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# The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights

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# The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights

## **Abstract**

In recent years, California has served as the primary laboratory for policy experimentation related to unauthorized immigrant workers' rights. No other state, to date, has advanced comparable policy initiatives that preserve state-provided workers' rights regardless of immigration status. Through close examination of two open Supremacy Clause questions under California's Agricultural Labor Relations Act, the article illustrates that states can, as a constitutional matter, and should, as a policy matter, serve as laboratories for unauthorized immigrant worker rights. Exploring the outer boundaries of state action in this area is particularly compelling given the significant labor force participation of unauthorized immigrants in low-wage jobs in the United States, given the disproportionate labor rights violations experienced by this population and given thirty years of federal legislative inaction on comprehensive immigration reform.

## **Keywords**

California, immigrant workers, immigrant workers' rights, labor rights, immigration reform

## **Disciplines**

Immigration Law | Labor and Employment Law | Labor Relations

## **Comments**

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# The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights

Kati L. Griffith\*

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## TABLE OF CONTENTS

INTRODUCTION .....	1281
I. OPEN SUPREMACY CLAUSE QUESTIONS UNDER CALRA.....	1286

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A.	<i>Can California Provide Unauthorized Farmworkers with Lost Wages to Remedy an Employer's CALRA Violation Regardless of Immigration Status?</i> .....	1287
B.	<i>Can California Limit the Effects of Employer Inquiries into Immigration Status During CALRA Enforcement Proceedings?</i> .....	1290
II.	THE IMPLIED OBSTACLE PREEMPTION FRAMEWORK.....	1293
III.	THE STRENGTH OF CALIFORNIA'S POLICE POWERS .....	1295
A.	<i>State Employment Laws Emanate from Police Powers</i> .....	1295
B.	<i>The State's Interest in Reducing Immigration Status Effects on Worker Rights</i> .....	1297
C.	<i>The State's Interest in Regulating Agricultural Labor Relations</i> .....	1303
D.	<i>Exclusion from Federal Protection Amplifies State Interest</i> .....	1309
IV.	THE WEAKNESS OF THE FEDERAL–STATE TENSION .....	1315
A.	<i>IRCA's Plain Language and Supremacy Clause Jurisprudence</i> .....	1316
B.	<i>IRCA's Legislative History</i> .....	1317
	CONCLUSION.....	1321

## INTRODUCTION

State and local efforts to prohibit the employment of unauthorized immigrant workers have proliferated<sup>1</sup> and have come under intense constitutional scrutiny.<sup>2</sup> In the last five years, the U.S. Supreme Court has twice engaged in Supremacy Clause analyses to consider whether federal immigration law conflicted with, and thus preempted, state initiatives to curb unauthorized immigration through workplace-based regulations.<sup>3</sup>

In both *Chamber of Commerce v. Whiting* and *Arizona v. United States*, the Court acknowledged the federal government's broad power in the area of immigration<sup>4</sup> but allowed some state regulation. For example, the Court upheld Arizona's law suspending employers' licenses to do business when employers knowingly employ unauthorized immigrants.<sup>5</sup>

These court battles — both involving laws passed by the State of Arizona — and the scholarship grappling with them, focus on the relationship between federal immigration law and state initiatives

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<sup>1</sup> See NAT'L CONF. OF STATE LEG., REPORT ON 2015 STATE IMMIGRATION LAWS 8 (Feb. 3, 2016), <http://www.ncsl.org/research/immigration/report-on-2015-state-immigration-laws.aspx> (reporting that states enacted twenty immigration-related laws in 2015 that targeted employment issues).

<sup>2</sup> See Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 155 (2012) (referencing proliferation of subfederal laws “targeting so-called illegal immigrants”); Kati L. Griffith, *Discovering “Immemployment” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 390-92 (2011) [hereinafter *Discovering “Immemployment” Law*].

<sup>3</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2497, 2518-19 (2012) (“To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute [S. B. 1070],” which states its purpose as to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”); *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 600, 607 (2011) (“Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens.”).

<sup>4</sup> *Arizona*, 132 S. Ct. at 2498, 2510 (referring to the federal government's “broad, undoubted power over the subject of immigration . . .”); *Whiting*, 563 U.S. at 588, 611 (acknowledging that the power to regulate immigration is a federal power).

