S. v. Candelaria*, 130 S. Ct. 3498 (2010).
6. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).
7. The potential sanctions for violations are monetary civil sanctions or, in more serious cases, criminal sanctions. 8 U.S.C. § 1324a(f) (2006).
8. *Id.* § 1324a(a)-(b); see *What is E-Verify?*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov> (follow "E-Verify Homepage" to "What is E-Verify?") (last visited Mar. 22, 2011) (stating that "E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S [sic] Department of Homeland Security and Social Security Administration records to confirm employment eligibility").
9. 8 U.S.C. § 1324c(a).
10. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

al employer-sanctions laws. A singular focus on federal immigration law, however, has resulted in a split of authority in the courts to date.<sup>11</sup>

In contrast to the extensive scholarly and judicial focus on whether federal *immigration* law (IRCA, in particular) preempts subfederal employer-sanctions laws, this Article moves the analytical focus toward federal *employment* law. This Article specifically considers the preemptive force of two baseline federal employment laws: the Fair Labor Standards Act of 1938 (FLSA)<sup>12</sup> and Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>13</sup> FLSA, which prohibits child labor and establishes federal minimum-wage and overtime requirements, and Title VII, which protects employees from employment discrimination based on their membership in certain protected classes, provide some of the most broad-reaching workplace protections for employees in the United States.

The potential intersections and conflicts between federal workplace protections for employees and subfederal employer-sanctions laws call for new Supremacy Clause frameworks (also referred to as “preemption frameworks”) that incorporate federal employment laws.<sup>14</sup> Subfederal employer-sanctions laws, like federal employment laws, aim to achieve their goals through heightened regulation of the workplace. These subfederal laws, therefore, may implicate federal employment law along with federal immigration law. Moreover, broadly speaking, there is a potential conflict between FLSA’s and Title VII’s inclusiveness of a broad class of workers, including undocumented workers, and the exclusiveness of subfederal laws prohibiting the employment of undocumented workers entirely.<sup>15</sup> The underlying logic of the two federal employment laws at issue here is that protecting the labor pool’s most marginalized employees from workplace abuses will improve the working standards of all employees. FLSA and Title VII include a wide range of employees in their workplace protections in order to deter employers from preferring, or taking

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11. See *supra* note 4 and accompanying text.

12. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. §§ 201-19 (2006)).

13. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended in scattered sections of 42 U.S.C.).

14. For an article detailing the tensions and increasing interconnectivity between immigration regulation and workplace regulation in the United States, see Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125 (2009).

15. Cf. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 248 (stating that there is an “inherent tension between the restrictive goals of immigration laws, used to control the nation’s borders, and the expansive civil rights laws, utilized within U.S. borders to remove discriminatory restrictions on the labor pool”).

advantage of, marginalized workers.<sup>16</sup> In contrast, subfederal employer-sanctions laws unequivocally aim to exclude undocumented workers from the United States.<sup>17</sup>

This Article develops two general preemption frameworks that feature federal employment law. It first devises and applies an implied-preemption analysis of subfederal employer-sanctions laws based on the preemptive force of FLSA and Title VII. In doing so, this Article reveals that the four subfederal employer-sanctions laws that have produced conflicting court decisions are unconstitutional because they stand as obstacles to fundamental policies underlying FLSA and Title VII. Specifically, these four subfederal laws, along with other subfederal laws that share their qualities, conflict with core federal employment policy goals of protecting employees from employment discrimination and encouraging valid employee-initiated complaints from marginalized workers for the benefit of employees more broadly. Second, this Article develops a hybrid preemption framework that simultaneously considers the policy goals of federal immigration law and federal employment law. This new hybrid framework highlights an additional theory for preemption of these subfederal employer-sanctions laws. This Article's analytical focus on legal theories for preemption of subfederal employer-sanctions also indirectly exposes a number of policy tensions between workplace-based immigration regulation and federal workplace protections more generally.

Part I of this Article briefly sets forth the history of subfederal employer-sanctions laws in the United States and the Supremacy Clause challenges they have faced thus far in the courts. It describes preemption analyses of subfederal

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16. For FLSA legislative history confirming this claim, see 93 CONG. REC. 1495 (1947) ("Remember, also, that the public, in addition to the employee, is interested in the matter of [FLSA] liquidated damages."); 82 CONG. REC. 1390-92 (1937) (arguing that FLSA would ensure that all workers had living wages and hours); and 81 CONG. REC. 7672 (1937) (stating that "the poorest-wage workers, who are not organized, who have no means of asserting their rights to a living wage, are now to have the benefit of a Federal commission to hear their claim to a living wage"). For Title VII legislative history confirming this claim, see H.R. REP. NO. 102-40, pt. 1, at 64-65 (1991) (describing Title VII's monetary damages as "necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity"); and 188 CONG. REC. 7168 (1972) (stating that Title VII "involve[s] the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant"). See also Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 399-400 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (noting the connection between the rights of individuals and the rights of employees more broadly).
17. See, e.g., Hazleton, Pa., Ordinance 2006-18, § 2(D) (Sept. 8, 2006) (stating that the City of Hazleton is "mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration").

employer-sanctions laws to date, which have focused exclusively on federal immigration law and have resulted in conflicting court decisions. In Part II, this Article demonstrates why it is crucial to develop Supremacy Clause analyses of subfederal employer-sanctions laws that consider federal employment law in particular. It illuminates the ways that subfederal employer-sanctions laws simultaneously implicate two historically separate statutory regimes and therefore should be considered hybrids between immigration law and employment law (what this Article refers to as “immemployment law”).

Part III develops an implied-preemption analysis based on two federal employment laws, FLSA and Title VII. It shows that subfederal employer-sanctions laws, as currently written, are unconstitutional because of the ways in which they conflict with FLSA and Title VII. It thereby proposes a theory for preemption that could help resolve the unsettled issue of federal law’s preemptive effects on subfederal employer-sanctions laws. It focuses on the laws of two states (Arizona and Oklahoma) and two localities (Hazleton, Pennsylvania, and Valley Park, Missouri) because courts are currently in disagreement about the preemptive force of federal immigration law in these contexts. These four laws are also instructive because, while there is wide variation in the content of subfederal employer-sanctions laws across the country,<sup>18</sup> many of the dominant prohibitions, requirements, enforcement schemes, and consequences for violations are present in at least one or all four of these subfederal laws.<sup>19</sup> In Part IV, this Article develops a hybrid *immemployment*-law preemption framework that considers both federal immigration-law and federal employment-law policy goals. Part V proposes arguments for why, even if the subfederal laws were amended to mirror the federal government’s employer-sanctions regime in its entirety, federal law would preempt these four subfederal employer-sanctions laws.

#### I. SUBFEDERAL EMPLOYER-SANCTIONS LAWS AND FEDERAL IMMIGRATION LAW’S PREEMPTIVE EFFECTS

Thus far, Supremacy Clause challenges to subfederal employer-sanctions laws have focused exclusively on federal immigration law’s preemptive effects. These challenges began soon after individual states enacted the first employer-

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18. For descriptions of some of this variation, see CRISTINA RODRIGUEZ, MAZAFFAR CHISHTI & KIMBERLY NORTMAN, MIGRATION POLICY INST., TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES (2007), available at [http://www.migrationpolicy.org/pubs/NCIIP\\_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf](http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf).

19. The analysis in the remainder of this Article applies to the laws of: (1) Hazleton, Pennsylvania; (2) Valley Park, Missouri; (3) Arizona; (4) Oklahoma; as well as laws in other parts of the country that mirror these four laws’ provisions. Where relevant, this Article will cite other laws that have provisions similar to those of the Hazleton, Valley Park, Arizona, or Oklahoma laws.

sanctions laws. In the 1970s, more than a decade before the federal government enacted an employer-sanctions law, approximately twelve state and local authorities passed some form of employer-sanctions law.<sup>20</sup> In the 1976 case *De Canas v. Bica*,<sup>21</sup> the U.S. Supreme Court heard a constitutional challenge to California's 1971 employer-sanctions law. California's law prohibited California employers from knowingly employing workers who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."<sup>22</sup> In *De Canas*, lawful residents sued their employer and invoked California's employer-sanctions law. The employee-plaintiffs argued that they were out of work because of the employer's "knowing employment" of undocumented workers.<sup>23</sup> The lower courts dismissed the plaintiffs' complaint, concluding that California's employer-sanctions law conflicted with federal immigration law and was therefore unconstitutional under the Supremacy Clause.<sup>24</sup>

The Supreme Court, in its decision in *De Canas*, disagreed with the employer and lower courts' view of federal immigration law's preemptive force.<sup>25</sup> It held that California's employer-sanctions law was constitutional as it did not conflict with federal authority over immigration. Since federal immigration law at the time did not include any express language about preemption of subfederal employer-sanctions laws, the *De Canas* Court considered federal immigration law in its entirety and searched for ways to infer Congress's intent with respect to preemption.<sup>26</sup>

There are three main types of preemption analysis. Express-preemption analyses consider the plain language of the statute to determine Congress's intent.<sup>27</sup> Implied-preemption analyses require preemption of subfederal laws when the federal government has occupied "the field" such that there is no room for subfederal laws.<sup>28</sup> Another form of implied preemption trumps subfederal laws when "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>29</sup>

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20. See Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 787 (2008) (noting that, after California enacted its employer-sanctions law in 1971, "[t]en states and one city soon followed suit, passing similar legislation").

21. 424 U.S. 351 (1976).

22. *Id.* at 352 (quoting CAL. LAB. CODE § 2805).

23. *Id.* at 353.

24. *Id.* at 353-54.

25. *Id.* at 365.

26. *Id.* at 356-65.

27. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

28. *Id.*

29. *Id.* (citations omitted) (internal quotation marks omitted).

The *De Canas* Court primarily conducted a field-preemption analysis and concluded that federal immigration law did not impliedly preempt California's law because it was not a "regulation of immigration."<sup>30</sup> Regulations of immigration, the Court went on to state, are "determination[s] of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."<sup>31</sup> California's law, which focused on employment rather than government decisions related to the admission of, and conditions for, legal entrants, did not fit this definition of the federally dominated field. In other words, the Court viewed the employment of immigrants as a "peripheral concern" of national immigration policy as it stood in 1976.<sup>32</sup> When the Supreme Court decided *De Canas*, the federal government did not regulate immigration via the workplace.<sup>33</sup> Moreover, the *De Canas* Court emphasized that California was not overreaching because it was acting appropriately pursuant to its police powers.<sup>34</sup> California's purpose was "to strengthen its economy" and to protect California residents.<sup>35</sup> Undocumented immigrants, according to the Court, "seriously depress wage scales and working conditions of citizens and legally admitted aliens,"<sup>36</sup> and the law was narrowly tailored to address this local concern.<sup>37</sup>

For thirty years following the 1976 *De Canas* decision, preemption challenges involving subfederal employer-sanctions laws were rare. This was the case even after the federal government arguably altered the definition of "regulation of immigration" through the enactment of its own employer-sanctions law in 1986, the Immigration Reform and Control Act (IRCA).<sup>38</sup> As noted above,<sup>39</sup> IRCA restricts employers from knowingly recruiting, hiring, or em-

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30. *De Canas*, 424 U.S. at 355.

31. *Id.*

32. *Id.* at 360.

33. This is in contrast to many European countries that enacted employer-sanctions laws in the 1970s. See Philip Martin & Mark Miller, *Employer Sanctions: French, German and US Experiences* 3-4 (Int'l Labour Office, Working Paper No. 36, 2000), available at <http://www.ilo.org/public/english/protection/migrant/download/imp/imp36.pdf>.

34. *De Canas*, 424 U.S. at 356.

35. *Id.* at 355, 356.

36. *Id.* at 357.

37. The law, according to the Court, "focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." *Id.* at 357.

38. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1565 (2008) (discussing federal immigration law's entrance into areas that were traditionally in the "triumvirate of state power: criminal law, employment law, and welfare").

39. See *supra* notes 6-9 and accompanying text.



ploying undocumented employees.<sup>40</sup> It imposes civil and, in more serious cases, criminal sanctions on employers who violate this provision.<sup>41</sup> To comply with IRCA's requirement that employers verify their employees' work authorization, an employer can either fill out the paper I-9 form and keep a copy on file or utilize the federal government's online E-Verify system, which pulls data from the Social Security Administration and the Department of Homeland Security.<sup>42</sup>

Preemption challenges to subfederal employer-sanctions laws were rare before 2006, at least in part because state and local governments largely did not legislate in this area. This is not all that surprising because IRCA contains a preemption provision which, in many ways, forecloses subfederal governments from regulating the employment of immigrants.<sup>43</sup> It states that IRCA "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."<sup>44</sup> The language of this provision makes it clear that Congress intended to foreclose state and local governments from imposing "civil or criminal sanctions" on employers who employ undocumented employees.<sup>45</sup> In other words, IRCA's plain language expressly preempts subfederal laws (such as California's 1971 law described above) that impose these kinds of sanctions. What is less immediately clear is what Congress intended with respect to the phrase "licensing and similar laws." These four words are important, of course, because they form IRCA's savings clause.<sup>46</sup> State and local laws that fall within the scope of this phrase are "saved" from IRCA preemption.

Since 2006, state and local governments have passed dozens of employer-sanctions laws, which, they contend, fall within IRCA's savings clause or are not

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40. Immigration Reform and Control Act (IRCA) of 1986 § 101(b), 8 U.S.C. § 1324a(a) (2006).

41. *Id.* § 1324a(f). It also prohibits employees from knowingly using fraudulent documents to obtain a job. *Id.* § 1324c(a).

42. *Id.* § 1324a(a)-(b).

43. See Pham, *supra* note 20, at 789 (noting that IRCA's preemption provision preempted many pre-IRCA subfederal employer-sanctions laws).

44. 8 U.S.C. § 1324a(h)(2).

45. Some states, however, still have employer-sanctions laws that impose civil or criminal sanctions on their books. See, e.g., COLO. REV. STAT. ANN. § 8-2-122(4) (West Supp. 2010) (imposing civil sanctions); FLA. STAT. ANN. § 448.09(2), (3) (West Supp. 2010) (imposing civil and criminal sanctions); VA. CODE ANN. § 40.1-11.1 (Supp. 2010) (imposing criminal sanctions); W. VA. CODE ANN. § 21-1B-5(b) (LexisNexis Supp. 2010) (same).

46. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009).

otherwise preempted by IRCA.<sup>47</sup> Many of these subfederal laws have faced preemption challenges based on federal immigration law.<sup>48</sup> To date, there are four federal court cases that directly consider whether IRCA expressly or impliedly preempts a subfederal employer-sanctions law.<sup>49</sup> All four of these cases exclusively examine federal immigration law's preemptive effect, with courts reaching an even split on the question.<sup>50</sup>

Courts, using IRCA preemption analyses, have concluded that the laws of Oklahoma and Hazleton, Pennsylvania, largely do not survive Supremacy Clause scrutiny. In February 2010, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's preliminary injunction, ruling that IRCA is likely to preempt the provisions of Oklahoma's employer-sanctions law with one exception. It concluded that plaintiffs were likely to succeed on their claim that IRCA's preemption provision, which forbids subfederal governments from imposing civil or criminal sanctions, expressly preempts Oklahoma's private-right-of-action provision.<sup>51</sup> Oklahoma's law allowed an employee to bring suit for monetary damages against any employer who "terminate[s] an authorized

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47. Pham, *supra* note 20, at 789-91; Seth M.M. Stodder & Nicolle Sciara Rippeon, *State and Local Governments and Immigration Law*, 41 URB. LAW. 387, 418-26 (2009); see also Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2056 (2008) (identifying the year 2006 as marking an important shift).

48. Legal challenges to these subfederal laws are initiated by a variety of actors, spanning from business associations and chambers of commerce to labor unions and civil rights groups. See Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 750 (10th Cir. 2010) (noting that the plaintiffs comprised "various chambers of commerce and trade associations"); *Chicanos Por La Causa*, 558 F.3d at 860 (noting that the plaintiffs comprised labor associations, along with several "business and civil-rights organizations"); Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (noting that the plaintiffs comprised several branches of the ACLU); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 482-83 (M.D. Pa. 2007), *aff'd in part and vacated in part*, 620 F.3d 170 (3d Cir. 2010) (noting that the plaintiffs comprised the Hazleton Hispanic Business Association and branches of the ACLU).

49. See Lozano, 620 F.3d 170; Edmondson, 594 F.3d 742; *Chicanos Por La Causa*, 558 F.3d 856; Gray, 2008 WL 294294.

50. See Lozano, 620 F.3d at 210-20 (concluding that IRCA impliedly preempts all aspects of Hazleton's law and declining to rule on IRCA's preemptive effects on Hazleton's private cause of action); Edmondson, 594 F.3d at 765 (stating that "plaintiffs have demonstrated a strong likelihood that Section 7(C) is expressly preempted [by IRCA] and that Section 9 is conflict preempted"); *Chicanos Por La Causa*, 558 F.3d at 869 (declaring "that the district court correctly determined that the Act provides sufficient process to survive this facial challenge"); Gray, 2008 WL 294294, at \*31 (stating that "[t]he Ordinance at issue is not preempted by [IRCA], to the contrary, federal law specifically permits such licensing laws as the one at issue").

51. See Edmondson, 594 F.3d at 750.

worker while retaining an employee that the employer knows or reasonably should know is unauthorized to work.”<sup>52</sup> The Tenth Circuit also determined that the plaintiffs were likely to succeed on their claim that IRCA impliedly preempts Oklahoma’s independent-contractor provision, which extended the state law’s requirements beyond employers to independent contractors.<sup>53</sup> According to the Tenth Circuit, this provision conflicted with IRCA because IRCA focuses on employers, rather than independent contractors.<sup>54</sup> The court, however, concluded that IRCA is not likely to preempt Oklahoma’s requirement that all public employers (including private employers that are working on government contracts) use the E-Verify system to verify their employees’ work authorization.<sup>55</sup>

Like the Tenth Circuit in some respects, the U.S. Court of Appeals for the Third Circuit affirmed most of a district court’s permanent injunction, concluding that IRCA impliedly preempted all but one aspect of Hazleton, Pennsylvania’s employer-sanctions regime.<sup>56</sup> Among other things, the court concluded that IRCA preempted Hazleton’s licensing provision and E-Verify requirement.<sup>57</sup> Hazleton’s law required use of E-Verify by public and private employers<sup>58</sup> and broadly stated that businesses may not “recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any . . . unlawful worker . . . .”<sup>59</sup> The Third Circuit concluded that Hazleton’s law placed additional burdens on employers and thereby conflicted with Congress’s careful balancing of interests in IRCA.<sup>60</sup> Unlike the Tenth Circuit, however, the Third Circuit did not consider the constitutionality of Hazleton’s provision providing a private cause of action to coworkers of undocumented immigrant workers

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52. *Id.* at 750; *see also* OKLA. STAT. ANN. tit. 25, § 1313(B)(1) (2008) (“After July 1, 2008, no public employer shall enter into a contract for the performance of services within this state unless the contractor registers and participates in the Status Verification System to verify information of all new employees.”).