<sup>5</sup> *Whiting*, 563 U.S. at 609-11 (concluding that federal immigration law did not conflict with Arizona's licensing law or mandatory E-Verify requirement for employers). Cf. *Arizona*, 132 S. Ct. at 2509 (striking down many aspects of the law but rejecting facial challenge to Arizona's requirement that state officials “conduct a[n] [immigration] status check during the course of an authorized, lawful detention or after a detainee has been released”).

aimed at reducing unauthorized immigration to the United States.<sup>6</sup> While it is clear the federal government has plenary power to regulate immigration, it is not clear how far a state can go to influence immigration patterns through welfare, criminal and employment laws. As Juliet Stumpf has elucidated, federal immigration law's recent encroachment into areas of traditional state action have blurred constitutional boundaries.<sup>7</sup>

This article examines the relationship between federal immigration law and state initiatives on the other side of the policy spectrum: state efforts that seek to protect, rather than penalize, unauthorized immigrant workers and their authorized counterparts. As this article will reveal, states have wider constitutional latitude in this area than it might seem initially. *Whiting* and *Arizona* reviewed various types of state-level regulations that touched on state interests, but focused on reducing unauthorized immigration. In contrast, state efforts to reduce immigration effects on state-provided worker protections emanate more exclusively from the states' significant police power interests in providing protections for workers. Thus, a powerful presumption against preemption is at play and Supremacy Clause jurisprudence instructs courts not to preempt these initiatives unless the federal government expressed a clear intent to do so.<sup>8</sup>

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<sup>6</sup> See, e.g., Leticia Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. REV. 1505, 1557 (2015) [hereinafter "*Wrongfully*" *Documented Worker*] (arguing that state identity theft laws that affect immigration regulation "are arguably unconstitutional"); 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, 392-95 (2010) (focusing on subfederal attempts to limit employer hiring of the unauthorized); Christopher M. Sherwood, Comment, *Threading the Needle: State Immigration-Related Employment Laws Surviving a Federal Preemption Analysis*, 12 WYO. L. REV. 253, 254 (2012) (focusing on the preemption of state immigration laws); Jaime Walter, Comment, *Congressional Preemption of Work-Authorization Verification Laws: A Narrower Approach to Defining the Scope of Preemption*, 45 U.S.F. L. REV. 289, 289-90 (2010) (focusing on the preemption of state immigration laws).

<sup>7</sup> See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1602 (2008) ("[S]tate laws that attempt to influence the movement of noncitizens us[e] traditional state police powers over employment, welfare, and crime. These laws raise tensions between the outward-looking justifications for federal control over immigration law — uniformity in foreign policy and the border-centered role of the federal government in defining the national identity — and the domestic role of the states in exercising their police powers. Now that federal immigration law has invaded those traditional areas of state concern, there is friction with the constitutional preemption rule reserving governance of immigration law to the federal government.").

<sup>8</sup> There is only one circumstance where federal immigration law expresses a clear

While Arizona has been at the forefront of state-level laws intended to reduce unauthorized immigration, California has been at the forefront of state-level attempts to ameliorate the ways that a worker's immigration status can negatively affect the state's enforcement of worker protections. For instance, California in 2002 passed a law that explicitly made an employee's immigration status "irrelevant" to the state's enforcement of state-provided labor and employment protections.<sup>9</sup> More recently, in 2013, California law made it illegal for an employer to threaten to report an employee's immigration status in response to an employee's attempt to enforce his or her state-provided worker rights. Such an act now constitutes "immigration-related retaliation" in violation of California law.<sup>10</sup>

The scope of states' ability to serve as laboratories of unauthorized immigrant workers' rights involves the interaction between federal and state regulatory spheres. It also implicates the sometimes complementary, sometimes contradictory, relationship between immigration and employment regulation. Indeed, immigration and employment regulation have become so interconnected in some areas that the author has written extensively on the emergence of a new hybrid area of law — "immployment" law.<sup>11</sup>