53. *See Edmondson*, 594 F.3d at 750.

54. *See id.* at 769-71.

55. *See id.* at 771. For ease, this Article uses the term “public employer” to refer to both the government as a direct employer of employees and to private employers that are working on government contracts.

56. *See Lozano v. City of Hazleton*, 620 F.3d 170, 210 (3d Cir. 2010).

57. *Id.*

58. *See id.* at 214 (concluding that Hazleton’s law explicitly requires public employers to use E-Verify and implicitly requires private employers to do so as well, for the law “provides its safe harbor only to employers who use E-Verify. In this way, [the law] significantly alters the risk calculus for employers, and coerces use of E-Verify”).

59. Hazleton, Pa., Ordinance 2006-18, § 4(A) (Sept. 8, 2006).

60. *Lozano*, 620 F.3d at 213.

because it determined that there was no plaintiff with standing to challenge that provision.<sup>61</sup>

In contrast, two federal courts have found that IRCA does not preempt subfederal employer-sanctions laws in any way. A district court in Missouri concluded that IRCA did not preempt any aspect of the employer-sanctions regime of Valley Park, Missouri.<sup>62</sup> Similarly, the U.S. Court of Appeals for the Ninth Circuit ruled that IRCA did not preempt Arizona's employer-sanctions law, including its licensing requirement and E-Verify requirement for both public and private employers.<sup>63</sup> Arizona's law prohibits employers from "knowingly employ[ing] an unauthorized alien."<sup>64</sup> It calls for the suspension of a business license or permit after a first violation (and revocation of the license or permit after a second violation during a probationary period).<sup>65</sup> It also requires both public and private employers in Arizona to use E-Verify.<sup>66</sup> The Ninth Circuit concluded that the licensing portion of Arizona's law is a "licensing" law and therefore fell into IRCA's savings clause.<sup>67</sup> It also determined that Arizona's E-Verify requirement was in line with IRCA's goals to promote electronic verification and was, therefore, not preempted.<sup>68</sup> The Supreme Court is currently reviewing the Ninth Circuit's ruling on the constitutionality of Arizona's employer-sanctions law.<sup>69</sup> Even if the Supreme Court resolves the question of whether IRCA preempts Arizona's law, however, the case cannot fully resolve the constitutionality of provisions in other subfederal laws that do not parallel Arizona's law.

While all of these challenges focus on federal immigration law (IRCA) rather than federal employment law (notably, Title VII and FLSA), some IRCA-based preemption arguments do consider to a limited extent IRCA's workplace protections for marginalized employees.<sup>70</sup> This is the case because IRCA itself

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61. *Id.* at 176.

62. *See* Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at \*31 (E.D. Mo. Jan. 31, 2008).

63. *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 869 (9th Cir. 2009).

64. ARIZ. REV. STAT. ANN. § 23-212(A) (Supp. 2010).

65. *Id.* § 23-212(F)(2).

66. *Id.* § 23-214(A).

67. *Chicanos Por La Causa*, 558 F.3d at 860.

68. *Id.* at 867.

69. 558 F.3d 856, *cert. granted sub nom.* Chamber of Commerce of the U.S. v. Candelaria, 130 S. Ct. 3498 (2010).

70. *See, e.g.*, Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 422 (2010) (referring to "IRCA's balance of employer sanctions and antidiscrimination provisions" and noting that "[s]ome local

contains protections against two types of discrimination: citizenship-status discrimination and national-origin discrimination.<sup>71</sup> These types of IRCA-preemption arguments, however, have received only minimal traction in the courts so far. In the *Hazleton* case, the Third Circuit concluded that Hazleton's law conflicted with IRCA's intent to balance the competing interests of reducing employment of undocumented workers, keeping burdens on employers minimal, and deterring employment discrimination based on national origin and citizenship status.<sup>72</sup> In contrast, the district court in Missouri found that IRCA did not preempt Valley Park's law because the local law provided sufficient protections against discrimination.<sup>73</sup> The Ninth Circuit viewed the IRCA preemption issue as a facial challenge and did not find Arizona's law discriminatory on its face.<sup>74</sup> The Tenth Circuit found all but one aspect of Oklahoma's employer-sanctions law to be preempted but did not rely on an IRCA-discrimination argument to do so.<sup>75</sup>

Thus, despite intensive consideration of the constitutionality of subfederal employer-sanctions laws, courts have not considered federal *employment* law's preemptive effects.<sup>76</sup> Similarly, scholars have neglected federal employment law and have focused exclusively on federal immigration law's preemptive effects. Some scholars argue for a broad view of federal control over immigration<sup>77</sup>

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ordinances have upset this careful balance by not only failing to include anti-discrimination provisions, but also by actually fostering discrimination").

71. See Immigration Reform and Control Act (IRCA) of 1986 § 102(1), 8 U.S.C. § 1324b(a)(1) (2006).
72. See *Lozano v. City of Hazleton*, 620 F.3d 170, 211-12 (3d Cir. 2010).
73. *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*15 (E.D. Mo. Jan. 31, 2008).
74. *Chicanos Por La Causa*, 558 F.3d at 861. The court did leave open the possibility, however, that discrimination may come up as part of a future as-applied challenge to the law. *Id.* ("We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.").
75. See *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010).
76. See *Lozano*, 620 F.3d at 201-10 (failing to consider employment law); *Edmondson*, 594 F.3d at 765-70 (same); *Chicanos Por La Causa*, 558 F.3d at 863-67 (same); *Gray*, 2008 WL 294294, at \*8-19 (same).
77. See, e.g., Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 236 (1994) (arguing for federal supremacy in immigration regulation); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76

(thereby calling for federal preemption of these subfederal employer-sanctions laws<sup>78</sup>), and others contend that subfederal governments have more leeway than previously thought.<sup>79</sup> By filling this employment-law gap, this Article helps to resolve a pressing question about the constitutionality of subfederal employer-sanctions laws.

## II. THE RELEVANCE OF FEDERAL EMPLOYMENT LAW

It is not surprising that preemption analyses of subfederal employer-sanctions laws thus far have exclusively focused on whether IRCA's federal employer-sanctions regime preempts its subfederal counterparts. After all, many subfederal employer-sanctions laws have requirements and prohibitions that are similar to IRCA's in some ways. So why engage in a preemption analysis of

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N.Y.U. L. REV. 493, 567 (2001) (“States possess no power to regulate immigration, and the federal government may not devolve by statute its own immigration power. Accordingly, although states are plainly empowered to enact welfare rules pursuant to their traditional spending and police powers, those rules are entitled to none of the judicial deference reserved for exercises of the federal immigration power.”).

78. See, e.g., Karla Mari McKanders, *Welcome to Hazleton! ‘Illegal’ Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 35, 35-45 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34.
79. Peter Schuck, for example, argues that local “employer sanctions provisions that are carefully drafted to track the federal employer sanctions law” are not preempted. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 80; see also Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1062 (2007) (explaining “why local governments should be able to regulate in the immigration arena and supplement—but not conflict with—federal efforts”). For arguments outside of the employer sanctions context that subfederal governments have more leeway than is traditionally thought, see Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 852-53 (2008) (contending that state and local governments are not foreclosed from regulating immigration); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 633-34 (2008) (acknowledging the federal government’s continued role in immigration regulation, but identifying some constitutional space for subfederal regulation); and Stodder & Rippeon, *supra* note 47, at 426 (stating that “state and local governments in fact have significant latitude when it comes to dealing with unauthorized aliens present within their jurisdictions”). For an argument in favor of expansive subfederal regulation of immigrants, see Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 482 (2008) (“Those who claim that the states have no role in addressing the problem of illegal immigration are evidently unaware of the substantial body of legal authority that exists to the contrary . . .”).

subfederal employer-sanctions laws that is based on a seemingly far-removed area of federal law—federal employment law?<sup>80</sup>

Federal employment law should be considered, not just because of the potential conflicts between employer-sanctions laws and employment laws described in the Introduction, but also because of the hybrid nature of these subfederal laws. Subfederal employer-sanctions laws are immigration-employment law hybrids. As such, they implicate the federal employment regulatory regime along with the federal immigration regime. Moreover, while much is said about the federal government’s dominant interest in immigration regulation historically, this Part demonstrates that the federal government has had a profound (yet sometimes underappreciated) interest in federal employment regulation since the New Deal. By demonstrating the relevance of federal employment regulation, this Part sets the stage for Part III’s examination of the preemptive force of two federal employment laws (FLSA and Title VII) and Part IV’s revelation of the combined preemptive force of federal immigration law and federal employment policy.

#### A. *Subfederal Employer-Sanctions Laws as Immigration-Employment Hybrids*

Employment law is relevant to the question of whether federal law preempts subfederal employer-sanctions laws because subfederal employer-sanctions laws are immigration-employment law hybrids. These subfederal laws cover areas that federal immigration regulations and federal employment regulations already regulate. By definition, employer-sanctions laws, similar to federal employment laws, target the employment relationship between an employer and an employee or prospective employee.<sup>81</sup> By giving employers the responsibility and power to verify an employee’s work authorization,<sup>82</sup> and by restricting an employer’s employment decisions over hiring,<sup>83</sup> these subfederal laws deal with the same employer-employee relationship, which is very much at the heart of federal employment laws. Similar to immigration laws, however, the primary aim of employer-sanctions laws is typically to reduce illegal immigration. By this logic, these laws constitute a new hybrid breed of law, what I call “immployment” law.

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80. In no way does this Article argue that IRCA is not relevant to preemption analyses of subfederal employer-sanctions laws. Instead, the intent is to bring federal employment law into preemption analyses.

81. *See, e.g., Stumpf, supra* note 38, at 1584 (stating that federal employer sanctions “more closely resembled classic state employment law in regulating hiring and termination, which are arguably the two most important employment decisions”).

82. *E.g., ARIZ. REV. STAT. ANN.* § 23-214(A) (Supp. 2010).

83. *E.g., Valley Park, Mo., Ordinance 1722, § 4A* (Feb. 14, 2007).

Debates about IRCA's preemptive effects indirectly reveal the hybrid immigration-employment nature of subfederal employer-sanctions laws. The U.S. Supreme Court has affirmed that "IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law."<sup>84</sup> Courts and scholars, however, widely disagree about whether subfederal employer-sanctions laws are employment laws or immigration laws. Courts and scholars who conclude that IRCA does not preempt subfederal employer-sanctions laws often characterize these subfederal laws as employment laws rather than immigration laws.<sup>85</sup> The legal relevance of this distinction, of course, is that federal immigration law is more likely to preempt a subfederal immigration law than a subfederal employment law.<sup>86</sup> To the extent that these subfederal laws are employment laws, this view posits, states and local governments are acting squarely within their historic police powers to regulate the employment of the residents within their borders. As such, they are not stepping on the federal government's preeminent power over immigration. On the other side of the debate, courts and scholars who are contending that IRCA does preempt subfederal employer-sanctions laws often characterize these laws as immigration regulations and therefore conclude that they are preempted by IRCA.<sup>87</sup>

Court analyses of labor- and employment-law claims on behalf of undocumented employees further demonstrate that subfederal employer-sanctions laws are an immigration-employment law hybrid. The Supreme Court's 2002 *Hoffman Plastic Compounds, Inc. v. NLRB* decision,<sup>88</sup> for instance, considered whether an undocumented employee who had committed an IRCA violation through his fraudulent use of someone else's identification documents and had

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84. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (emphases added) (internal quotation marks omitted).

85. See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 984 (9th Cir. 2009) (concluding that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here"); Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 *HOFSTRA L. REV.* 1323, 1328 (2008) (referring to Arizona's employer-sanctions law as an "employment law" and noting that a federal appeals court declined to preempt it).

86. Cf. *De Canas v. Bica*, 424 U.S. 351 (1976) (holding that California's employer-sanctions law is not an immigration law and thus is not preempted); Stumpf, *supra* note 38, at 1565 (stating that when "courts view the subnational government as merely acting within its traditional spheres of power . . . the local rule stands a much greater chance of surviving").

87. See, e.g., *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 768 n.29 (10th Cir. 2010) (declining to use the presumption against preemption and finding Oklahoma's law to be preempted); McKanders, *supra* note 78, at 28 (characterizing Hazleton's law as a regulation of immigration and arguing in favor of preemption).

88. 535 U.S. 137.



suffered a National Labor Relations Act (NLRA) violation when he was fired for engaging in union organizing could be awarded back pay as a remedy for his employer's NLRA violation.<sup>89</sup> The *Hoffman* Court considered the potential conflict between IRCA's goals and the NLRA's goals and concluded that awarding NLRA back pay to this employee would harm IRCA's underlying policies. According to the Court, awarding the employee NLRA back pay would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."<sup>90</sup>

By considering the intertwined relationship between immigration law and a workplace law, the Court engaged in what this Article refers to as an *immployment-law* analysis. In this way, the Court established a labor-law consequence (no NLRA back pay) for an employee's immigration-law (IRCA) violation. It imported immigration-law priorities into its analysis of a federal workplace-law claim. Because *Hoffman* did not deal with state or local laws, the Supremacy Clause and preemption analyses were not directly relevant.<sup>91</sup> The case, however, is instructive because the *Hoffman* Court identified and avoided a potential conflict<sup>92</sup> between an employer-sanctions law (IRCA) and a federal workplace law (NLRA) by engaging in *immployment-law* analysis.

In the wake of *Hoffman*, lower courts have continued to engage in what are essentially *immployment-law* analyses. These courts have been faced with a number of questions about whether and when federal employment laws, such as the Fair Labor Standards Act and Title VII of the Civil Rights Act, must yield to federal employer-sanctions laws.<sup>93</sup> Many lower courts have been reluctant to

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89. *See id.* at 137-38, 140-41.

90. *Id.* at 151.

91. Preemption analysis is not relevant when the potentially conflicting laws are both federal statutes. *See* N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 539 n.32 (1979); *Marvin Tragash Co. v. U.S. Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *see also* Ruby Ann David, *Federal Preemption of a Federal Statute: The Case of Vornado Air Circulation Systems v. Duracraft Corporation*, 37 SANTA CLARA L. REV. 253, 253 (1996) ("Nowhere in the Constitution is it written that one federal statute can preempt another federal statute. Such a proposition is absurd considering two underlying assumptions regarding such statutes and their enactment. First, is the assumption that there is no inherent hierarchy of importance among federal statutes. Second, is the assumption that Congress does not intentionally pass conflicting laws.").

92. The sharply divided *Hoffman* Court concluded that, even without the NLRA's back pay remedy, the federal interest in labor-law enforcement would still be served in cases involving similar undocumented employees through the NLRA's other remedies for violations. *Hoffman*, 535 U.S. at 152.

93. There are myriad post-*Hoffman* legal questions about which rights and remedies are available to undocumented workers under federal labor laws as well as under federal employment laws and state workplace laws. *See, e.g.*, Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal*

extend *Hoffman* into the federal employment-law context.<sup>94</sup> These courts conclude that IRCA does not decrease an employee's access to essential federal employment-law remedies.<sup>95</sup> Some lower courts, however, have extended *Hoffman*'s rationale to the employment-law context, denying undocumented workers back pay under Title VII because of IRCA.<sup>96</sup> These courts' analyses of IRCA in the context of labor- and employment-law disputes confirm the hybrid *immigration*-nature of employer-sanctions laws.<sup>97</sup>

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*Employment Discrimination Law*, 77 *FORDHAM L. REV.* 113, 117 (2008) ("Depending upon the jurisdiction, circuit, or district, an undocumented worker's remedial rights under federal employment discrimination law range from recovery of all of the available monetary remedies, to only some of those remedies, to none of those remedies."). Professor Keith Cunningham-Parmeter recently developed an intricate legal framework to address post-*Hoffman* tensions and ambiguities currently at issue in federal and state courts. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 *AM. U. L. REV.* 1361, 1371-90 (2009); see also *id.* at 1371 ("Given the inconsistency among the responses to *Hoffman*, it is safe to say that immigrants' rights will remain undefined for the indefinite future. This disarray underscores the need for a coherent framework . . .").

94. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (distinguishing *Hoffman* and the NLRA from Title VII).
95. See, e.g., *id.* at 1074-75 (holding that immigration status was not relevant during the discovery phase of litigation and stating, in dicta, that *Hoffman* should not affect Title VII remedies); *Hernandez v. City Wide Insulation of Madison, Inc.*, 2006 U.S. Dist. LEXIS 86756, at \*3 (E.D. Wis. Nov. 30, 2006) ("[D]efendants are unable to point to a single case in which a court has held that *Hoffman* stands for the proposition that FLSA defendants need not pay back wages actually earned by workers. Multiple courts have found that *Hoffman* does not stand for such a proposition.").
96. See, e.g., *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 896-98 (S.D. Tex. 2003) (excluding back pay as a remedy for a Title VII violation); cf. Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 *CORNELL INT'L L.J.* 127, 131 (2008) ("[A] Florida district court in *Veliz v. Rental Service Corp. USA, Inc.* relied on *Hoffman* to hold that the IRCA preempted a state tort law remedy of lost future earnings to an undocumented worker who had violated the IRCA.").
97. In another context, scholars have widely noted the convergence of two formerly separate regulatory regimes: immigration and criminal law. See, e.g., Jennifer M. Chacon, *Managing Migration Through Crime*, 109 *COLUM. L. REV. SIDEBAR* 135, 137 (2009) ("[N]ot only are we seeing what Stephen Legomsky has termed the asymmetric incorporation of criminal justice norms into civil removal proceedings, but we are also witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm."); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *WASH. & LEE L. REV.* 469 (2007) (referring to the "criminalization" of immigration law); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *AM. U. L. REV.* 367, 376 (2006) (referring to these intersecting areas as "crimmigration").

B. *The Federal Government's Interest in Employment Regulation*

It is also imperative to include federal employment law in preemption analyses of subfederal employer-sanctions laws because the federal government has a well-established interest in workplace regulation.<sup>98</sup> The exclusive focus on federal immigration law's preemptive effects on subfederal employer-sanctions laws overlooks the federal government's significant interest in employment regulation. Employment regulation is sometimes characterized as "a quintessential police function" of states.<sup>99</sup> This characterization, however, ignores the federal government's broad interest in labor and employment law. Before the New Deal, workplace regulation largely took place at the state and local levels.<sup>100</sup> Since the beginning of the New Deal period, however, federal regulation of the workplace has grown exponentially.<sup>101</sup> In 1935, the NLRA provided many private-sector employees across the United States with the right to unionize and to act collectively for their mutual aid and protection in the workplace.<sup>102</sup> The Fair

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98. For an extensive analysis of preemption in the employment context, see Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469 (1993).

99. Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 *YALE L.J.* 940, 946 (1980); see also David Angueira & David Conforto, *Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA*, 39 *SUFFOLK U. L. REV.* 955, 959 (2006) (commenting that "federal preemption of state employment standards 'should not be lightly inferred' since this area lies 'within the traditional police power of the State'" (quoting *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994))).

100. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1357 (1983) (referring to the lack of federal employment regulation during the nineteenth century).

101. See Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 *MINN. L. REV.* 1462, 1462 (2008) (referring to "the phalanx of laws, administrative rulings, and enforcement mechanisms that constitute the governmental regulation of work and labor established in the United States during the decades of social reform that stretched from the Progressive Era, through the New Deal, and on into the 1960s and early 1970s"). See generally Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 *MONTHLY LAB. REV.* 22 (1978) (describing President Roosevelt's New Deal efforts to expand wage and child labor protections at the federal level). The federal government, however, has not expanded its reach into some areas of employment such as workers' compensation. See, e.g., Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 *N.Y.U. REV. L. & SOC. CHANGE* 299, 310 (2006) (contending that workers' compensation is "an area of law which has always been controlled almost exclusively by state governments").

102. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2006)). While the NLRA is expansive, it also

Labor Standards Act of 1938 (FLSA) also illustrates a significant federal interest in regulating the workplace.<sup>103</sup> It requires that employers pay a minimum wage and overtime to qualified employees and forbids some forms of child labor.<sup>104</sup> FLSA's broad reach grows from FLSA's expansive definition of "employee,"<sup>105</sup> which courts and the executive branch routinely reference.<sup>106</sup> The U.S. Department of Labor (DOL)'s website states that FLSA covers "more than 130 million workers, both full-time and part-time, in the private and public sectors."<sup>107</sup>

Moreover, the federal government significantly expanded its interest in employment regulation during the Civil Rights era. In 1963, Congress focused regulatory efforts on the nation's agricultural industry. The Farm Labor Contractor Registration Act of 1963 (FLCRA) was "the first major federal effort to improve the lot of agricultural laborers who have long been among the most exploited groups in the American labor force."<sup>108</sup> In 1964, Congress enacted Title VII of the Civil Rights Act ("Title VII").<sup>109</sup> Title VII demonstrates a significant federal interest in eradicating employment discrimination based on sex, race, color, ethnicity, national origin, and religion.<sup>110</sup> Three years after Title VII, Congress, with the Age Discrimination in Employment Act (ADEA), expressed

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excludes important segments of the workforce such as farm workers and domestic workers. *See* 29 U.S.C. § 152(3). For another example of federal expansion into the employment arena this same year, see Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

103. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19 (2006)); *see also* *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (stating that FLSA was "designed to . . . ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of 'overwork' as well as 'under-pay'" (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)) (internal quotation marks omitted)).
104. *See* 29 U.S.C. §§ 206, 207, 212.
105. *Id.* § 203(e) (defining "employee" as "any individual employed by an employer").
106. *See, e.g.,* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (referring to the "striking breadth" of FLSA's definition of "employee").
107. *Wages and Hours Worked: Minimum Wage and Overtime Pay*, U.S. DEP'T LAB., <http://www.dol.gov/compliance/guide/minwage.htm> (last updated Sept. 2009).
108. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993) (quoting S. REP. NO. 93-1295, at 1-3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6441, 6441-43) (internal quotation marks omitted).
109. Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended in scattered sections of 42 U.S.C.).
110. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-22 (1975) (contending that Title VII's remedies advance the government's interest in eradicating employment discrimination).

its goal to provide national protections for employees forty years of age or older from age discrimination.<sup>111</sup>

Congress has continued to demonstrate an interest in employment regulation since then as well. In 1970, Congress established national health-and-safety minimum standards through the Occupational Safety and Health Act (OSHA).<sup>112</sup> In 1974 it more extensively regulated employee pensions and benefit plans through the Employment Retirement Income Security Act (ERISA).<sup>113</sup> In 1983, Congress expanded FLCRA's protections of agricultural employees and enacted the Migrant and Seasonal Agricultural Worker Protections Act (AWPA).<sup>114</sup> The 1990s also witnessed new federal regulatory measures in the employment area with the Americans with Disabilities Act in 1990 (ADA)<sup>115</sup> and the Family and Medical Leave Act (FMLA) in 1993.<sup>116</sup>

In sum, because of the hybrid immigration-employment nature of subfederal employer-sanctions laws and the federal government's expansive interest in employment regulation, the constitutionality of subfederal employer-

111. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (2006)); *see also* *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (stating that Congress enacted the ADEA as part of a "congressional effort to eradicate discrimination in the workplace, reflect[ing] a social condemnation of invidious bias in employment decisions").
112. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (2006)); *see also* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) ("In the OSH Act, Congress endeavored to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." (internal quotation marks omitted)).
113. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-61 (2006)); *see also* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20 (1983) ("The Report expressed approval of ERISA's broad pre-emption of state law, explaining that 'the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.'" (quoting H.R. REP. NO. 94-1785, at 47 (1977))).
114. Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified as amended at 29 U.S.C. §§ 1801-72 (2006)). For a federal workplace law passed in 1988, see Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-09 (2006) (requiring some employers to give employees prior notice about upcoming layoffs).
115. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-213 (2006)); *see also* *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 446 (2003) (referring to the ADA and its "statutory purpose of ridding the Nation of the evil of discrimination").
116. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 5 U.S.C. §§ 6381-87 (2006); 29 U.S.C. §§ 2601-54 (2006)); *see also* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 n.1 (2003) ("It is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." (quoting 29 U.S.C. § 2601(b)(1))).

sanctions laws should be evaluated through new preemption frameworks that integrate federal workplace law.

C. *Two Baseline Employment Laws: FLSA and Title VII*

To derive a new preemption framework that considers federal workplace law, this Article focuses on two federal employment statutes in particular: the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964 (“Title VII”). These two federal statutes are critical to our federal workplace-law regime because they apply broadly and provide workplace protections to workers at the bottom of our labor market. These workers include low-wage and immigrant workers and workers who are marginalized because of their membership in a protected class. As one scholar puts it, FLSA and Title VII are “arguably the most critical [employment statutes] given that they secure such fundamental workplace interests as freedom from discrimination and payment of wages.”<sup>117</sup>

This Article focuses on these two statutes in particular because, when compared to the NLRA’s broad preemptive effects,<sup>118</sup> their preemptive force is somewhat narrower. Given the immigration-employment hybrid analysis in *Hoffman* and its progeny,<sup>119</sup> the NLRA is undoubtedly another relevant federal workplace law. Nonetheless, this Article addresses the more difficult question of whether the narrower preemption doctrines of Title VII and FLSA preempt subfederal employer-sanctions laws. Both Title VII and FLSA have been interpreted to serve as baseline standards that allow and encourage state and local initiatives that *further* their underlying policy goals.<sup>120</sup> Subfederal governments

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117. Cunningham-Parmeter, *supra* note 93, at 1372; *see also* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2687 (2008) (“Faced with a traditional labor law regime that has proven ineffectual, workers and their lawyers are turning to employment statutes like the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964 as the legal guardians of their efforts to organize and act collectively.”).

118. *See generally* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 *AM. U. L. REV.* 1 (2009) (describing the NLRA’s broad preemptive effect).

119. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

120. Section 218 of FLSA, for instance, clarifies that FLSA does not “excuse noncompliance with any . . . State law or municipal ordinance establishing a minimum wage higher than [FLSA minimum wage] or a maximum workweek lower than [FLSA’s maximum workweek].” 29 U.S.C. § 218(a) (2006). Title VII similarly promotes local laws that provide additional antidiscrimination protections in the workplace. *See* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 *LAB. LAW.* 429, 441 (1998) (stating that “federal antidiscrimination statutes do not preempt state law that is either consistent with or expands upon the rights conferred to employees by federal law”). The Supreme Court has acknowledged that Congress intended “state antidiscrimination laws” to play a

can regulate in these employment areas, and have historically done so, but their requirements cannot go below the baseline protections of FLSA and Title VII. In contrast, the NLRA broadly "preempts any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress to be controlled by the free play of economic forces in a zone free from all regulations, whether state or federal."<sup>121</sup> The NLRA's broad preemption doctrine thus very well may preempt subfederal employer-sanctions laws. Part III of this Article, however, focuses on the more challenging question of whether Title VII and FLSA, which are more permissive of subfederal interventions, preempt subfederal employer-sanctions laws.

### III. FEDERAL EMPLOYMENT LAW'S PREEMPTIVE EFFECTS

#### A. *An Implied-Obstacle-Preemption Framework*

This Section constructs an analytical framework for deciding whether FLSA and Title VII preempt subfederal employer-sanctions laws. Preemption analyses, which are targeted at revealing Congress's intent,<sup>122</sup> often start with a consideration of "express preemption." Express-preemption analyses consider whether the federal statute's language explicitly preempts some, or all, aspects of subfederal laws. Since neither federal employment statute contains a preemption provision that expressly preempts subfederal laws,<sup>123</sup> this Article develops an implied-preemption analysis.

Implied-preemption analyses generally fall into three categories, two of which are not relevant here. First, federal law impliedly preempts a subfederal law when the federal law's comprehensive coverage of a field implies that Congress intended to exclude state and local governments from acting in that entire area.<sup>124</sup> This preemption category, however, is not relevant to this

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role in reaching the "goal of equal employment opportunity." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282-83 (1987).

121. 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, 212 (2008) (internal quotation marks omitted).
122. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (affirming that Congress's intent is the touchstone of all preemption analyses).
123. *See* 29 U.S.C. § 218; 42 U.S.C. § 2000e-7 (2006).
124. *See* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 *VILL. L. REV.* 1, 6 (1995) ("In the absence of an express preemption provision, under current doctrine, preemption may be implied from a pervasive scheme of federal regulation, in which case federal law is said to 'occupy the field.'" (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990))). This type of implied-preemption analysis is often referred to as "field preemption." *See, e.g.,* Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 *FLA. L. REV.* 475, 484

Article's proposed framework because it would be too strained to say that these federal employment laws, which do not refer to employer sanctions in any way, have occupied a field that covers employer-sanctions laws.<sup>125</sup> Second, federal law impliedly preempts subfederal laws when it is impossible to comply with federal and subfederal laws at the same time.<sup>126</sup> Since it is *possible* for an employer to comply with federal employment laws and subfederal employer-sanctions laws concurrently, this form of implied-preemption analysis is also not applicable here. An employer, for instance, can simultaneously comply with FLSA's wage requirements and the verification procedures and prohibitions of subfederal employer-sanctions laws.

It is the third category of implied preemption, commonly referred to as "implied obstacle preemption,"<sup>127</sup> that therefore frames this Article's analysis of federal employment law's preemptive effects on the four subfederal employer-sanctions laws. According to this type of implied-preemption analysis, federal law preempts subfederal laws when the subfederal laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>128</sup> To examine whether a subfederal law serves as such an obstacle, courts consider the "entire scheme" of the federal statute and determine whether the federal law's "operation within its chosen field . . . [is] frustrated and its provisions [are] refused their natural effect."<sup>129</sup> For instance, one federal court employed implied-obstacle-preemption analysis and determined that Title VII preempted a subfederal regulation that mandated breaks for female employees.<sup>130</sup> The court reasoned that this regulation was an obstacle to Title VII because it made male employees more desirable to employers than female employees. The subfederal regulation, according to the court, contravened a

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(2009) ("Congress may intend that federal law 'occup[ies] the field' and governs the conduct exclusively, an arrangement called 'field preemption.'" (alteration in original) (footnote omitted) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000))).

125. See *Guerra*, 479 U.S. at 281 ("Congress has explicitly disclaimed any intent categorically to pre-empt state law or to 'occupy the field' of employment discrimination law."); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1150-51 (9th Cir. 2000) (stating that FLSA's allowance of local laws that provide stricter protections is evidence that Congress did not intend to regulate the entire field of wage and hour law).

126. *English*, 496 U.S. at 79.

127. See, e.g., *Deweese v. Nat'l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 246 n.9 (3d Cir. 2009) (using the phrase "implied obstacle preemption").

128. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

129. *Crosby*, 530 U.S. at 373 (citations omitted) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)) (internal quotation marks omitted).

130. *Burns v. Rohr Corp.*, 346 F. Supp. 994, 997-98 (S.D. Cal. 1972).



"basic objective of Title VII," which is "to cause employment to be based only upon applicable job qualifications" rather than the employee's sex.<sup>131</sup>

Despite its striking breadth,<sup>132</sup> there are limits to implied-obstacle-preemption analysis. The Supreme Court has declined to find implied preemption when the alleged conflict between subfederal and federal law is too speculative.<sup>133</sup> Moreover, the presumption against preemption<sup>134</sup> is likely to be applicable here.<sup>135</sup> This canon of statutory interpretation requires an even stronger showing that Congress intended to preempt a particular subfederal law. According to this presumption, federal laws do not preempt subfederal laws that regulate "a field which the States have traditionally occupied" as part of their "historic police powers" unless "that was the clear and manifest purpose of Congress."<sup>136</sup>

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131. *Id.* Similarly, the U.S. Court of Appeals for the Ninth Circuit held that Title VII impliedly preempted California's state sovereign immunity law because it created an obstacle to an important policy goal of Title VII. *See Sosa v. Hiraoka*, 920 F.2d 1451, 1460-61, 1461 n.4 (9th Cir. 1990). California's law shielded state officials from Title VII liability. The court held that this subfederal law was in conflict with "Congress's evident purpose in authorizing Title VII suits against states, state subdivisions, and state officials." *Id.* at 1461 n.4.
132. *See Viet D. Dinh, Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2104 (2000) ("The operation of obstacle preemption significantly differs from express or conflict preemption because there is no direct conflict with any federal law precisely on point—for example, either the preemption provision or a primary regulatory provision. Obstacle preemption thus moves the displacement analysis along the spectrum away from the direct action extreme by both relaxing the standard for conflict—from direct conflict to obstacle to accomplishment—and expanding the evidence of congressional intent—from statutory text to purposes and objectives.").
133. *See Griffith, supra* note 96, at 134-38 (describing Supreme Court precedent limiting implied preemption).
134. While some argue that its use "has receded of late," courts do sometimes consider this canon of statutory interpretation. Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 102 NW. U. L. REV. COLLOQUY 415, 416 (2008).
135. The *De Canas* Court unequivocally stated that subfederal employer-sanctions laws (at least as of 1976) fall within states' historic police powers to "regulate the employment relationship to protect workers within the State." *De Canas v. Bica*, 424 U.S. 351, 356 (1976). There is a question, however, about whether this is still the case post-IRCA. *See, e.g., Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 767 n.28 (10th Cir. 2010). For the sake of argument, this Article assumes that the presumption against preemption is in operation and highlights, when possible, Congress's manifest purposes.
136. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks omitted).

The plain language of both FLSA and Title VII shows that Congress did intend both statutes to preempt subfederal laws that serve as obstacles to their underlying policies. Specifically, it demonstrates that both federal laws were intended to be absolute floors on employee rights and that subfederal laws could go above, but not below, those statutory floors. FLSA section 218, for instance, clarifies that FLSA does not “excuse noncompliance with any . . . State law or municipal ordinance establishing a minimum wage *higher than* [FLSA’s minimum wage] or a maximum workweek *lower than* [FLSA’s maximum work week].”<sup>137</sup> Similarly, Title VII preempts any subfederal law that is “*inconsistent with any of the purposes of this Act, or any provision thereof.*”<sup>138</sup>

Even though the analysis will assume that the presumption against preemption is operating, the question of whether there is a conflict between congressional objectives and the subfederal laws is still the key inquiry. This question is critical because one way to show Congress’s manifest intent to preempt a subfederal law, and therefore to overcome the presumption against preemption, is to demonstrate that there is a conflict between a subfederal law and the congressional objectives underlying a federal statute.<sup>139</sup> Thus, the remainder of this Part

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137. 29 U.S.C. § 218(a) (2006) (emphases added); see also Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1260-61 (2009) (acknowledging that implied obstacle preemption is the most common preemption analysis in the FLSA context).

138. 42 U.S.C. § 2000h-4 (2006) (emphasis added). On the one hand, Title VII states that only subfederal laws that “purport[] to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]” are preempted. *Id.* § 2000e-7. For an argument that Title VII’s preemptive effect should be read this narrowly, see Drummonds, *supra* note 98, at 540. On the other hand, Title XI of the Civil Rights Act, which a plurality of the Supreme Court says is “applicable to all titles of the Civil Rights Act,” *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987), declares that the federal statute preempts subfederal laws that are “inconsistent with any of the purposes of this Act, or any provision thereof.” 42 U.S.C. § 2000h-4. Along with its *Guerra* decision, the Supreme Court has subsequently acknowledged the applicability of implied obstacle preemption to the Title VII context in dicta. The Court, in *International Union v. Johnson Controls, Inc.*, stated that Title VII’s implied obstacle preemption would come into play “[i]f state tort law furthers discrimination in the workplace.” 499 U.S. 187, 210 (1991). A number of federal courts have similarly acknowledged implied obstacle preemption in the Title VII context. See, e.g., *Pascouau v. Martin Marietta Corp.*, 1999 U.S. App. LEXIS 15712, at \*28-31 (10th Cir. July 14, 1999); *Sosa v. Hiraoka*, 920 F.2d 1451, 1461 n.4 (9th Cir. 1990); *Broughton v. Courtney*, 861 F.2d 639, 641 (11th Cir. 1988); *Gray v. Webco Gen. P’ship*, 36 F. Supp. 2d 1331, 1333-35 (M.D. Fla. 1999); *Thomas Publ’g Co. v. Div. of Human Rights*, 456 F. Supp. 1104, 1108 (S.D.N.Y. 1978).

139. The presumption can be overcome in a number of ways. Most obviously, Congress could include express language in a federal employment statute that demonstrates its intent to preempt a subfederal law. The presumption can also be overcome, however, even when there is no express statutory language. According

considers whether subfederal employer-sanctions laws pose obstacles to Congress's intent with respect to Title VII and FLSA.

To evaluate whether there is a conflict between Title VII and FLSA, on the one hand, and the four subfederal employer-sanctions laws (as well as other subfederal laws that share their qualities), on the other, the analysis will set out Congress's purposes with respect to both federal statutes. It will also examine whether subfederal employer-sanctions laws stand as obstacles to these purposes by (1) comparing subfederal employer-sanctions laws to IRCA and (2) reviewing scholarship about the effects of IRCA's employer-sanctions on federal workplace law. Even though the focus of this Part is on federal employment laws' preemptive effects, comparisons to, and scholarship on, IRCA are instructive because IRCA is an employer-sanctions law and because it has been in operation much longer than the subfederal employer-sanctions laws at issue. As will be elaborated below, IRCA is qualitatively different in ways that ameliorate IRCA's effects (albeit inadequately in my view) on federal employment laws. Without these ameliorative elements, subfederal employer-sanctions laws are in conflict with federal employment law. Moreover, research on IRCA's effects provides insight into potential conflicts between employer-sanctions laws and federal employment laws. In fact, as the analyses below reveal, there is a growing body of literature that exposes the increased tension between immigration regulation and workplace regulation since IRCA's enactment.<sup>140</sup>

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to the Supreme Court, Congress's manifest purpose to preempt a local law can be established when the local law "produce[s] a result inconsistent with the objective of the federal statute." *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (internal quotation marks omitted) (quoting *Rice*, 331 U.S. at 230)). This exception weakens the presumption against preemption. As Professor Richard Epstein put it, "for what the Court giveth . . . —the need to show a clear and manifest purpose—it taketh away in the . . . enumerated exceptions." Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 Nw. U. L. REV. COLLOQUY 54, 58 (2008).