Most notably, a 2002 Supreme Court decision raised a number of questions about the relationship between immigration and employment regulation. In *Hoffman Plastic Compounds v. NLRB*, the Court considered whether the National Labor Relations Act's (NLRA's) lost wages (backpay) remedy was available to an unauthorized employee who experienced a federal labor law violation when he was fired for engaging in union organizing.<sup>12</sup> The *Hoffman* Court held the National Labor Relations Board (NLRB) could not award backpay to this unauthorized employee, who had violated the

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intent to preclude states from providing a protection to an unauthorized immigrant worker who experiences a violation of state workplace law — states cannot require employers to reinstate unauthorized employees back into their jobs as a remedy for the violation as that would directly conflict with federal immigration law's requirement that employers do not knowingly employ unauthorized immigrants. See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 505 (2004) (explaining that courts cannot order reinstatement of an employee that is not legally entitled to work in the U.S.).

<sup>9</sup> CAL. CIV. CODE § 3339(b) (West 2016).

<sup>10</sup> S.B. 666, 2013 Leg. Serv., Reg. Sess. (Cal. 2013).

<sup>11</sup> See, e.g., Griffith, *Discovering "Immployment" Law*, *supra* note 2, at 405; 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, 128-29 (2009).

<sup>12</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140-41 (2002).

Immigration Reform and Control Act (IRCA) by using fraudulent documents to gain employment.<sup>13</sup> In coming to this conclusion, the Court noted that providing backpay to an unauthorized employee in this circumstance would condone the employee's prior immigration law violations and encourage future immigration law violations.<sup>14</sup> This decision gave birth to myriad *immigration* law questions about federal immigration law's effects on state efforts to provide labor and employment protections, regardless of a worker's immigration status.

To take a deep dive into this complex tangle of regulatory interactions, this article focuses on one case study in particular: the scope of California's ability to protect the collective action rights of unauthorized immigrant workers in agriculture. Agriculture is a strategic focal point as it is the sector with the highest concentration of unauthorized workers. By some estimates, California is home to one-fourth of the population of unauthorized immigrants nationwide.<sup>15</sup> The U.S. Department of Labor estimates that in fiscal years 2010–2012, sixty percent of California's hired crop workers were unauthorized immigrants.<sup>16</sup>

There are several open Supremacy Clause questions about federal immigration law's effects on California's ability to protect the collective action rights of unauthorized immigrant farmworkers through its Agricultural Labor Relations Act (CALRA) of 1975.<sup>17</sup> Unlike national labor law passed during the New Deal era, CALRA granted some of the nation's most exploited workers, farm laborers, with rights to engage in many forms of workplace-based collective activity to try to improve their working conditions free of employer retaliation.<sup>18</sup>

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<sup>13</sup> *Id.* at 148-49.

<sup>14</sup> *Id.* at 151.

<sup>15</sup> SENATE RULES COMM., SENATE FLOOR ANALYSIS, S.B. 666, 2013 Reg. Sess., at 5-6 (Cal. 2013) [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0651-0700/sb\\_666\\_cfa\\_20130423\\_090638\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0651-0700/sb_666_cfa_20130423_090638_sen_comm.html).

<sup>16</sup> DANIEL CARROLL ET AL., U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL SURVEY, tbl. 1 (1989–2012).

<sup>17</sup> See generally Herman M. Levy, *The Agricultural Labor Relations Act of 1975 — La Esperanza de California para el Futuro*, 15 SANTA CLARA L. REV. 783 (1975) (describing the political context that gave rise to the CALRA); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 UC DAVIS L. REV. 1057, 1059 (2000) (arguing “farm workers need unions because they suffer from low pay, deplorable working conditions, racialized and gendered exploitation, intentional pitting of workers against each other, depending upon their ethnicity, and oversupply of labor spurred by statute”).

<sup>18</sup> The Agricultural Labor Relations Act's “Declaration of Policy” provides:

Part I of the article will describe the specific open Supremacy Clause questions under CALRA<sup>19</sup>: namely does IRCA forbid California (1) from providing unauthorized farmworkers with lost wages for the period after the employer discovers an employee's unauthorized immigration status to remedy an employer's CALRA violation and (2) from limiting the effects of an employer's private inquiries into immigration status during CALRA enforcement proceedings?