140. See, e.g., Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 46 (2008); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); Griffith, *supra* note 14; Kim, *supra* note 15; Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004); Annie Decker, Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 YALE L.J. 2193 (2006). Moreover, sociologist Douglas Massey has shown that IRCA's employer sanctions encouraged subcontracting, which further deregulated the workplace and eroded basic protections for documented and undocumented employees. See DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 120 (2002) (noting that some employers reduced wages to compensate for "the increased costs and risks" imposed by IRCA and that others "shifted to a pattern of indirect hiring through labor subcontractors").

If IRCA is in tension with federal employment law, and subfederal employer-sanctions laws go further than, and do not have the same safeguards as, IRCA, then subfederal employer-sanctions laws are likely to be in conflict with federal employment law. In other words, revealing the current *tension* between two federal regimes (federal employment law and IRCA) exposes an unconstitutional *conflict* between a federal regime (federal employment law) and subfederal employer-sanctions laws that extend beyond IRCA.

As is elaborated in the remaining two Sections of this Part, there appear to be at least two substantial ways that these four subfederal employer-sanctions laws “stand[] as an obstacle to the accomplishment and execution of [Congress’s] full purposes and objectives”<sup>141</sup> in enacting FLSA and Title VII. They encourage employment discrimination and discourage employees, especially immigrant employees, from bringing valid complaints about federal employment-law violations to the attention of government officials or the courts. They thereby undermine protections for all workers. This Article takes each of these obstacles in turn, illuminating how these four subfederal employer-sanctions laws, as well as the many others that share their qualities, serve as barriers to federal employment-law goals. While the focus of this Part and Part IV is on subfederal laws as currently written, Part V will develop arguments for why subfederal employer-sanctions laws should be voided even if state and local governments amended their laws to replicate IRCA’s requirements, prohibitions, and enforcement scheme exactly.

### B. *Obstacle 1: Encouraging Employment Discrimination*

The four subfederal employer-sanctions laws are in conflict with Title VII because they stand as obstacles to Title VII’s most fundamental policy goal: eradicating specified forms of employment discrimination. Title VII’s language and Supreme Court interpretations of the statute demonstrate that Congress’s central purpose in passing this legislation was to eliminate employment discrimination based on the protected classes of sex, race, color, ethnicity, national origin, and religion.<sup>142</sup> Congress’s protections against discrimination in the workplace are broad. Employers are forbidden from intentionally discriminating against employees because of their membership in a protected class.<sup>143</sup>

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141. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (holding that Occupational Safety and Health Administration regulations preempt various Illinois licensing requirements for workers at certain hazardous waste facilities).

142. *See* 42 U.S.C. § 2000e-2(a)(1)-(2) (2006); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress . . . to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”).

143. *See* 42 U.S.C. § 2000e-2.

Title VII protects employees not just from intentional discrimination that they experience from employers and their agents but also from intentional discrimination that they experience at the hands of their coworkers. It outlaws hostile work environments based on sex, race, color, ethnicity, national origin, and religion.<sup>144</sup> Even some forms of unintentional employment discrimination are also Title VII violations. For example, an employer is not allowed to utilize facially neutral employment practices that have a disparate impact on members of a protected class unless the employer has a sufficient business necessity for such practices.<sup>145</sup>

As the Subsections below elaborate, both the ways in which these subfederal laws differ qualitatively from IRCA's language, as well as the scholarship on IRCA's effects on Title VII, demonstrate a conflict between subfederal employer-sanctions laws and Title VII's purposes. On their face, the subfederal laws do not provide the same safeguards against employment discrimination as IRCA. Moreover, unlike IRCA, their heavy reliance on complaints from average citizens and coworker private causes of action fosters discriminatory harassment among coworkers. These subfederal laws also encourage employment discrimination because they place extra burdens on employers and expand the use of E-Verify beyond what IRCA requires. Thus, IRCA, when compared with subfederal employer-sanctions laws, has more protections against discrimination, much less reliance on citizen complaints for enforcement, no allowance for coworker private causes of action, and fewer burdens and verification requirements on employers. IRCA, however, is already in considerable tension with Title VII's main policy goal even though it contains these ameliorative elements.

1. Inadequate Protections, Permissive Complaint Procedures, and Heightened Burdens

Subfederal employer-sanctions laws are in conflict with Title VII because their protections against employment discrimination are inferior to IRCA's. Unlike the subfederal governments at issue here, when Congress passed IRCA it acknowledged that IRCA's employer sanctions could stand as an obstacle to Title VII's goal to eradicate employment discrimination. In particular, Congress acknowledged that IRCA could unintentionally create incentives for employers to discriminate based on national origin or against non-nationals who have

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144. See *id.* § 2000e-2; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

145. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that an employer can defend itself by establishing that the practice is "job related for the position in question and consistent with business necessity"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C) (stating that a plaintiff can still prevail if the plaintiff shows that the employer refused the plaintiff's proposed alternative employment practice and that the alternative practice will have a less severe disparate impact and will still satisfy the employer's business needs).

work authorization.<sup>146</sup> In other words, employers, fearful of liability, could decide not to hire someone with an accent, someone with a work visa, or someone who “looks foreign” for fear that they were going to violate IRCA. The House committee report on IRCA stated, for instance, that “every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur *must be* a part of this legislation.”<sup>147</sup>

To attempt to remedy this situation, Congress included explicit antidiscrimination protections in IRCA. IRCA prohibits employers from discriminating against employees and prospective employees because of their national origin or citizenship status.<sup>148</sup> It forbids employers from retaliating against employees who make, or who intend to make, IRCA discrimination complaints. Additionally, IRCA restricts employers from asking for different and additional documents (beyond what the law requires) from any employee during the employee-

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146. See *IRCA Antidiscrimination Provisions*, U.S. DEP'T OF AGRIC., <http://www.usda.gov/ocelabor/ina.htm> (last modified May 16, 2006) (acknowledging that Congress passed antidiscrimination protections to address the “fear that employers would overreact to the threat of sanctions and discriminate against individuals who sounded or appeared ‘foreign’”); see also Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 277 (2001) (“The possibility that employer sanctions could cause discrimination against legal immigrants figured prominently both in the 15-year legislative debate preceding the IRCA’s passage and in the eventual form of the legislation.”); Cunningham-Parmeter, *supra* note 93, at 1375 (“Legislators were concerned that the IRCA’s work verification requirements would cause employers to discriminate against ‘foreign-looking’ and ‘foreign-sounding’ job applicants.” (citing U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 41-42 (1990), available at <http://archive.gao.gov/d24t8/140974.pdf>)).

147. H.R. REP. NO. 99-682, pt. 1, at 68 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, at 5672 (emphasis added).

148. See Immigration Reform and Control Act (IRCA) of 1986 § 102, 8 U.S.C. § 1324b(a)(1) (2006). Employees are required to bring IRCA discrimination complaints to an administrative agency. Unlike with Title VII, employees never gain the opportunity to pursue their claims in federal court. See Kenneth Juan Figueroa, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 423 n.84 (2002) (“IRCA does not provide for a private cause of action, but rather places the responsibility of enforcement on an agency, the Office of Special Counsel on Employment Discrimination.”); Sandra F. Sperino, *Complying with Export Laws Without Importing Discrimination Liability: An Attempt To Integrate Employment Discrimination Laws and the Deemed Export Rules*, 52 ST. LOUIS U. L.J. 375, 403 (2008) (“IRCA provides aggrieved individuals with an administrative enforcement mechanism, which does not provide a private cause of action in court.”).

verification procedure.<sup>149</sup> Congress created the Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice to enforce IRCA's antidiscrimination protections.<sup>150</sup> Remedies for IRCA discrimination violations include injunctive relief, civil penalties, reinstatement, and back pay.<sup>151</sup>

Despite these protections, IRCA has been found to have encouraged employment discrimination.<sup>152</sup> A 1989 survey, conducted by the U.S. General Accounting Office, demonstrated that "10% of employers admitted to discriminating against people based on language, accent, or appearance because of fear of violating IRCA, and an additional 9% admitted to discriminating on the basis of citizenship status."<sup>153</sup> Moreover, in 1994, the U.S. Commission on Immigration Reform identified a "[p]attern of subjecting foreign-appearing workers to different or additional [verification] requirements."<sup>154</sup> IRCA's track record

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149. 8 U.S.C. § 1324b(a)(6).

150. *Id.* § 1324b(c).

151. *Id.* § 1324b(g).

152. See, e.g., Fredric J. Bendremer & Lisa A. Heiden, *The Unfair Immigration-Related Employment Practices Provision: A Modicum of Protection Against National Origin and Citizenship Status Discrimination*, 41 U. MIAMI L. REV. 1025, 1054-55 (1987) (stating that "Congress, through employer sanctions, has, in fact, created an incentive for employers to discriminate on the basis of national origin and citizenship status"); Pham, *supra* note 20, at 812 ("[O]ur experience with employer sanctions shows that even when presented with valid documentation of legal status, a significant number of enforcers are likely to raise questions about the adequacy of the documents, particularly if applicants look or sound foreign.").

153. Oliveri, *supra* note 1, at 79 (citing U.S. GEN. ACCOUNTING OFFICE, *supra* note 146, at 39). *But see* Pham, *supra* note 20, at 822-25 (referring to limitations in the General Accounting Office study, citing other sources that support GAO's analysis and stating that "GAO attributed at least some of the discrimination it found to employer confusion about their obligations under federal employer sanctions").

154. Oliveri, *supra* note 1, at 79 (citing U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 80 (1994)); see Rachel E. Morse, *Following Lozano v. Hazleton: Keep States and Cities Out of the Immigration Business*, 28 B.C. THIRD WORLD L.J. 513, 532-33 (2008) ("Requiring employers to go to extra lengths to verify the immigration status of applicants is also likely to cause discrimination against applicants on the basis of race or appearance, with employers refusing to hire lawful minority residents rather than taking the time to determine whether every individual applicant is eligible for employment."); Pham, *supra* note 20, at 823 ("In a 1988 survey of 400 employers in the New York City metropolitan area, the New York State Inter-Agency Task Force on Immigration Affairs found that 7% of the employers required only employees who look foreign or 'risky' to provide work authorization documents. In a 1989 survey of San Francisco employers, researchers found that 12% of the employers had different work authorization procedures for foreign-born workers than for workers born in the United States.").

suggests that subfederal employer-sanctions laws, which have even less protection against employment discrimination than IRCA, are likely to pose an obstacle to Title VII. In this way, the current tension between IRCA and Title VII further exposes the unconstitutional conflict between subfederal employer-sanctions laws and Title VII.

It is therefore critical that none of the subfederal employer-sanctions laws include the same protections against employment discrimination as IRCA's. For example, Oklahoma's law does not refer to discrimination in any way.<sup>155</sup> The laws of Arizona; Valley Park, Missouri; and Hazleton, Pennsylvania, include a minor protection against discrimination, but it is much more limited than IRCA's protections. They simply state that the subfederal government will not pursue complaints that are primarily based on the race, national origin, or ethnicity of the allegedly undocumented employees.<sup>156</sup> Unlike IRCA, none of these subfederal laws explicitly prohibit employers from discriminating based on national origin or work-authorization status, from retaliating against employees who claim discrimination is taking place, or from requiring additional verification documents beyond what the federal government requires.<sup>157</sup> Similarly, none have designated an agency to enforce antidiscrimination protections.

The complaint and investigation procedures of some subfederal laws, which are not modeled after IRCA, serve as additional obstacles to Title VII's goals. The laws of Arizona, Hazleton, and Valley Park automatically initiate investigations in response to complaints by average citizens.<sup>158</sup> In contrast, IRCA's

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155. See OKLA. STAT. ANN. tit. 25, § 1313 (2008) (lacking a provision to protect against employer discrimination).

156. See ARIZ. REV. STAT. ANN. § 23-212(B) (Supp. 2010); Valley Park, Mo., Ordinance 1722, §§ 2(E), 4B(2) (Feb. 14, 2007); Hazleton, Pa., Ordinance 2006-18, § 4(B)(2) (Sept. 8, 2006). At least two other subfederal employer-sanctions laws share this quality. See MO. ANN. STAT. § 285.535(2) (West Supp. 2010); Palmdale, Cal., Ordinance, 1333 § 2.50.040(B) (Nov. 7, 2007).

157. At least five states have provisions clarifying that their employee-verification requirements should be "enforced" without regard to race, national origin or citizenship status. See COLO. REV. STAT. ANN. § 8-2-122(5) (West Supp. 2010); GA. CODE ANN. § 13-10-91(c) (Supp. 2010); MISS. CODE ANN. § 71-11-3(2) (Supp. 2010); S.C. CODE ANN. § 8-14-30 (Supp. 2010); UTAH CODE ANN. § 63G-11-103(2)(b) (LexisNexis Supp. 2010).

158. ARIZ. REV. STAT. ANN. § 23-212(B) ("On receipt of a complaint on a prescribed complaint form that an employer allegedly knowingly employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section."); Valley Park, Mo., Ordinance 1722, § 4B(1) ("An enforcement action shall be initiated by means of a written signed complaint to the Valley Park Code Enforcement Office submitted by any City official, business entity, or City resident."); Hazleton, Pa., Ordinance 2006-18, § 4(B)(1) ("An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident."). Other subfederal employer-sanctions laws



enforcement scheme is not necessarily set into motion in response to complaints from the public. The federal government will consider only those citizen complaints that "have a substantial probability of validity."<sup>159</sup> Moreover, Oklahoma's law allows coworkers to bring private suits against their employers when they believe their employer has hired an undocumented worker.<sup>160</sup> Similarly, Hazleton's law "makes it 'an unfair business practice' for a business entity to discharge 'an employee who is not an unlawful worker,' if, on the date of the discharge, 'the business entity was not participating in [E-Verify] and the business entity was employing an unlawful worker.'"<sup>161</sup> Employees can sue under Hazleton's provision for triple damages, attorneys' fees, and costs.<sup>162</sup> IRCA does not allow for private causes of action; only the federal government can bring IRCA enforcement actions.<sup>163</sup>

The complaint and investigation schemes of these four subfederal laws, which more readily initiate investigations based on citizen complaints and allow coworker causes of action, invite invidious employment discrimination based on such characteristics as accent, race, and national origin.<sup>164</sup> In other words,

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share this quality. *See* LA. REV. STAT. ANN. § 23:996A (Supp. 2010); MO. REV. STAT. §§ 285.535(2); S.C. CODE ANN. § 41-8-50(A).

159. 8 U.S.C. § 1324a(e)(1)(B) (2006).

160. *See, e.g.*, OKLA. STAT. ANN. tit. 25, § 1313(C). At least four additional states have employer-sanctions provisions that allow employees, under certain circumstances, to sue their employers for employing undocumented workers. *See* MISS. CODE ANN. § 71-11-3(4)(d); MONT. CODE ANN. § 39-2-305(3) (2009); S.C. CODE ANN. § 41-1-30(a); UTAH CODE ANN. § 63G-11-103(4)(a), (c). In South Carolina, prevailing plaintiffs receive lost wages, actual damages, and reinstatement. *See* S.C. CODE ANN. § 41-1-30(d)(1)-(3).

161. *Lozano v. City of Hazleton*, 620 F.3d 170, 179 (3d Cir. 2010). The Third Circuit did not consider the constitutionality of this provision because the plaintiffs lacked standing to challenge it. *Id.* at 187-89. Oklahoma's private-right-of-action provision is similar. OKLA. STAT. ANN. tit. 25, § 1313(C) (allowing employee complaints when an employer "discharge[s] an employee . . . who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien"). The Tenth Circuit recently affirmed a preliminary injunction against this provision. *See* Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010).

162. *Lozano*, 620 F.3d at 179.

163. *See* 8 U.S.C. § 1324a(e)(9) (making no mention of private enforcement and providing that only the Attorney General "shall file a suit to seek compliance with the order in any appropriate district court of the United States").

164. *See* Grube, *supra* note 70, at 423 (acknowledging that "[r]esidents could easily use these ordinances as a tool for harassing minorities."). The author proposes that "[i]f municipalities choose to impose licensing penalties following the procedures of [IRCA], they should also provide protections to minority employees comparable to those in [IRCA]." *Id.*; *see also* Nchimunya D. Ndulo, Note, *State Employer*

they conflict with Title VII's goal to deter employment discrimination. Determining an individual's immigration status is not an easy thing to do.<sup>165</sup> It can be especially difficult for an average citizen or coworker who does not have access to accurate employee-verification information. In fact, some have argued that the citizen-complaint procedures of subfederal employer-sanctions laws induce citizens to make discriminatory complaints "against business entities based on [the businesses'] employment of Hispanics."<sup>166</sup>

Moreover, because an employee will most often have no basis for believing that a coworker is undocumented (other than that coworker's race, accent, or national origin), the complaint and private-causes-of-action provisions create new vehicles for discriminatory workplace harassment based on race and national origin. A recent Title VII case illustrates the potential danger of providing citizens and coworkers with the power to "identify" undocumented workers. In *Chellen v. John Pickle Co.*, a federal district court concluded that the employer and its employees created a hostile work environment based on national origin in violation of Title VII. One of the many derogatory comments about the Indian workers in that case included the following statement from a coworker: "[H]e's an Indian. He's no good. And, you know, we'll send him back."<sup>167</sup> Despite this employee's assertion that he somehow had the power to

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*Sanctions Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 CORNELL J.L. & PUB. POL'Y 849, 877 (2009) ("The fact that members of the public can initiate complaints raises concerns about the use of discriminatory practices and malicious intent in making such complaints. . . . Such complaints may be initiated solely on the basis of race or language abilities, accents, and other racially targeted and unlawful characteristic determinations.").