Part II will describe the proper Supremacy Clause analytical framework for addressing these questions. It will highlight the need to specify the particular nature of the state's police powers at issue when engaging in Supremacy Clause analysis. It will also note the importance of gauging Congress' intent to the extent that it is possible as well as the degree of tension necessary for courts to find that federal law impliedly preempts state law.

Parts III and IV will apply the Supremacy Clause analytical framework to the two specific preemption questions described in Part I. Part III will highlight the strength of California's police powers interest in the area of reducing immigration status effects on state-provided workplace protections in general, and in particular in the area of agricultural relations. Part IV will demonstrate that federal immigration law does not express an intent to restrict a state from ameliorating the ways that immigration status negatively affects its ability to enforce protections for all workers in its state. It will make the case that, if anything, state attempts to reduce immigration status effects on worker rights helps, rather than hurts, federal policy

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It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

CAL. LAB. CODE § 1140.2 (Deering 2016); see Cal. Legislature, ASSEMBLY DAILY J., May 20, 1975, at 31-32, <http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/DailyJournal/1975/Volumes/756133e.pdf> (stating that Gordon Duffy "voted in support of SB 1 [CALRA] since in my opinion it is essential that we resolve the problem of employer-employee relationships in agriculture").

<sup>19</sup> This article focuses on IRCA preemption questions, as those are the questions arising from recent developments. It does, however, make reference to reasons why the NLRA does not preempt CALRA in Part III.

interests in reducing incentives for employers to hire unauthorized workers.

Through close examination of two open Supremacy Clause questions under California's Agricultural Labor Relations Act, the overall aim of the article is to illustrate that states can, as a constitutional matter, and should, as a policy matter, serve as laboratories for unauthorized immigrant worker rights. Exploring the outer boundaries of state action in this area is particularly compelling given the significant labor force participation of unauthorized immigrants in low-wage jobs in the United States and given thirty years of federal legislative inaction on comprehensive immigration reform.

### I. OPEN SUPREMACY CLAUSE QUESTIONS UNDER CALRA

Before describing the specific Supremacy Clause preemption questions related to CALRA, a brief primer on Supremacy Clause analysis is in order. The Supremacy Clause communicates that federal law is "supreme"<sup>20</sup> and preempts state regulation that conflicts with federal law. Congressional intent is the ultimate touchstone of all Supremacy Clause or preemption analyses.<sup>21</sup> To determine whether Congress intended to preempt state regulatory initiatives, the Court has developed four different types of preemption analyses. As this Part will elaborate upon, there are three types of preemption analyses that are not relevant here: express preemption, field preemption and impossibility preemption. The open questions under CALRA that will be discussed in subsequent Parts of the article involve the fourth type of preemption analysis: implied obstacle preemption.

The first category of preemption analysis instructs that federal law expressly preempts state law when it flatly states that it intends to supersede state law.<sup>22</sup> IRCA has an express preemption provision, but that provision only prohibits state and local ("subfederal") laws that impose sanctions on employers who employ unauthorized workers and exempts licensing-type laws from its reach.<sup>23</sup> State labor and

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<sup>20</sup> U.S. CONST. art. VI, cl. 2.

<sup>21</sup> *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

<sup>22</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

<sup>23</sup> IRCA's express preemption provision "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." 8 U.S.C. § 1324a(h)(2) (2012). This provision is silent about its intended effects on state workplace rights for unauthorized immigrants. See *Madeira v.*

employment laws do not impose sanctions on employers for employing unauthorized workers. Instead, they impose legal obligations on employers for violating state labor and employment laws vis-à-vis their authorized and unauthorized employees. Thus, express preemption is not applicable to the circumstances at issue in this article because IRCA's plain language says nothing about its intended effects on workplace protections for unauthorized immigrants who fall within a state's definitions of "employee."

In the second preemption category, referred to as field preemption, federal law trumps state law in an implied manner when it covers a regulatory field so extensively that courts interpret this as an implied message that states are not welcome. Field preemption is not at issue either because federal law by no means blankets the entire regulatory field of workplace protections for unauthorized immigrant workers.

The third and fourth categories of preemption analyses relate to scenarios when courts can imply that the federal law preempts state law due to a conflict between federal and state law. In the third category, federal law forecloses state law when it is impossible to simultaneously comply with state and federal law ("impossibility preemption"). In the fourth situation, federal law preempts state law when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"<sup>24</sup> ("obstacle preemption").

As the next subsection will discuss, impossibility preemption is not an issue here because it is possible for an employer to comply with IRCA's prohibitions against employing unauthorized immigrants and to comply with CALRA requirements to pay lost wages to remedy a CALRA violation. Thus, the primary preemption framework at issue in the article, which will be further fleshed out in Part II, relates to implied obstacle preemption.

A. *Can California Provide Unauthorized Farmworkers with Lost Wages to Remedy an Employer's CALRA Violation Regardless of Immigration Status?*

Given the description of the *Hoffman* decision in the Introduction a reader may ask: If backpay for unauthorized employees is not available in the national labor law context because it may conflict with federal

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Affordable Hous. Found., Inc., 469 F.3d 219, 231-32 (2006) (discussing IRCA's preemption provision and recognizing that it "is silent . . . as to its preemptive effect on any other state or local laws").

<sup>24</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

immigration law, then why might it be available in the state agricultural labor law context?<sup>25</sup> The applicability of *Hoffman*'s analyses to the state law context is limited because the U.S. Supreme Court was not constrained by the more deferential Supremacy Clause analytical lens and the presumption against federal preemption of state law.<sup>26</sup> Instead, the Court was interpreting two federal laws (IRCA and the NLRA) in order to avoid a potential tension. As Part II will elaborate upon, when considering IRCA's effects on state-provided workplace protections, Supremacy Clause jurisprudence requires courts to presume that the state law is valid unless Congress' intent to preempt the state law is "clear and manifest."<sup>27</sup>

A 2014 case from California's highest court, *Salas v. Sierra Chemical Co.*, also illustrates the open backpay question under CALRA.<sup>28</sup> In *Sierra*, the court addressed whether an unauthorized employee, who experienced a violation of California's protections against employment discrimination based on disability could receive lost wages to remedy his employer's state law violation. It found *Hoffman* immaterial because it had not applied a Supremacy Clause analytical framework to the issues. It held that California could award lost wages for the period before the employer learned of the employee's unauthorized status. It also held, however, that federal immigration law preempted

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<sup>25</sup> It is again important to note that while there is an open question about federal immigration law's impact on state-provided lost wages remedies, it is undisputed that federal immigration law preempts states from issuing a reinstatement remedy when unauthorized immigration status is known. Such a remedy would require an employer to hire an unauthorized worker to the job he or she held prior to an illegal dismissal. As the article will outline in Part IV, such an act would be in direct conflict with federal prohibitions against an employer's knowing employment of unauthorized workers. *See infra* Part IV.

<sup>26</sup> *See Hoffman Plastic Compound, Inc., v. NLRB*, 535 U.S. 137, 147-48 (2002). California's highest court also viewed *Hoffman* as an inapplicable case because it did not involve the Supremacy Clause. *See, e.g., Salas v. Sierra Chem. Co.*, 327 P.3d 797, 804-05 (Cal. 2014). Some have argued that *Hoffman* should have considered an "implied repeal" framework to consider the relationship between federal labor law and federal immigration law and that its failure to do so makes it inapplicable to implied preemption analysis. *See, e.g., Nhan T. Vu & Jeff Schwartz, Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 53-55 (2008).

<sup>27</sup> *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting that the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (quoting *Hillsborough Cty. v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985)).

<sup>28</sup> *Salas*, 327 P.3d at 800.

California from awarding lost wages for the period after the employer's "discovery" of the employee's unauthorized immigration status.<sup>29</sup>

Focusing on impossibility preemption, *Salas* erroneously concluded that it was impossible for the state to award lost pay to an unauthorized employee for the period after the employer's discovery of the employee's immigration status without a direct conflict with federal immigration law. In the *Salas* court's words:

any state law award that compensates an unauthorized alien worker for loss of employment during the post-discovery period directly conflicts with the federal immigration law prohibition against continuing to employ workers whom the employer knows are unauthorized aliens.<sup>30</sup>

This conclusion falsely assumes that requiring an employer to pay lost wages for the post discovery period "would impose liability" on an employer "for not performing an act . . . expressly prohibited by federal law."<sup>31</sup> In this way, the *Salas* court's impossibility preemption analysis conflated an employer's payment of lost wages (not expressly prohibited by IRCA) with an employer's employment of that individual (expressly prohibited by IRCA).