165. See Grube, *supra* note 70, at 423 ("Further, the parties enforcing local regulations—employers, citizens, and local police—have less training in immigration law than federal authorities and are more likely to resort to proxies—such as race or ethnicity—to determine an individual's immigration status."); Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83, 130 (2004) (identifying the argument that "federal immigration law is a complicated body of law that requires extensive training and expertise to properly enforce, because there are many different ways for people to be lawfully present in the United States and the federal government issues many different types of documents that entitle such lawful presence"); Pham, *supra* note 20, at 781 ("Private parties, not trained in immigration law and not given clear legal guidelines, are likely to make mistakes.").
166. Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at \*19 (E.D. Mo. Jan. 31, 2008) (internal quotation marks omitted); see also NAT'L IMMIGRATION LAW CTR., ERECTING ITS OWN TOMBSTONE: ARIZONA'S MANDATORY BASIC PILOT/E-VERIFY LAW (2008), available at [http://www.nilc.org/immsemplymnt/state\\_local/AZ\\_factsheet\\_2008—04-25.pdf](http://www.nilc.org/immsemplymnt/state_local/AZ_factsheet_2008—04-25.pdf) (referring to allegations in a lawsuit that a subfederal employer-sanctions law discriminated against foreign-born workers).
167. *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1266 (N.D. Okla. 2006).

send his coworker back to India, the Indian worker-plaintiffs were not actually undocumented.<sup>168</sup>

Finally, when subfederal laws place additional burdens and penalties on employers (beyond IRCA) they increase the incentives for employers to discriminate based on race and national origin in order to avoid new forms of potential liability under the subfederal law.<sup>169</sup> Congress arguably kept burdens on employers minimal, at least in part, to reduce incentives for employers to discriminate.<sup>170</sup> Adding additional burdens and penalties on employers, such as intensified verification requirements, revocation of a business license after a subfederal adjudication,<sup>171</sup> or the payment of triple damages to an employee, raises the stakes for employers.<sup>172</sup> If IRCA already encourages employers to

168. As the court concluded, the “plaintiffs were not ‘undocumented.’ They had visas, albeit ones that did not permit them to work in the United States . . . [because of] the failure of defendants to obtain proper visas.” *Id.* at 1277 n.9.

169. See, e.g., Amy Pritchard, “*We Are Your Neighbors*”: *How Communities Can Best Address a Growing Day-Labor Workforce*, 7 SEATTLE J. SOC. JUST. 371, 395 (2008) (referring to local laws that create criminal sanctions for the use of day laborers and stating that “[t]hese types of ordinances may encourage a system where some employers discriminate against all Latino workers, rather than face penalties for mistakenly hiring someone who is unauthorized”).

170. See *Lozano v. City of Hazleton*, 620 F.3d 170, 211 n.33 (3d Cir. 2010) (“Not only is [placing penalties on private employers] unfair to private employers, but it will cause them, out of fear, to discriminate against prospective employees who are ‘foreign-looking.’” (quoting 132 CONG. REC. H10,583-01 (daily ed. Oct. 15, 1986))).

171. There are at least six states and two municipalities that require the suspension or revocation of a business license as a consequence for violating the subfederal employer-sanctions laws. See ARIZ. REV. STAT. ANN. § 23-212(F)(1)(c) (Supp. 2010); MISS. CODE ANN. § 71-11-3(7)(e)(i) (Supp. 2010); MO. ANN. STAT. § 285.535(5)(2)(a)-(b) (West Supp. 2010); S.C. CODE ANN. § 41-8-50(D)(2)-(4) (Supp. 2010); TENN. CODE ANN. § 50-1-103(e)(1)(A)-(B) (2008); W. VA. CODE ANN. § 21-1B-7(a)(1)-(2) (LexisNexis Supp. 2010); LANCASTER, CAL., CODE OF ORDINANCES § 5.50.040(B) (2009); BEAUFORT COUNTY, S.C., CODE OF ORDINANCES § 18-69(e)(1) (2006). At least five states and two municipalities revoke a public contractor’s state contract for violating an employer-sanctions law. For the state provisions, see ARK. CODE ANN. § 19-11-105(7)(d)(2)(A) (Supp. 2009); COLO. REV. STAT. ANN. § 8-17.5-102(3) (West Supp. 2010); MISS. CODE ANN. § 71-11-3(7)(e)(i); Mass. Exec. Order No. 481, 1073 Mass. Reg. 7 (Mar. 9, 2007); and Minn. Exec. Order No. 08-01, 32 Minn. Reg. 1284 (Jan. 14, 2008). For the municipal provisions, see LAKEWOOD, CAL., MUNICIPAL CODE § 01.42.40(b) (2009); and Palm-dale, Cal., Ordinance 1333, § 40(d) (Nov. 7, 2009). At least three states make a public contractor ineligible for future contracts with the state for a given period of time as a consequence of violating an employer sanction law. See COLO. REV. STAT. ANN. § 8-17.5-102(4); MISS. CODE ANN. § 71-11-3(7)(e)(i); TENN. CODE ANN. § 12-4-124(b).

172. Similarly, at least fifteen subject employers who violate employer-sanctions requirements to criminal liability. See COLO. REV. STAT. ANN. § 8-2-122(4); FLA.

intentionally discriminate to some extent, subfederal laws that add requirements for employers and intensify the consequences for employer violations<sup>173</sup> are in conflict with Title VII's purpose to deter employment discrimination.

## 2. Mandatory E-Verify Requirements

The mandatory E-Verify requirements of subfederal employer-sanctions laws deserve special attention because E-Verify's discriminatory effects have been extensively studied. These mandatory requirements serve as an additional obstacle to Title VII's antidiscrimination goals. Studies show that IRCA's voluntary E-Verify system,<sup>174</sup> which Congress extended through September 3, 2012,<sup>175</sup> already encourages unintentional employment discrimination.<sup>176</sup> Because E-Verify relies heavily on the Social Security database, it is more likely to lead to mistakes with respect to employees from countries outside of the United States, who may have names with uncommon spellings or sequencing of last names,

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STAT. ANN. § 448.09(2) (West Supp. 2010); IDAHO CODE ANN. § 44-1005 (2003); IOWA CODE ANN. § 715A.2A(3)(a)-(b) (Supp. 2010); ME. REV. STAT. ANN. tit. 26, § 871(2) (2007); MISS. CODE ANN. § 71-11-3(8)(c)(i); MONT. CODE ANN. § 39-2-305(1)-(2) (2009); NEV. REV. STAT. ANN. § 360.796(3) (LexisNexis 2009); N.J. STAT. ANN. § 34:9-1 (West Supp. 2000); OR. REV. STAT. § 658.453(1) (2009); S.C. CODE ANN. § 41-8-50(D)(1); VT. STAT. ANN. tit. 21, § 444a(d) (Supp. 2009); VA. CODE ANN. § 40.1-11.1 (2002); W. VA. CODE ANN. § 21-1B-5(b)(1-3); Mass. Exec. Order No. 481, 1073 Mass. Reg. 7.

173. Some states impose a penalty of imprisonment for both public and private employers who violate a subfederal employer sanction law. *See* FLA. STAT. ANN. § 448.09(3); KAN. STAT. ANN. § 21-4409(b) (2007); MISS. CODE ANN. § 71-11-3(8)(c)(i); S.C. CODE ANN. §§ 8-14-60, 41-8-70; W. VA. CODE ANN. § 21-1B-5(b)(3).
174. *See* Immigration Reform and Control Act (IRCA) of 1986 § 101(b), 8 U.S.C. § 1324a(b) (2006).
175. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177 (2009).
176. *See* WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION, at xxv (2007), available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf> (stating that “[f]oreign-born U.S. citizens are considerably more likely to receive erroneous tentative nonconfirmations than are work-authorized foreign-born persons who have not become U.S. citizens”); Ndulo, *supra* note 164, at 875-76 (stating that “[a] congressional audit from 2006 indicated that ‘4 percent of the time E-Verify. . . initially labeled workers ineligible for employment when in fact they had work authorization’” (quoting Daniel González, *Sanctions Law Begins: Many Ariz. Businesses Are Still Unprepared*, ARIZ. REPUBLIC, Jan. 2, 2007, [http://www.azcentral.com/specials/special46/articles/1230\\_sanctionsstart.html](http://www.azcentral.com/specials/special46/articles/1230_sanctionsstart.html) (last visited May 1, 2011))).

middle names, and first names.<sup>177</sup> A 2007 report to the U.S. Department of Homeland Security concluded that "the database used for verification is still not sufficiently up to date to meet the [federal immigration law's] requirement for accurate verification."<sup>178</sup> It concluded that "improvements are needed, especially if the Web Basic Pilot [E-Verify] becomes a mandated national program"<sup>179</sup> and that it "will take considerable time and will require better data collection and data sharing between [Social Security, U.S. Citizenship and Immigration Services (USCIS)], and the U.S. Department of State than is currently the case."<sup>180</sup>

A 2009 U.S. Department of Homeland Security report on IRCA demonstrated some improvements from earlier years but illustrated continued problems with employment discrimination related to the E-Verify program. For instance, between April and June of 2008, foreign-born workers were "more than 20 times more likely than U.S.-born workers" to receive a "Tentative Non-confirmation" (TNC) from the E-Verify system.<sup>181</sup> Similarly, work-authorized non-citizens were more likely to receive TNCs than their U.S.-citizen and lawful-permanent-resident counterparts. The error rate for work-authorized non-citizen workers was 5.3 percent. In contrast, U.S. citizens experienced a 0.3 percent error rate and lawful permanent residents experienced a 1 percent error

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177. See, e.g., DORIS MEISSNER & MARC R. ROSENBLUM, MIGRATION POLICY INST., THE NEXT GENERATION OF E-VERIFY: GETTING EMPLOYMENT VERIFICATION RIGHT 6 (2009) ("Many names have multiple possible spellings, especially in the case of transliterations from non-Latin alphabets. Some immigrants come from cultures in which naming and name-order conventions differ from those in the United States, making them more prone to such errors."); Oliveri, *supra* note 1, at 116 ("The Social Security Administration's database is riddled with errors, which are caused by data-entry mistakes, inconsistent transliteration of foreign names, applicants who use a less 'foreign' sounding first name for work purposes, and different naming conventions that are common in many parts of the world (such as multiple surnames, or the inversion of family name and given name).").
178. See Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 753 (10th Cir. 2010) (quoting WESTAT, *supra* note 176, at xxi); cf. WESTAT, *supra* note 176, at xxviii ("[T]he overall percentage of cases authorized automatically has increased over time. Yet, there are significantly different rates between noncitizen cases and citizen cases. On average, 96 percent of employees attesting to being U.S. citizens were found to be work-authorized automatically, while, on average, 72 percent of cases in which the employee attested to being a lawful permanent resident and 63 percent of cases in which the employee attested to being an alien authorized to work were authorized automatically.").
179. WESTAT, *supra* note 176, at xxi.
180. *Id.* at xxvi. Despite criticism, the federal government now requires federal government contractors to use the E-Verify system instead of the I-9 process. Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008).
181. WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION, at xxxv (2009), available at [www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf).

rate.<sup>182</sup> TNCs have real impacts. Workers who receive TNCs must resolve the inconsistency with the Social Security Administration or the Department of Homeland Security within a specified period, or they will lose the opportunity to work.<sup>183</sup> Sometimes, employers engage in intentional discrimination and take adverse employment actions against employees who receive TNCs.<sup>184</sup> Other times, employees, even if they are work-authorized, mistakenly receive final nonconfirmation, which ends their opportunities for employment in the United States.<sup>185</sup>

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182. *Id.* The E-Verify system has an adverse impact on naturalized citizens as well. The 2009 Department of Homeland Security report states that, “[a]lthough much improved since the last evaluation, the erroneous TNC rate for naturalized citizens remains well above the rate for U.S.-born workers.” *Id.* at xxxv-xxxvi (identifying a disparity of 3.2 percent versus 0.1 percent for U.S.-born workers); see also Oliveri, *supra* note 1, at 116 (“[T]hese databases are filled with inaccuracies, and these inaccuracies disproportionately work to the detriment of noncitizens and naturalized citizens.”).
183. See WESTAT, *supra* note 183, at xxvi (“When a TNC is issued, employers are required to inform affected workers in writing of the E-Verify finding and their right to contest the finding. If any discrepancies with SSA or DHS records are resolved by the worker during the contesting process, E-Verify issues an employment-authorized finding. When workers say that they do not want to contest TNCs or fail to contact SSA or USCIS within 10 Federal workdays, the E-Verify system issues a Final Nonconfirmation (FNC) finding and employers are expected to promptly terminate the workers’ employment.”).
184. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-146, EMPLOYMENT VERIFICATION: FEDERAL AGENCIES HAVE TAKEN STEPS TO IMPROVE E-VERIFY, BUT SIGNIFICANT CHALLENGES REMAIN 41 (2010), available at <http://www.gao.gov/new.items/d11146.pdf> (“Employees may be vulnerable to discrimination under E-Verify if, for example, employers engage in practices prohibited by E-Verify, such as limiting the pay of or terminating employees who receive TNCs, or prescreening job applicants. In 2009, Westat reported that some employers who responded to its survey acknowledged engaging in such practices. Specifically, of 2,320 survey respondents, 17.1 percent (397) reported restricting work assignments until employment authorization was confirmed; 15.4 percent (357) reported delaying training until employment authorization was confirmed; and 2.4 percent (56) reported reducing pay during the verification process.”); Raquel Aldana, *Of Katz and ‘Aliens’: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1097 (2008) (identifying the problem of “adverse employer action[s] against workers who receive a tentative nonconfirmation in the first phase of verification”); *New Rule Requires Increased Use of Employment Verification System*, 42 CLEARINGHOUSE REV. 322, 323 (2008) (“Employers . . . have been found to penalize those who receive tentative nonconfirmation notices.”).
185. See Shelly Chandra Patel, Note, *E-Verify: An Exceptionalist System Embedded in the Immigration Reform Battle Between Federal and State Governments*, 30 B.C. THIRD WORLD L.J. 453, 463-64 (2010) (citing an “independent examination of the E-Verify program” and stating that final nonconfirmation for a work-authorized employee “often results when the employee did not follow proper procedures to

The problem with all four of the subfederal employer-sanctions laws, and the reason they conflict with Title VII, is that they expand the use of E-Verify beyond what the federal government allows. Some subfederal employer-sanctions laws, such as Arizona's law and Hazleton's law, require private employers, as well as public employers at the subfederal level, to use the E-Verify system.<sup>186</sup> Others, such as Oklahoma's law, require E-Verify only with respect to public employers and employers that are working on government contracts.<sup>187</sup> Even though the federal government's voluntary use of E-Verify signals that E-Verify does not appear to be in conflict with Title VII, the subfederal laws' expanded use of E-Verify tips the balance such that E-Verify is much more likely to have a discriminatory effect on employees because of their national origin or race.

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contest or, alternatively, was not aware of either the TNC or the opportunity to contest because his employer failed to initiate a SSA referral. . . . The difficult question, and one that currently remains unanswered, is what recourse is available to legal residents who are subject to final nonconfirmation under the E-Verify system?" ); *E-Verify in Arizona—How Is It Working for Your Business?: Questions & Answers from CIS Ombudsman's Teleconference*, U.S. DEP'T HOMELAND SECURITY, [http://www.dhs.gov/xabout/structure/gc\\_1215715302905.shtm](http://www.dhs.gov/xabout/structure/gc_1215715302905.shtm) (last modified Oct. 29, 2008) ("There is not a formal appeals process for final nonconfirmations issued by the E-Verify, though the E-Verify program will delay a final nonconfirmation finding on a case by case basis if employees have experienced delays in receiving needed documentation that will help prove their employment eligibility.").

186. ARIZ. REV. STAT. ANN. § 23-214(A) (Supp. 2010) (applying a mandatory E-Verify requirement to all private and public employers); Valley Park, Mo., Ordinance 1722, § 4(C)-(D) (Feb. 14, 2007) (applying a mandatory E-Verify requirement to city employers and private employers who seek a contract with the city); Hazleton, Pa., Ordinance 2006-18, § 4(C)-(D) (Sept. 8, 2006) (same). The *Lozano* court concluded that Hazleton's law indirectly required private employers to use E-Verify because the use of E-Verify gave these employers a "safe harbor" from the law. *Lozano v. City of Hazleton*, 620 F.3d 170, 214 n.35 (3d Cir. 2010). The Valley Park law has a similar safe harbor and thus may also be viewed as requiring public and private employer use of E-Verify. See Valley Park, Mo., Ordinance 1722, § 4B(5). At least two other states and one city require E-Verify for both private and public employers. See MISS. CODE ANN. § 71-11-3(4)(b)(i) (Supp. 2010); S.C. CODE ANN. §§ 41-8-20(B)(1), 8-14-20(A) (Supp. 2010); LANCASTER, CAL., CODE OF ORDINANCES § 5.50.030(A) (2009).
187. See OKLA. STAT. ANN. tit. 25, § 1313(A)-(B) (2008). For examples of E-Verify requirements for public employers in other states and municipalities, see COLO. REV. STAT. ANN. § 8-2-122 (West Supp. 2010); GA. CODE ANN. § 13-10-91(a) (Supp. 2010); MO. REV. STAT. § 285.530(2)-(3) (West Supp. 2010); NEB. REV. STAT. § 4-114(2) (Supp. 2010); N.C. GEN. STAT. ANN. § 126-7.1(f) (West Supp. 2010); VA. CODE ANN. § 40.1-11.2 (Supp. 2010); Decatur, Ala., Resolution No. 09-141 (June 1, 2009); LAKEWOOD, CAL., MUNICIPAL CODE § 01.42.030(a) (2009); Palmdale, Cal., Ordinance 1333, § 2.50.030(A)-(B) (Nov. 7, 2007); and Bonita Springs, Fla., Ordinance 09-04, § 4(C) (Mar. 19, 2009).

C. *Obstacle 2: Discouraging Enforcement Through Employee-Initiated Complaints*

The four subfederal employer-sanctions laws also pose a barrier to a fundamental, yet less obvious, policy that underlies both Title VII and FLSA: the promotion of employee-initiated complaints. Title VII's and FLSA's most obvious policy goals are, respectively, to protect marginalized employees from employment discrimination and to protect employees at the bottom of the labor market from minimum-wage, child-labor, and overtime abuses.<sup>188</sup> As stated by the Supreme Court in its landmark 1971 decision in *Griggs v. Duke Power Co.*, Title VII's main goal was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."<sup>189</sup> Similarly, FLSA's legislative history suggests that FLSA "is intended to give a certain degree of protection to a group of people who cannot speak for themselves, who are unorganized and politically and economically powerless."<sup>190</sup>

A recent case in the U.S. Court of Appeals for the Fourth Circuit shows that a federal employment law can preempt subfederal laws that contravene the federal law's enforcement scheme.<sup>191</sup> In that case, FLSA preempted state law, not because state law directly lowered the federal minimum wage or overtime premium, but because it served as an obstacle to FLSA's enforcement scheme. Specifically, the court found that FLSA preempted an employee's state negligence, fraud, and contract claims in the context of a minimum-wage case.<sup>192</sup> Plaintiffs had brought state-law claims based on the employer's alleged FLSA violations and thus sought state-law remedies for the FLSA violations.<sup>193</sup> Noting

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188. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060, 1060-69 (codified as amended at 29 U.S.C. §§ 201-219 (2006)); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended in scattered sections of 42 U.S.C.).

189. 401 U.S. 424, 429-30 (1971).

190. 82 CONG. REC. 1491 (1937).

191. See *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 193-94 (4th Cir. 2007); see also Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 131 n.84 (1998) (indicating that federal procedural rights can preempt state law as long as the procedural rights are related to a "substantive federal statutory purpose").

192. See *Anderson*, 508 F.3d at 194 (finding implied preemption). In contrast, the Court of Appeals for the Ninth Circuit found that FLSA did not preempt a similar subfederal law. See *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1152 (9th Cir. 2000) (finding against preemption of state fraud claims).

193. *Anderson*, 508 F.3d at 193.



FLSA's "unusually elaborate enforcement scheme,"<sup>194</sup> the Fourth Circuit concluded that allowing plaintiffs to turn to state-law remedies for FLSA violations conflicted with FLSA. According to the court, access to state remedies conflicted with FLSA because it would allow plaintiffs to "circumvent" FLSA's comprehensive enforcement scheme.<sup>195</sup>

As is elaborated below, Congress intended the enforcement of FLSA's and Title VII's protections to depend almost entirely on employee-initiated reports of abuse. Instead of wide-scale government-initiated inspections, as is common in other parts of the world, these laws largely rely on the initiative of employees to bring a lawsuit or agency complaint forward.<sup>196</sup> The promotion of employee-initiated complaints in each statute is inextricably tied to Congress's policy goal of protecting the most subordinated and marginalized groups of workers for the good of the whole. Individual complainants serve as "private attorneys general" who enforce Title VII and FLSA on behalf of themselves *and* employees more

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194. *Id.* at 192 (quoting *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999)).

195. *Id.* at 194; *see also* *Gentry v. Home Depot, Inc.*, 2007 U.S. Dist. LEXIS 17469, at \*9 (W.D. Mo. Mar. 13, 2007) (concluding that Title VII preempted plaintiff's claim under a whistleblower law because allowing the claim would allow plaintiff to avoid "comprehensive statutory remedies" and would "excus[e] her failure to follow their administrative procedures").

196. For a discussion of the importance of private rights of action under Title VII and FLSA, *see* Kim, *supra* note 15. *See also* Jennifer Baugh, *Punitive Damages and the Anti-retaliation Penalties Provision of the Fair Labor Standards Act*, 89 IOWA L. REV. 1717, 1724 (2004) ("[I]t is impractical to expect the Department of Labor, with its limited resources, to pursue action against every employer who violates the Act. That leaves the vindication of FLSA rights primarily in employees' hands, which seems to be what Congress intended."); Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 601 (2007) ("The strict enforcement of Title VII necessary for maintenance of equality in the workplace depends heavily upon complaints by and information from employees, who come closer than most anyone else to witnessing employer conduct firsthand."); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 683 (2004) ("Title VII's enforcement mechanisms were not self-executing. Individuals who believed they had suffered discrimination were to bring complaints to the Equal Employment Opportunity Commission."); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1994 (2000) (referring to Title VII and Congress's creation of "private rights of action to enforce the Act"); Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 368, 385 (1939) ("The limited appropriations available to the Wage and Hour Division make it essential that adequate machinery for policing of the minimum standards be set up by the employees intended to be benefited.").

broadly.<sup>197</sup> In other words, an individual employee who brings his or her own complaint is vindicating a right as an individual employee, but is also serving as a mini-prosecutor on behalf of a broader public enforcement purpose.<sup>198</sup> The

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197. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (“The private right of action remains an important part of Title VII’s scheme of enforcement. . . . Congress considered the charging party a ‘private attorney general’ . . . .”); Kim, *supra* note 15, at 307 (“[T]he legal norms and values promoted by undocumented workers in their suits against unscrupulous employers support conferring them with immigration status to enable them as private attorneys general.”). In *New York Gaslight Club, Inc. v. Carey*, the Supreme Court stated that “Congress has cast the Title VII plaintiff in the role of a ‘private attorney general,’ vindicating a policy of the highest priority.” 447 U.S. 54, 63 (1980); see also Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers To Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 428 (1993) (“By permitting Title VII plaintiffs to act as private attorneys general vindicating an important public policy, Congress anticipated that these plaintiffs would represent the interests of individuals not before the court.”). Similarly, the Court explicitly referred to FLSA as a private right that is “granted in the public interest.” *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945). The Court concluded that, even when individual employees are informed and want to privately waive their right to minimum wages, overtime, or liquidated damages for work performed, the law forbids it in the interest of employees more generally. *Id.* at 706-07. Congress amended FLSA in 1947 to allow reductions in liquidated damages in some circumstances but still forbids private waivers. Liquidated damages, according to FLSA’s Portal-to-Portal Act amendments, can be reduced only when (1) a court or the DOL provides oversight, and (2) the employer shows that it acted in good faith and had reasonable grounds to believe it was acting in accordance with FLSA’s requirements. Portal-to-Portal Act of 1947, 29 U.S.C. §§ 216(c), 260 (2006). Subsequent to these amendments, the Supreme Court has cited *Brooklyn Savings’s* interpretation of FLSA’s underlying policies favorably and has explicitly reaffirmed its interpretation of FLSA’s role as a private right in the public interest. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 206 n.4 (1995); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 n.16 (1981).
198. The importance of Title VII plaintiffs’ role as “private attorneys general” is frequently referred to in the legislative history. During the 1972 debates about Title VII amendments, the following statement was introduced into the record: “The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant.” 118 CONG. REC. 7168 (1972) (statement of Sen. Harrison A. Williams). During the 1991 debates over Title VII amendments, Jane Lang, a former General Counsel of the U.S. Department of Housing and Urban Development, testified that: “The individual Title VII litigant acts as a ‘private attorney general’ to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.” H.R. REP. NO. 102-40, at 46-47 (1991); see also *id.* at 65 (stating that certain remedies are “necessary to encourage citizens to act as private attorneys general to enforce the statute”). For a FLSA example, see 93 CONG. REC. 2258 (1947), which notes Senator

analysis below will further elaborate Congress's intent to preempt subfederal laws that serve as obstacles to employee-initiated complaints. It will then explore whether there is an unconstitutional conflict through a comparison of relevant aspects of IRCA and subfederal laws and an examination of the scholarship related to IRCA's effect on employee-initiated complaints.

### 1. FLSA's and Title VII's Encouragement of Employee-Initiated Complaints

An in-depth examination of the legislative history, language, and case law involving both federal employment statutes demonstrates that Congress intended to preempt subfederal laws that discourage employees from coming forward with valid FLSA and Title VII complaints. Namely, with both statutes, Congress intended to encourage employee-initiated complaints and to discourage employee fear of coming forward. The statutes' reliance on employee-initiated complaints is manifest. In 1938, eleven days before FLSA was signed into law, Representative Kent Keller, referring to "the enforcement of the act," noted that it "puts directly into the hands of employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act."<sup>199</sup> Title VII's legislative history similarly shows that Congress intended

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J. Howard McGrath's statement: "The framers of the Fair Labor Standards Act believed that the possibility of employee suits would greatly help in obtaining general compliance."

199. 83 CONG. REC. 9264 (1938). Moreover, during a debate over proposed amendments to FLSA in 1946, Representative Michael Feighan stated: "[T]he employee-suit provision" of FLSA "has undoubtedly had the effect of securing compliance without either Government action or court action." 92 CONG. REC. 5298 (1946). For an example of scholars who noted this soon after FLSA's enactment, see Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 II*, 54 POL. SCI. Q. 29, 54 (1939) (stating that FLSA's private rights of action provision "promise[] to add to the effectiveness of the enforcement features of the act"). For more contemporary references, see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1903 n.102 (2007) (citing a number of sources that demonstrate the importance of private rights of action and contending that agency enforcement alone is not enough); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 553, 556 (2010) (referring to "complaint-driven investigations" as central to FLSA enforcement historically, and proposing a new "logic" of enforcement based on government partnerships with workers' organizations); and 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, 66 (2005) (describing FLSA as reliant on complaints from workers). See also *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 n.16 (1981) (acknowledging that FLSA was designed to "encourage employees to enforce their FLSA rights in court").

to encourage private enforcement of Title VII's antidiscrimination protections.<sup>200</sup>

The language of both statutes also illustrates Congress's manifest intent to encourage employee complaints. FLSA's enforcement provision, section 216(b), facilitates employee-led enforcement in several ways. It allows private employees to initiate lawsuits on their own behalf without having to exhaust administrative remedies.<sup>201</sup> It encourages employee-initiated complaints by requiring employers to pay the attorneys' fees and costs of prevailing FLSA plaintiffs.<sup>202</sup> Moreover, according to section 216(b), prevailing FLSA plaintiffs not only receive the unpaid minimum wages and overtime premiums that they should have received in the first place, but they also receive an equal amount in liquidated damages.<sup>203</sup> Liquidated damages, sometimes referred to as "double damages," provide an additional incentive for employees to come forward with their complaints. Unlike FLSA, Title VII does require employees to first make their complaints to a federal agency, the Equal Employment Opportunity Commission (EEOC), and does not allow the federal agency to sue employers

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200. Legislative history related to Title VII's 1972 amendments, for instance, "reflects a strong reaffirmation of the importance of the private right of action in the Title VII enforcement scheme." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 n.21 (1981) (quoting 118 CONG. REC. 7565 (1972)); *see also* H.R. REP. NO. 102-40, at 82 (1991) (referring to employee-initiated complaints as something "Congress has relied upon for enforcement of the statute's guarantees and advancement of the public's interest").

201. *See* 29 U.S.C. § 216(b) (2006) ("An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."); *see also* *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.").

202. *See* 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."). This purpose is evident in the Act's legislative history as well:

[Employees] themselves . . . [can] maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit.

83 CONG. REC. 9264 (1938) (statement of Rep. Michael Feighan).

203. 29 U.S.C. § 216(b).

in the absence of an employee complaint.<sup>204</sup> However, like FLSA, Title VII permits an employee to bring a private suit in court once the EEOC has issued a right-to-sue letter.<sup>205</sup> Also in line with FLSA, prevailing Title VII plaintiffs may receive attorneys' fees and costs.<sup>206</sup> Additionally, they can receive back pay,<sup>207</sup> compensatory damages, and, in some circumstances, punitive damages to remedy Title VII violations.<sup>208</sup>

Congress not only explicitly encouraged employee-initiated complaints; it also tried to offset barriers to coming forward, such as employee fear. In other words, Congress acknowledged that, "[w]hen the costs outweigh the benefits, workers are less likely to enforce their rights."<sup>209</sup> This intention is perhaps best demonstrated by Congress's inclusion of anti-retaliation provisions in both statutes. Title VII's anti-retaliation provision protects an employee from retaliation that occurs "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."<sup>210</sup> Title VII's remedies, listed above, along with an employee's reinstatement back into his or her job, are the potential consequences for an employer who violates this provision. FLSA's anti-retaliation provision makes it unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" FLSA.<sup>211</sup> FLSA remedies for retaliation include reinstatement and

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204. See 42 U.S.C. § 2000e-5 (2006).

205. *Id.* § 2000e-5(f).

206. *Id.* § 2000e-5(k).

207. *Id.* § 2000e-5(g)(1), (k).

208. *Id.* § 1981a(a)(1); see also H.R. REP. NO. 102-40, at 70 (1991) (referring to the increase in remedies as "enhanc[ing] the effectiveness of Title VII . . . by encouraging private enforcement"); H.R. REP. NO. 101-644, at 77 (1990) (referring to remedies and noting that "[t]hey promote the private enforcement of Title VII by providing incentives to discrimination victims to seek legal redress when their rights are infringed upon"); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 513 (2005) ("[B]ackpay in the Title VII setting also plays a crucial role in encouraging private individuals to come forward and enforce the public interest in freedom from discrimination, over and above any private interests of the complainants.").

209. Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 272 (2008).

210. 42 U.S.C. § 2000e-3(a).

211. 29 U.S.C. § 215(a)(3) (2006).

compensatory damages. In some federal circuit courts of appeals, punitive damages are an additional available remedy in FLSA retaliation cases.<sup>212</sup>

In the retaliation context, the Supreme Court's decision in *Mitchell v. Robert DeMario Jewelry, Inc.* confirms Congress's intent to offset employee fear of coming forward with FLSA complaints. The *Mitchell* Court considered whether lost wages were available to remedy an employer's violation of FLSA's anti-retaliation provision in cases brought by the U.S. Secretary of Labor. In coming to the conclusion that FLSA's unpaid wages remedy was available, the Court reasoned that Congress intended FLSA's anti-retaliation provision to reduce barriers to employee-initiated complaints. The Court stated that "effective enforcement could . . . only be expected if employees *felt free* to approach officials with their grievances."<sup>213</sup>

A number of Supreme Court cases in the Title VII retaliation context also demonstrate Congress's policy goal of ensuring that employees are not unreasonably deterred from, or made fearful of, coming forward with complaints.<sup>214</sup> In *Burlington Northern & Santa Fe Railway Co. v. White*, the Court stated that "Title VII depends for its enforcement upon the cooperation of *employees who*

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212. See *id.* § 216(b); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (concluding that punitive damages were available). *But see* *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-39 (11th Cir. 2000) (concluding that punitive damages were unavailable).
213. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added). Federal courts of appeals have largely followed this interpretation of the intentions behind FLSA's anti-retaliation provision. See, e.g., *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 43 (1st Cir. 1999) (stating that the purpose of the anti-retaliation provision is to "prevent[] employees' attempts to secure their rights under the Act from taking on the character of 'a calculated risk.' Such circumstances would fail to 'foster a climate in which compliance with the substantive provisions of the Act would be enhanced'" (citation omitted) (quoting *Mitchell*, 361 U.S. at 292, 293)); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) ("The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation . . ."); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) ("[T]he Court has made clear that the key to interpreting the [FLSA's] anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions.").
214. Federal circuit courts of appeals consistently follow this view of Title VII. See e.g., *Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003) (discussing the need to protect employee complainants); *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000) (referring to the importance of not deterring employee-initiated Title VII complaints); *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) ("The undoubted purpose of Title VII's prohibition against retaliation is to prevent employers from discouraging complaints or otherwise chilling the exercise of an employee's rights."); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) (stating that if Title VII employee complainants were not protected, "resort to the remedies provided by the Act would be severely chilled" (quoting *Sias v. City of Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978))).

are willing to file complaints and act as witnesses.”<sup>215</sup> It relied on this aspect of Title VII to conclude that courts should not narrowly interpret what constitutes an employer’s adverse employment action against an employee in the retaliation context.<sup>216</sup> In *Robinson v. Shell Oil Co.*, the Court considered whether Title VII’s anti-retaliation provision covered adverse employment actions that an employer took against employees who no longer worked at a particular establishment.<sup>217</sup> The Court concluded that Title VII does protect former employees from post-employment retaliation that takes place due to Title VII complaints.<sup>218</sup> In coming to this determination, the Court reasoned that excluding former employees from this protection would “deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.”<sup>219</sup> Deterring employees from bringing complaints, the Court reasoned, would be inconsistent with Title VII’s purposes.<sup>220</sup>

The legislative history of both statutes also shows congressional intent to offset barriers to employee-led complaints, including employee fear. In the Title VII context, Senator Hubert Humphrey remarked in 1964 that Congress’s goal was to “make it easier for a plaintiff of limited means to bring a meritorious suit.”<sup>221</sup> In opposition to a proposed shortening of FLSA’s statute of limitations for employee complaints under FLSA in 1946, Senator James Murray introduced a letter from the Secretary of Labor, which contended that “to place unreasonable difficulties in the way of bringing employee suits would increase both the burden and expense of enforcement of the act by the Federal Government.”<sup>222</sup> The Secretary’s letter also acknowledged the importance of reducing employee fear of coming forward with complaints. It stated that, because of “unequal bargaining power between unorganized employees and their employers,” employees “may, and often do, fear to bring suit while they are still employed, because of the possibility of losing their jobs.”<sup>223</sup> Scholars confirm Congress’s intent to reduce fear among employees so that they are willing to come forward with FLSA and Title VII claims. As one scholar contends, federal employment statutes “would collapse in the absence of protections for com-

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215. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (emphasis added).

216. *Id.* at 60-67.

217. 519 U.S. 337 (1997).

218. *Id.* at 346.

219. *Id.* (emphasis added).

220. *Id.* at 345-46.

221. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting 110 CONG. REC. 12,724 (1964)).

222. 92 CONG. REC. 3187 (1946).

223. *Id.*

plaining employees.”<sup>224</sup> Moreover, many have noted that “Title VII’s ability to realize its potential depends . . . on the willingness of victims of workplace discrimination to bring that discrimination to light.”<sup>225</sup>

## 2. Subfederal Employer-Sanctions Laws’ Discouragement of Employee-Initiated Complaints

Subfederal employer-sanctions laws present formidable barriers to the employee-led complaint schemes of Title VII and FLSA. As compared to IRCA, these subfederal laws do not ameliorate their impact on federal workplace protections for employees in any way. Instead, they intensify fear among immigrant workers and facilitate coworker harassment. The qualitative differences between IRCA and the subfederal laws, along with research on IRCA’s effects on employee-initiated workplace law complaints, demonstrate why there is a conflict between the subfederal laws, on the one hand, and FLSA and Title VII, on the other. Despite having a provision to offset its impact on FLSA, relying much less heavily on citizen complaints for enforcement, and permitting no private causes of action, IRCA is already in considerable tension with FLSA’s and Title VII’s employee-led enforcement schemes.

Unlike these subfederal laws, Congress acknowledged (although insufficiently in my view<sup>226</sup>) potentially negative effects of IRCA’s workplace immigra-

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224. Cunningham-Parmeter, *supra* note 140, at 46; see also Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 538 (2001) (“[T]he purpose of these substantive obligations would not be realized if employees are unable to exercise their rights due to fear of their employer’s retaliation.”).

225. See Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1478 (2007); see also Lorrie E. Bradley, *Striking Back Against Retaliatory Discrimination: How Burlington Northern & Santa Fe Railway Company v. White Expands Protections for Employees Under Title VII’s Participation and Opposition Clauses*, 85 N.C. L. REV. 1224, 1229 (2007) (noting that Title VII enforcement depends on employee complaints); Christopher M. Courts, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 238-39 (2001) (noting that “[t]he EEOC relies on such complaints to perform its enforcement duties”); Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1086-87 (2008) (arguing that a lack of employee complaints would chill Title VII enforcement); Michael S. Vogel, *The Remains of Title VII After Lorraine v. AT&T Technologies*, 22 COLUM. HUM. RTS. L. REV. 73, 82 (1990) (“The willingness of individuals to bring complaints is an essential element of Title VII.”).