Nothing in IRCA's language prohibits an employer from paying wages to an unauthorized employee for work they did not perform (lost wages) in order to remedy that employee for the employer's violation of state labor and employment law. IRCA sanctions employers for knowingly hiring unauthorized immigrants,<sup>32</sup> requires that employers verify the work authorization status of its employees<sup>33</sup> and sanctions employees who gain employment through the use of fraudulent documents.<sup>34</sup>

Consistent with the view that the lost wage remedy does not conflict with IRCA, courts have widely agreed that IRCA does not prohibit employees from getting lost wages under state health and safety laws to remedy a past injury.<sup>35</sup> In contrast, IRCA would prohibit

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<sup>29</sup> *Id.* at 803.

<sup>30</sup> *Id.* at 807.

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

<sup>32</sup> 8 U.S.C. § 1324a(a)(1)(A) (2012).

<sup>33</sup> *Id.* § 1324a(b)(1)(A).

<sup>34</sup> *Id.* § 1324c(a).

<sup>35</sup> *See, e.g.,* *Sanchez v. Dahlke Trailer Sales, Inc.*, No. A15-1183, 2016 WL 3129352, at \*1-2 (Minn. Ct. App. June 6, 2016) (holding "the Immigration Reform Control Act (the IRCA) does not prohibit an undocumented worker from receiving workers' compensation benefits under the Act"). *See generally* Oliver T. Beatty, Comment, *Workers' Compensation and Hoffman Plastic: Pandora's Undocumented Box*,

unauthorized workers from getting their job back, reinstatement, and unemployment insurance benefits because they are solely connected to the acquisition of future work, rather than remedying a workplace injustice that occurred in the past.

Simply stated, the impossibility doctrine does not apply because it is *possible* for an employer to follow federal law (and not knowingly employ an unauthorized employee) and to provide state labor and employment law remedies to an employee regardless of employer knowledge of immigration status.<sup>36</sup> The Supreme Court has consistently expressed that impossibility preemption is applicable only when compliance with both federal law and state law “is a physical impossibility.”<sup>37</sup>

What is left open, and will be examined further on in this article, is the question of whether the provision of backpay to an unauthorized immigrant worker after the employer discovers immigration status stands as an obstacle to federal immigration law purposes or enforcement mechanisms.

*B. Can California Limit the Effects of Employer Inquiries into Immigration Status During CALRA Enforcement Proceedings?*

To what extent can California limit the effects of employer inquiries into immigration status during worker protection enforcement proceedings without running afoul of federal immigration law? California’s 2002 law, referenced in the Introduction and discussed further in Part III, forbids an employer from using the formal discovery process to make inquiries about an employee’s immigration status unless the employer shows “clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.”<sup>38</sup> California’s 2013 immigration-related retaliation protections restrict employers from threatening to notify immigration authorities, from requesting different identification documents from some workers

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55 ST. LOUIS U. L.J. 1211, 1214 (2011) (“[T]he application of *Hoffman Plastic* in workers’ compensation cases is misplaced and perversely incentivizes employers to both further violate immigration laws by employing undocumented workers and ignore workplace safety standards, endangering both legal residents and the undocumented claimants.”).

<sup>36</sup> For a pre-*Salas* and *Hoffman* CALRB case finding no actual conflict with federal law, see *Rigi Agric. Servs.*, 11 A.L.R.B. No. 27, at 15-17 (1985).

<sup>37</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>38</sup> CAL. CIV. CODE § 3339(b) (West 2016); CAL. LAB. CODE § 1171.5(b) (West 2016).

and from doing more than the federal immigration verification requirements mandate.