226. At least one federal immigration reform policy proposal has addressed the need to further protect immigrants who report employment law violations. See Amber McKinney, *Menendez Introduces Senate Bill To Protect Immigrants Who Report Labor Law Violations*, DAILY LAB. REP., Apr. 15, 2010, at A-17 (reporting on a “bill designed to provide enhance[d] labor protections to immigrant workers and deter



tion enforcement measures on FLSA's enforcement scheme. IRCA contains a provision that appropriates money to the U.S. Department of Labor (DOL) to reduce FLSA wage-and-hour violations against undocumented employees. IRCA's section 111(d) states the following:

There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.<sup>227</sup>

Despite this appropriation, IRCA is in evident tension with FLSA's and Title VII's promotion of employee-initiated complaints. While there is little systematic empirical investigation of this issue to date, scholars and worker advocates have extensively noted that IRCA reduces the likelihood that noncitizen immigrant employees will initiate complaints against their employers.<sup>228</sup> As Professor Michael Wishnie remarks, federal employer sanctions "have deterred immigrants from communicating with labor and employment agencies about

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employers from using immigration laws to prevent employees from reporting workplace abuses").

227. Immigration Reform and Control Act (IRCA) of 1986 § 111(d), 8 U.S.C. § 1101 (2006).
228. *E.g.*, NAT'L EMP'T LAW PROJECT, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS 5 (2009), available at [http://nelp.3cdn.net/75a43e6ae48f67216a\\_w2m6bp1ak.pdf](http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf) ("The single-minded focus on immigration enforcement without regard to violations of workplace laws has enabled employers with rampant labor and employment violations to profit by employing workers who are terrified to complain about substandard wages, unsafe conditions, and lack of benefits."); Fine & Gordon, *supra* note 199, at 555 (stating that "immigrants [are] increasingly unwilling to come forward to report wage violations" because of "work site raids and employer sanctions enforcement"); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 360 (2001) (noting that immigration enforcement during labor disputes "creat[es] an unemployed underclass within our borders . . . . The unemployed, non-deported, discharged workers remain a part of our society, and are pushed further underground, where they are that much more vulnerable to exploitation by unscrupulous employers seeking to circumvent labor laws"); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 385 (2008) ("When workers fear coming forward to complain of unpaid wages, it chills enforcement of the wage laws and financially rewards employers who illegally underpay their employees."); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 325 (2010) ("The consequence of decades of worksite and employer-focused immigration enforcement has been the continued erosion of workplace rights for noncitizen workers.").

unlawful activity they have suffered or witnessed.”<sup>229</sup> Similarly, as Professor Jennifer Gordon contends, employer “sanctions rendered undocumented immigrants more vulnerable, less likely to report violations of minimum wage and other workplace standards, cheaper, and increasingly resistant to [union] organizing efforts.”<sup>230</sup>

There is some evidence that noncitizen employees do, in fact, underreport workplace law violations.<sup>231</sup> Underreporting occurs, at least in part, because of employee fear of coming forward. One study, for instance, showed that sixty-two percent of undocumented workers who acknowledged not reporting a safety violation explained their choice as due to their “fear of employer retaliation or to the fear of deportation.”<sup>232</sup> It is not a surprise that IRCA’s workplace-based immigration enforcement scheme would make undocumented workers fearful. The “growing anecdotal and empirical evidence suggests that many employers report workers in retaliation for unauthorized immigrants’ attempting to assert

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229. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 213 [hereinafter Wishnie, *Prohibiting*]; see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (stating that “most undocumented workers are reluctant to report abusive or discriminatory employment practices”); Michael J. Wishnie, *Immigrants and the Right To Petition*, 78 N.Y.U. L. REV. 667, 667-80 (2003) [hereinafter Wishnie, *Immigrants*]; Wishnie, *Prohibiting*, *supra*, at 213 (contending that IRCA and *Hoffman* “have deterred immigrants from communicating with labor and employment agencies about unlawful activity they have suffered or witnessed”).
230. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 540 (2007). Gordon further argues that sanctions “increased the appeal of undocumented workers to unscrupulous employers and gave employers a way to derail organizing campaigns in immigrant-heavy workplaces.” *Id.*
231. See Wishnie, *Immigrants*, *supra* note 229, at 676-80 nn.51-61 (reporting some empirical evidence). Deterrence is an important aspect of both FLSA and Title VII. FLSA’s legislative history from 1947 illustrates this well. As Senator Olin Johnston remarked in 1947 debates over FLSA amendments, “Although substantial sums have been regained by workers through the exercise of their rights under [FLSA 216(b)], they are of minor importance compared with its indirect influence on employers.” 93 CONG. REC. 2372 (1947).
232. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1123 (2009) (describing a Center for Urban Economic Development study, which was based on a survey of 1131 documented and undocumented workers in Chicago). Officials from the DOL’s Wage and Hour Division have also “expressed concerns that foreign born workers, although generally protected by FLSA to the same extent as other workers, may be less likely than others to complain because they may be unaware of federal laws or fear deportation if they are undocumented.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-90-62, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 3-4 (2008).

their labor and employment rights.”<sup>233</sup> Moreover, “even if an employer never calls in federal immigration authorities,” IRCA still increases fear among undocumented workers because the “constant threat can make workers’ lives precarious—always reminding them that they are powerless.”<sup>234</sup>

Courts have even acknowledged that IRCA can provoke employee fear and thus can have negative consequences on employee-led enforcement schemes. These courts often address this issue when confronted with an argument that IRCA, as interpreted by the *Hoffman* Court, requires discovery into immigration status during an employment law dispute.<sup>235</sup> The U.S. Court of Appeals for the Ninth Circuit, for instance, stated the following when it refused discovery into immigration status during a Title VII case:

While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the [immigration authorities] and

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233. Lee, *supra* note 232, at 1107. To address the “asymmetrical” relationship between employers and employees that IRCA creates, Professor Lee proposes sanctions for employers who make immigration complaints in response to employee workplace-law complaints. *See id.* at 1141.
234. Motomura, *supra* note 47, at 2069; *see also id.* (“F. Ray Marshall, Secretary of Labor in the Carter Administration, once said that immigrants who come outside the law work ‘scared and hard.’”). Even though employer-sanctions laws focus on employer liability on their face, workers more often feel the brunt of enforcement. *See Lee, supra* note 232, at 1107 (describing employers as having “de facto immunity from sanctions”). Similarly, workplace raids under Arizona’s employer-sanctions law, in effect since January 1, 2008, have led to a number of arrests of undocumented workers but very little employer liability. *See* Michael Kiefer, *Romley Bucks Party Line, Challenges SB 1070 Flaws*, ARIZ. REPUBLIC, July 24, 2010, at B1 (“[D]espite 36 raids in the name of enforcing employer sanctions, there was only one successful prosecution [of an employer].”); Jim Small, *Arizona’s New Employer Sanctions Law Coming up Short*, ARIZ. CAPITOL TIMES, Oct. 12, 2009, <http://azcapitoltimes.com/news/2009/10/12/employer-sanctions-coming-up-short/> (“Although 310 employees have been arrested for identity theft and fake identifications, none of those businesses faced punishment under the state law.”).
235. *See, e.g., Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (refusing discovery into immigration status and stating that “if forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance . . . [which] would effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation”); *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (refusing discovery into plaintiffs’ immigration status because it could “inhibit plaintiffs in pursuing their rights”).

they will be subjected to deportation proceedings or criminal prosecution. . . . The case law substantiates these fears.<sup>236</sup>

Similarly, the Ninth Circuit concluded that immigration inquiries during workplace disputes even foster fear among documented immigrant workers. Documented immigrant workers, according to the court, “may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends.”<sup>237</sup>

Once again, IRCA’s track record is illuminating to the analysis. It illustrates that subfederal employer-sanctions laws that do not share IRCA’s DOL appropriation are likely to pose barriers to FLSA’s enforcement scheme. In contrast to IRCA, none of the subfederal employer-sanctions laws discussed in this Article contain anything even arguably similar to IRCA’s provision to allocate funds to the DOL for greater enforcement of employment laws on behalf of undocumented employees.

Additionally, IRCA’s track record shows that the complaint and investigation procedures of some subfederal employer-sanctions laws pose obstacles to FLSA’s and Title VII’s enforcement schemes. As described above, IRCA does not initiate an investigation following every complaint, nor does it give employees a private cause of action.<sup>238</sup> The laws in Arizona, Hazleton, and Valley Park, however, each call for the initiation of an investigation into a potential violation of the subfederal employer-sanctions law once a resident of the jurisdiction makes a complaint.<sup>239</sup> We saw an example of such a loose basis for initiating an investigation when Arizona officials raided a McDonald’s restaurant in March 2010. They arrested twenty-one allegedly undocumented workers after they “were tipped off . . . by a caller.”<sup>240</sup> Moreover, Oklahoma’s law and Hazle-

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236. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (citing cases in which employers reported undocumented workers who made labor-rights claims to immigration authorities).

237. *Id.* at 1065.

238. *See* Immigration Reform and Control Act (IRCA) of 1986 § 101(e)(8), 8 U.S.C. § 1324a(e)(9) (2006).

239. ARIZ. REV. STAT. ANN. § 23-212(B) (Supp. 2010); Valley Park, Mo., Ordinance 1722, § 4B(1) (Feb. 14, 2007); Hazleton, Pa., Ordinance 2006-18, § 4(B)(1) (Sept. 8, 2006). Some Arizona counties heighten the standards for making complaints. *See* Brady McCombs, *Cochise Will Field Anonymous Complaints*, ARIZ. DAILY STAR, Jan. 6, 2008, [http://azstarnet.com/news/local/border/article\\_8dfff692-6dc1-5cf4-9dof-69cf131f0595.html](http://azstarnet.com/news/local/border/article_8dfff692-6dc1-5cf4-9dof-69cf131f0595.html) (reporting that law enforcement agencies in some southeastern Arizona counties “require that people accusing businesses of employing unauthorized workers submit a written complaint in person and sign it under oath before a notary public”).

240. *Immigration Raids Nab 21 at Phoenix-Area McDonalds*, ARIZ. DAILY STAR, Mar. 27, 2010, [http://azstarnet.com/news/state-and-regional/article\\_402d05bo-a38a-5d8d-9eed-5bb280eb9859.html](http://azstarnet.com/news/state-and-regional/article_402d05bo-a38a-5d8d-9eed-5bb280eb9859.html).

ton's law allow employees who feel that undocumented employees have negatively affected them to bring private suits against their employers.<sup>241</sup>

Such "lax" complaint and investigation procedures of subfederal employer-sanctions laws<sup>242</sup> are likely to heighten the fear of immigration enforcement in the workplace and coworker harassment beyond the fear that IRCA already stokes. This heightened fear makes it even less likely that immigrant workers will come forward when they experience a FLSA violation or when they are harassed by a supervisor or coworker because of their sex, religion, ethnicity, race, or national origin.<sup>243</sup> Furthermore, the complaint and investigation procedures that go beyond IRCA also create new opportunities for retaliation against employees who make FLSA or Title VII complaints. A coworker or supervisor, for instance, who is accused (or fears being accused) of sex discrimination against an allegedly undocumented employee may threaten to make a complaint or bring a private suit under the subfederal employer-sanctions law if the undocumented employee does not withdraw his or her Title VII claim.

As Part III illustrated, altering the analytical lens to focus the preemption analysis on federal employment law, rather than federal immigration law, reveals that federal law does preempt subfederal employer-sanctions laws.

#### IV. FEDERAL *IMMPLOYMENT* LAW'S PREEMPTIVE EFFECTS

This Article's main contention, presented in Part III, is that two federal employment statutes (FLSA and Title VII) independently preempt the four subfederal employer-sanctions laws and other subfederal laws that mirror their provisions. The analysis thus far, however, also reveals the need to advance hybrid preemption frameworks that integrate two areas of federal concern: immigration law and employment law. As Part II discussed, subfederal employer-sanctions laws are a hybrid form of law. While their primary intent is to deter illegal immigration, they do so by regulating the workplace. This Part develops

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241. See OKLA. STAT. ANN. tit. 25, § 1313(C) (West 2008); Hazleton, Pa., Ordinance 2006-18, § 4(E)(2) (Sept. 8, 2006).

242. See Ndulo, *supra* note 164, at 877 (referring to Arizona's law as including "lax requirements . . . for filing complaints").

243. See Saucedo, *supra* note 140, at 903 ("Recent state and local enforcement ordinances, such as the one enacted in Hazleton, Pennsylvania, further increase the anxiety of immigrant communities."). Even before the heightened fear due to subfederal employer-sanctions laws, potential plaintiffs were hesitant to complain. See Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 449 n.129 (2002) (contending that FLSA plaintiffs may be reluctant to complain); Gorod, *supra* note 225, at 1478-82 ("One study found that 'more than one-third of those who reported unfair treatment took no further action, and only 3% reported suing their employer.'" (quoting Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 241 (2004))).

an *immigration* preemption theory. Specifically, it proposes that these four subfederal employer-sanctions laws conflict with Congress's intent to consider and promote federal employment policy goals as part of IRCA.

In other words, IRCA may conflict with subfederal employer-sanctions laws because IRCA incorporates the very federal employment policy goals shown in Part III to be in conflict with these subfederal laws. IRCA "balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected."<sup>244</sup> Courts and scholars have noted that legislators did not intend for employer sanctions "to undermine or diminish in any way labor protections in existing law."<sup>245</sup> And, as IRCA's legislative history and plain language will demonstrate, legislators did intend for IRCA to promote its own employment policy goals. While this proposed preemption theory focuses on IRCA's preemptive effects, it is unlike other IRCA preemption theories because it places a more comprehensive spotlight on IRCA's integration of employment policy goals. It is for this reason that this Article refers to this theory as an *immigration-law* preemption theory.

Legislators folded FLSA policy concerns into the scope of IRCA. They acknowledged, for example, that employers have an incentive to employ undocumented workers because of these workers' "willingness to accept substandard wages and working conditions."<sup>246</sup> As a result, during the fifteen years that Congress considered proposed federal employer-sanctions provisions, many called for "[v]igorous and effective enforcement of" FLSA.<sup>247</sup> This recommendation included proposed "increases in budget, equipment and personnel that [would] allow the Employment Standards Administration of the Department of Labor [using FLSA and other labor laws] to increase its efforts to monitor the

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244. See, e.g., *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 767 (10th Cir. 2010) (quoting *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991)); see also Wishnie, *Prohibiting*, *supra* note 229, at 198-205 (discussing the debate involving various competing interests that preceded IRCA's enactment in 1986).

245. H.R. REP. NO. 99-682, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662; see also Wishnie, *supra* note 140, at 517 n.103 (citing other aspects of the legislative history that express this sentiment).

246. S. REP. NO. 97-485, at 120 (1982).

247. *Id.*; see also *Immigration Control and Legalization Amendments: Hearing on H.R. 3080 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 129 (1986) [hereinafter *Hearing*] (statement of Mr. Arthur Fleming) (stating that "[v]igorous enforcement of the Fair Labor Standards Act and other labor laws" was essential to immigration reform); STAFF OF H. COMM. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 70 (Comm. Print 1981) [hereinafter *NATIONAL INTEREST*] (recommending increased enforcement of workplace legislation).

workplace.<sup>248</sup> To respond to some of these FLSA concerns, legislators proposed an appropriation to the DOL as part of immigration reform.<sup>249</sup> Congress eventually passed IRCA with the appropriation to the DOL intact, giving federal authorities more power to combat employers' failure to follow FLSA standards regarding undocumented workers. In these ways, IRCA's legislative history and plain language delineate IRCA's *employment* policy goals.

Legislators also incorporated Title VII policy concerns into IRCA. During their lengthy consideration of IRCA, legislators frequently and extensively discussed the need for antidiscrimination protections in IRCA.<sup>250</sup> As early as 1973, for instance, some legislators were concerned that IRCA "would be highly discriminatory against Mexican-Americans and against aliens from Mexico and other countries who are legally entitled to work because, rather than risking violation of a Federal criminal law, employers would refuse to hire anyone with a foreign accent or a Spanish surname."<sup>251</sup> As Representative Edward Roybal put it in 1986, some employers "will just not interview anyone who may appear to be Hispanic and quite obviously Asian. That will result in discrimination. Silent perhaps, but damaging just as well."<sup>252</sup> Thus, many legislators felt that, even though Title VII had ameliorated employment discrimination, an employer-sanctions law would "re-create a civil rights issue."<sup>253</sup>

As a response to some of these Title VII-like employment-discrimination concerns, legislators proposed a number of protections that eventually became

248. NATIONAL INTEREST, *supra* note 247, at 70; *see also* S. REP. NO. 97-485, *supra* note 246, at 120 ("I propose authorizing additional funds to support enforcement efforts [for FLSA and other laws] while employer sanctions are implemented.").

249. *See* S. REP. NO. 99-132, at 29 (1985) ("Subsection (d) authorizes the appropriation to the Department of Labor of additional sums as may be necessary for enforcement activities of the Wage and Hour Division and the Office of Federal Contract Compliance Programs.").

250. *See, e.g., id.* at 109 ("The problem of discrimination resulting from employer sanctions against 'foreign-looking' or 'foreign-sounding' individuals is a reality which no Member of Congress should ignore."); S. REP. NO. 98-62, at 11 (1983) ("Concern has been expressed that the employer sanctions program will be used as an excuse by employers who want to avoid hiring certain persons because of their race or national origin."); H.R. REP. NO. 94-506, at 15 (1975) ("It has been suggested that this legislation would cause employers to discriminate on the basis of national origin."); 132 CONG. REC. 31,635 (1986) (statement of Rep. Edwards) ("In my view, Mr. Speaker, [IRCA] is an invitation to racial discrimination.").

251. STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., ILLEGAL ALIENS, A REVIEW OF HEARINGS CONDUCTED DURING THE 92D CONGRESS BY SUBCOMM. NO. 1, at 25 (Comm. Print 1973).

252. 132 CONG. REC. 29,994 (1986); *see also id.* ("The truth of the matter is that thousands and thousands of Hispanics in this country and Asians as well will suffer the consequences of discrimination simply because of sanctions.").

253. 132 CONG. REC. 31,640 (1986).

law. In fact, IRCA's employment-discrimination policy goals go beyond Title VII in several ways. Unlike Title VII, IRCA covers workplaces with fewer than fifteen employees<sup>254</sup> and protects employees who are legally entitled to work in the U.S. from citizenship-status discrimination.<sup>255</sup> As one legislator observed, "[a]ntidiscrimination legislation of this nature is unprecedented in that it is based upon anticipated discrimination, rather than an historical pattern of past discrimination."<sup>256</sup> Similarly, another legislator stated, "The bill broadens the Title VII protections against national origin discrimination, while not broadening the other Title VII protections, because of the concern of some Members that people of 'foreign' appearance might be made more vulnerable by the imposition of sanctions."<sup>257</sup>

There was so much overlap between Title VII's goals and IRCA's proposed antidiscrimination protections that legislators debated extensively whether it would be best to simply amend Title VII to respond to the new forms of discrimination that IRCA indirectly encouraged.<sup>258</sup> Others felt that the new federal antidiscrimination enforcement agency created by IRCA would be a "duplicative bureaucracy" because of the existence of the EEOC.<sup>259</sup> Ultimately, of course, Congress did not amend Title VII and instead included antidiscrimination protections and a new enforcement agency as part of IRCA itself. The debate, however, shows Congress's extensive consideration of employment-discrimination policy as part of immigration reform.<sup>260</sup>

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254. IRCA covers workplaces with four or more employees. 8 U.S.C. § 1324b(a)(2)(A) (2006).

255. *See id.* § 1324b(a)(1)(B); *see also* 132 CONG. REC. 33,223 (1986) ("The bill broadens the title VII protections of the Civil Rights Act to include national origin as well as citizenship. I believe this further protects against possible abuse."); 132 CONG. REC. 33,242 (1986) ("This bill further expands the civil rights provisions of title VII, first by adding the concept of a citizenship category, and second, by extending the coverage of title VII from employers and entities of 15 or more persons to employers and entities of 4 or more persons.").

256. 132 CONG. REC. 31,632 (1986); *see also id.* ("I believe this can be viewed as one of the most far-reaching and important civil rights provisions in recent history.").

257. 132 CONG. REC. 30,905 (1986).

258. *See Hearing, supra* note 247, at 231-33 (1986).

259. H.R. REP. NO. 94-506, at 15 (1975).

260. Legislators also drafted IRCA to avoid conflicts between the new Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice and the EEOC. IRCA, for instance, states that an employee cannot file an IRCA discrimination complaint "if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under [Title VII], unless the charge is dismissed as being outside the scope of such title." 8 U.S.C. § 1324b(b)(2).



Federal agency actions are consistent with the view that IRCA incorporates federal employment policy considerations.<sup>261</sup> A recent example of these considerations is the "Comprehensive Worksite Enforcement Strategy" of the United States Immigration and Customs Enforcement agency (ICE). ICE's website states that the federal government's workplace-based enforcement strategy "promotes national security, protects critical infrastructure and *targets employers who violate employment laws or engage in abuse or exploitation of workers.*"<sup>262</sup> It goes on to assert that, along with other things, "ICE will look for evidence of the mistreatment of workers."<sup>263</sup>

Moreover, a March 31, 2011, Memorandum of Understanding (MOU) between ICE and the DOL<sup>264</sup> exhibits the federal government's consideration of federal employment policy goals during IRCA enforcement actions. Two of the purposes of the 2011 MOU between immigration and labor authorities are "to ensure that their respective civil worksite enforcement activities do not conflict" and "to create a means to exchange information to foster enforcement against abusive employment practices directed against workers regardless of status."<sup>265</sup>

According to the 2011 MOU, which follows its 1998 predecessor in some ways,<sup>266</sup> federal immigration authorities will not engage in workplace-based

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261. Cf. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 788 (2004) (noting that "we might reasonably suppose agencies to possess significant expertise" because of the "technical and practical questions" that implied obstacle preemption implicates).

262. *Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/worksite/> (last visited Mar. 22, 2011) (emphasis added).

263. *Id.* For an argument that this policy does not help workers in practice, see David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77 (2010).

264. The agreement is between the Department of Homeland Security and the DOL. The "principal components" are ICE as well as DOL's Wage and Hour Division, the Office of Federal Contract Compliance Programs, and the Occupational Safety and Health Administration. See Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Mar. 31, 2011) [hereinafter Revised Memorandum], available at [http://www.dol.gov/\\_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf](http://www.dol.gov/_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf).

265. *Id.* at 1, 3.

266. See Memorandum of Understanding Between the Immigration and Nationalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), available at <http://www.nilc.org/immsemplmnt/emprights/MOU.pdf> (last visited May 25, 2011) ("The agencies will develop and implement policies . . . that avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute matter.").

enforcement if the DOL is simultaneously investigating a labor dispute at that workplace, unless there are exceptional circumstances.<sup>267</sup> As part of this effort, immigration authorities will continue to be vigilant about whether the “tips and leads it receives . . . are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.”<sup>268</sup> Acknowledging employment policy concerns, immigration authorities also agreed to ensure that the DOL has an opportunity to interview undocumented workers who are detained during ICE’s enforcement actions about potential employment-law violations.<sup>269</sup>

To deal with ongoing issues related to the overlap between immigration enforcement and employment policy, the 2011 MOU calls for the establishment of “a joint Worksite Enforcement Coordination Committee,” which will meet quarterly “to review the implementation of this MOU, resolve any disputes, work in partnership as cases arise, and deconflict civil enforcement activities.”<sup>270</sup> This interagency cooperation follows through on a recommendation put forth during Congress’s consideration of IRCA that the federal immigration agency and the Wage and Hour Division of the DOL have “greater cooperation and coordination.”<sup>271</sup>

It is too early to determine the impact of the 2011 MOU, but in the past, federal immigration authorities have sometimes coordinated with the federal

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267. See Revised Memorandum, *supra* note 264, at 2. Similarly, per the 1998 MOU, the DOL “will not report the undocumented status of workers if discovered during an investigation of a labor dispute triggered by an employee complaint, nor will it inquire into a worker’s immigration status while conducting a complaint-driven investigation.” Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555, 591-92 (2007) (citing the 1998 MOU).

268. Revised Memorandum, *supra* note 264, at 2. This is important, in part, because some employers report their workers to immigration authorities in retaliation for labor- and employment-law complaints. See, e.g., Lee, *supra* note 232, at 1120 (noting that “the existing empirical—and growing anecdotal—evidence all points to the same conclusion: within industries traditionally dependent on immigrant labor, employers report the presence of unauthorized workers as a way of escaping liability for labor- and employment-related workplace violations”); *id.* at 1120-23 (describing anecdotal and empirical evidence related to that statement).

269. Revised Memorandum, *supra* note 264, at 3.

270. *Id.*

271. H.R. REP. NO. 92-1366, at 5 (1972); see H.R. REP. NO. 94-506, at 10-11 (1975) (following up on the need to increase coordination among the DOL, the INS, the Social Security Administration, and the IRS).

agencies in charge of FLSA and Title VII enforcement before taking action.<sup>272</sup> Similarly, federal immigration authorities have sometimes followed the 1998 MOU's directives to stay out of labor disputes.<sup>273</sup> At least one scholar has referred to federal immigration enforcement as an "unlikely" response "to reports of undocumented workers in cases where [immigration authorities have] reason to believe labor disputes are in progress."<sup>274</sup> Some acknowledge that worker "advocates have had some success using this guidance to convince [federal immigration] officials to refrain from conducting a raid . . ."<sup>275</sup> Moreover, a New York immigration judge considered the 1998 MOU in a case involving an employer who called the federal immigration authorities in response to employee FLSA and NLRA complaints.<sup>276</sup> The judge suppressed evidence gathered from the raid because federal immigration authorities had ignored the MOU.<sup>277</sup>

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272. The DOL is not the only agency involved. In the Title VII context, federal immigration authorities and the EEOC have worked together to weigh conflicting interests. *See, e.g., Garcia, supra* note 140, at 762 (referring to a "joint enforcement action" between federal immigration authorities, the EEOC and the Department of Justice and stating that "[a]lthough separate federal bureaucracies manage immigration and labor law, there is precedent for the kind of joint enforcement action that would bring together these two agencies and their dichotomous bodies of law"); *see also Saucedo, supra* note 140, at 952-53 (referring to the DOL and the EEOC as two federal employment agencies that could help victims of workplace law abuses to gain protection from immigration law's U visa).
273. *See, e.g., Decker, supra* note 140, at 2194 & n.5 (citing various examples of such compliance and commenting that "the agencies implementing [workplace protection and immigration] goals have found much common ground").
274. Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 142 n.287 (2003).
275. NAT'L IMMIGRATION LAW CTR., ISSUE BRIEF: IMMIGRATION ENFORCEMENT DURING LABOR DISPUTES 2 (2009), *available at* [http://www.nilc.org/dc\\_conf/flashdrive09/Worker-Rights/emp20\\_labordispute-infobrief-2009-11-06.pdf](http://www.nilc.org/dc_conf/flashdrive09/Worker-Rights/emp20_labordispute-infobrief-2009-11-06.pdf). Scholars have noted the need for these agencies to work together more closely. *See, e.g., Nessel, supra* note 228, at 384 (arguing that federal immigration agents should use their discretion even more to avoid interfering with workplace law regulation); Saucedo, *supra* note 140, at 952-53 (demonstrating that immigration law's U visa has been used and could be used more to protect "immigrant workers who suffer workplace abuses, whether or not those abuses result in criminal prosecutions").
276. *See In re Herrera-Priego*, Decision and Order of the Immigration Judge 22-24 (July 10, 2003), *available at* [http://www.nilc.org/immsemplymnt/IWR\\_Material/Advocate/Herrera-Priego.pdf](http://www.nilc.org/immsemplymnt/IWR_Material/Advocate/Herrera-Priego.pdf).
277. *Id.*; *see Lee, supra* note 232, at 1144 ("Herrera-Priego hints at what kind of reform might be possible by sending the right set of signals to employers. Instead of permitting employers to hire unauthorized immigrants with the expectation that they can always report those immigrants should the immigrants attempt to vindicate their workplace rights, the principles embodied by Herrera-Priego foreclose reporting as an escape hatch. This puts employers to a choice: either they screen

MOUs, however, are not likely to end federal immigration enforcement during labor disputes entirely. The instructions are intended to provide guidance and do not carry with them the force of law.<sup>278</sup> In the end, federal immigration agents can and sometimes do engage in enforcement of immigration law during a labor dispute.<sup>279</sup> Indeed, there are a series of examples of federal immigration enforcement during labor disputes despite the 1998 MOU.<sup>280</sup> One scholar characterized the 1998 MOU's effect as leading to "the occasional willingness of immigration authorities to avoid entanglement in labor disputes"<sup>281</sup> and showed that a "substantial amount of [federal immigration] worksite enforcement correlates with the existence of [a] formal labor dispute[], despite internal agency rules intended to limit [federal immigration authorities'] involvement in employer-employee struggles."<sup>282</sup> Despite their lack of teeth and inconsistent enforcement,<sup>283</sup> the MOUs show that federal agencies consider federal employment policies as part of immigration enforcement.

In sum, subfederal employer-sanctions laws may conflict with IRCA because they conflict with IRCA's integration of federal employment policy concerns. In particular, these subfederal laws are in conflict with IRCA's incorporation of Title VII's employment policy goal to protect against national-

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for unauthorized immigrants in good faith when making hiring choices, or they knowingly hire unauthorized immigrants and face all of the limitations imposed by labor and employment law."). Similarly, after a federal immigration raid of a hotel during an ongoing labor dispute, federal authorities allowed the workers to remain in the United States for the duration of the dispute. See Kimberly Hayes Taylor, *Illegal Workers Get To Stay in U.S.*, MINNEAPOLIS STAR TRIB., Apr. 26, 2000, at 1B. *But cf.* *Montero v. INS*, 124 F.3d 381, 385 n.4 (2d Cir. 1997) ("The [MOU] in no way suggests that the INS believes that undocumented aliens should be shielded from deportation simply because they are engaged in a labor dispute.").

278. See Kim, *supra* note 15, at 272-73 ("[I]mplementation of the MOU is discretionary and does not prohibit immigration enforcement in cases where there are labor disputes in progress."); Nessel, *supra* note 228, at 385 (stating that the MOU "fails because it contains no enforcement mechanism").
279. See Kim, *supra* note 15, at 272-73; Nessel, *supra* note 228, at 385-86. Because enforcement requires "voluntary worker complaints . . . the refusal of the INS to significantly restrict its involvement in labor disputes results in the de facto exclusion of undocumented workers from the protection of federal and state labor laws." Wishnie, *supra* note 140, at 518.
280. See, e.g., *Velequez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997).
281. See Wishnie, *supra* note 140, at 521.
282. Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390 (2004).
283. See, e.g., Smith & Ruckelshaus, *supra* note 267, at 592 (referring to "studies of the policy [that] show that [the MOU] has not been uniformly enforced").

origin discrimination and FLSA's goal to ensure that workers get "a fair day's pay for a fair day's work."<sup>284</sup>

#### V. FEDERAL ACTORS AS *IMMPLOYMENT*-LAW MEDIATORS

Some may ask whether subfederal employer-sanctions laws would be viable if state and local governments were to amend their laws such that they mimic IRCA entirely. Undoubtedly, such changes would go a long way in ameliorating the conflicts between federal employment law and workplace-based immigration enforcement, covered in Parts III and IV.<sup>285</sup> Nonetheless, here this Article proposes arguments for why, even if these subfederal laws were amended to copy all aspects of the federal employer-sanctions law (including its antidiscrimination protections, complaint procedures, and appropriations to the DOL), subfederal employer-sanctions laws should still be voided.

It is possible that these subfederal laws are also in conflict with congressional intent to exclude subfederal governments from the role of mediating tensions between workplace-based immigration enforcement and federal employment policy goals. As Part IV illustrated, Congress placed federal actors in the role of mediating between immigration policy goals and employment policy goals in a number of ways. Because subfederal actors make the enforcement decisions pursuant to subfederal employer-sanctions laws, they are undoubtedly in the role of mediating (or ignoring) any potential tensions between immigration enforcement and the federal workplace rights of employees. Future scholarship should consider Congress's intent in this regard. Nonetheless, even if Congress did not intend to preempt subfederal governments from this mediating role, there is an important policy reason to keep subfederal governments from mediating conflicts between immigration law and employment law.

Simply stated, only federal actors can adequately negotiate ongoing tensions between workplace-based immigration enforcement and *federal* employment law policy goals. State and local authorities cannot consistently replicate how the federal government would resolve every potential conflict between workplace immigration enforcement and the enforcement of federal employment policies.<sup>286</sup> Professor Hiroshi Motomura's persuasive argument that federal immigration law enforcement is contingent and discretionary supports this

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284. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks omitted).

285. For an argument that local laws that "track" federal immigration law requirements should not be preempted, see Schuck, *supra* note 79, at 80.

286. In other contexts, the federal government balances its immigration regulatory interests with other federal interests. For instance, the federal government often considers national security and foreign policy more generally when it regulates immigration. See Wishnie, *supra* note 77, at 528.

point.<sup>287</sup> Federal immigration authorities, according to Motomura, consider a wide and varying array of factors in their enforcement decisions.<sup>288</sup> State and local governments cannot adequately reproduce this contingent and discretionary process of deciding whether, when, and how to enforce immigration at the workplace.

Subfederal governments are often responding to a different set of circumstances and therefore would not consistently come to the same conclusions as the federal government. As Motomura asserts, “It is crucial not only *who* picks enforcement targets, but also *who* allocates resources, and *who* balances enforcement against competing concerns like inappropriate reliance on race or ethnicity.”<sup>289</sup> From a policy standpoint, the federal government is simply in the best position to weigh the sometimes-competing interests of federal employment laws, which promote uniform and broad enforcement nationally to avoid the creation of subclasses of workers, and immigration regulation in the workplace.<sup>290</sup>

## CONCLUSION

The rise of *immigration* law since the federal government brought immigration enforcement into the workplace in 1986 poses a serious Supremacy Clause question about whether federal employment laws (namely FLSA and Title VII) impliedly preempt subfederal employer-sanctions laws. This Article’s new implied-preemption framework addresses this previously overlooked question. It establishes that four subfederal workplace-based immigration laws, and those that are like them, are unconstitutional because they conflict with fundamental federal employment policy goals to protect employees from employment discrimination and to encourage valid employee-initiated complaints for the benefit of employees more broadly. Thus, if one is in doubt about whether federal immigration law preempts subfederal employer-sanctions laws, consideration of federal workplace law’s preemptive effects clarifies that federal law does, indeed, preempt these laws.

In addition, this Article further elaborates why we should consider the joint preemptive effect of the two federal statutory regimes that subfederal employer-

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287. See Motomura, *supra* note 47, at 2060-65.

288. See *id.*

289. *Id.* at 2064 (emphases added).

290. Even though immigration enforcement and employment enforcement overlap, they do not always compete with each other. For an argument that workplace-law enforcement helps the federal government’s immigration policy goals, see Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT’L L. & COM. REG. 483, 495 (2002), contending that “increase[d] wage and hour and safety and health enforcement to ensure the safety of all workers” will deter employer use of undocumented workers and adding that workers who participate in these enforcement efforts need to be assured that they “will not be turned over to the INS” as a result.

sanctions laws implicate: federal immigration law and federal employment law. This hybrid *immemployment*-law preemption framework shows that subfederal employer-sanctions laws may conflict with Congress's intent to promote federal employment policy as part of IRCA. In other words, they conflict with IRCA's employment policies. It thereby adds weight to the arguments in favor of preemption of subfederal immigration regulation in the workplace. Finally, this Article proposes an additional rationale for voiding subfederal laws, which applies regardless of whether they mirror IRCA's language. Subfederal actors are simply not in a position to adequately mediate potential tensions between immigration-law priorities and *federal* employment-law priorities.

This Article brings fundamental federal employment policy goals out of the shadows and into constitutional analyses of subfederal employer-sanctions laws. It demonstrates that scholars, courts, states, and municipalities debating the constitutionality of subfederal employer-sanctions laws should not just consider federal immigration law; they should also consider federal employment policy goals.<sup>291</sup> While this Article's primary focus is on preemption analyses, it has policy implications as well. The tensions between workplace-based immigration regulation and federal workplace protections for employees, exposed here, deserve policymakers' attention as they contemplate so-called comprehensive immigration reform.<sup>292</sup>

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291. It is beyond the scope of this Article, but the conflict between subfederal employer-sanctions laws and federal employment law's promotion of employee-initiated complaints may violate the First Amendment of the Constitution. The First Amendment's Petition Clause states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. Professor Michael Wishnie has persuasively argued that "law enforcement policies that deter noncitizens from reporting" FLSA and Title VII violations may violate the First Amendment right to petition the government. Wishnie, *supra* note 229, at 213 n.105. He contends that IRCA's enforcement scheme is constitutionally suspect because it deters potential plaintiffs from reporting workplace-law violations. *Id.* at 213. As Section III.B of this Article illustrates, Congress has clearly set up an intricate reporting scheme with FLSA and Title VII. State and local efforts to expand the employer-sanctions regime and workplace-based immigration enforcement threaten to block these channels of communication further. These subfederal laws are especially suspect in light of the First Amendment's Petition Clause because they do not even have the same inter-agency coordination or minimal safeguards (such as employment-discrimination protections and DOL appropriations) as IRCA.

292. See Ruben Navarrette, Jr., *Why America Needs More Guest Workers*, SAN DIEGO UNION-TRIB., Dec. 21, 2008, at F-3 ("Comprehensive immigration reform is a three-legged stool: enhanced border enforcement; earned legalization for the undocumented; and guest workers for U.S. employers to fill jobs that Americans won't do.").