These state statutes express an intent to reduce immigration status effects on state-provided protections for workers. They do not, however, explicitly speak to the question of what kinds of private acts employers may engage in to discover immigration status during enforcement proceedings. *Salas* did not address this issue either. By distinguishing between the period before an employer discovers immigration status, pre-discovery, and the period after the employer discovers immigration status, post-discovery, however, the *Salas* court has given employers heightened incentives to “discover” immigration status.

Thus, a lurking issue is the extent to which the California Agricultural Labor Relations Board (CALRB), which is the agency in charge of enforcing CALRA, can limit the effects of private employer inquiries into immigration status. To what extent does federal immigration law limit the CALRB’s ability to disregard the relevance of immigration status or, depending on the facts, find that an employer’s inquiries into immigration status were done in retaliation for the enforcement of the worker’s rights?

The CALRB has not yet directly confronted the question of the extent to which it can limit employer inquiries into immigration status during enforcement proceedings, although it has raised the issue in *dicta*. In its 2015 *California Artichoke and Vegetable Corp. v. Hernandez* decision, the CALRB bifurcated the unfair labor practice and compliance proceedings in a case allegedly involving unauthorized immigrant employees.<sup>39</sup> The charging parties claimed that the employer committed an unfair labor practice when it disciplined workers for leaving the job site because of unsafe working conditions.<sup>40</sup> The CALRB reserved the question of whether the employer’s hiring of a private investigator to determine the employee’s immigration status in the face of the CALRB complaint was a separate unfair labor practice under state law.<sup>41</sup>

The issue of employer inquiries into immigration status during enforcement proceedings is unresolved in the federal private sector labor law context as well. The U.S. Supreme Court has acknowledged that an employer’s call to immigration authorities in retaliation for collective activity protected by the National Labor Relations Act

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<sup>39</sup> Cal. Artichoke & Vegetable Corp., 41 A.L.R.B. No. 2, 27-28 (2015).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 27-28.

(NLRA) can constitute an unfair labor practice. In its *Sure-Tan v. NLRB* decision, the Court, in 1984, concluded that the employer violated the NLRA because his call to immigration authorities was an act of retaliation in response to the employees' protected concerted activities.<sup>42</sup> Since then, the prosecutorial arm of the NLRB has also enforced the NLRA in the face of employer threats to call immigration in retaliation for employee engagement in protected concerted activity.<sup>43</sup> Moreover, it has suggested that it may be an NLRA violation when the employer's inquiries into immigration status are "for purposes of harassing the employee," but the NLRB has not fully adjudicated the issue to date.<sup>44</sup> In situations involving other federal employment law protections under the Fair Labor Standards Act and Title VII of the Civil Rights Act, courts have often limited immigration status inquiries during discovery to avoid creating a "chilling effect"<sup>45</sup> on employee plaintiffs.<sup>46</sup>

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<sup>42</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894-96 (1984); see also 29 U.S.C. § 158(a)(3) (2012) (stating that it is an unfair labor practice if an employer discriminates "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

<sup>43</sup> See Laura D. Francis, *Immigrant Workers Claim Retaliation, Seek Executive Action to Prevent More*, DAILY LAB. REP., Aug. 4, 2014, at A6, Bloomberg BNA No. 149 (reporting an NLRB regional director alleged that a D.C.-area construction contractor threatened immigration-related retaliation if immigrant workers voted in favor of a union); see also Memorandum OM 11-62 from NLRB Assoc. Gen. Counsel to All Reg'l Dirs., Officers in Charge, and Resident Officers (June 7, 2011) (noting that U and T visas are sometimes available for immigrant workers when employers engage in "egregious conduct" such as "interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities").

<sup>44</sup> Memorandum OM 12-55 from NLRB Assoc. Gen. Counsel to All Reg'l Dirs., Officers-in-Charge and Resident Officers (May 4, 2012) ("Regions may consider whether a charged party commits an independent violation of Section 8(a)(1) where, without evidence . . . it issues Board subpoenas for the employee's work authorization documents for purposes of harassing the employee."); see also *Flaum Appetizing Corp.*, 357 N.L.R.B. No. 162, at 5 (Dec. 30, 2011) (concluding that employers cannot engage in an immigration status "fishing expedition" during proceedings and must plead specific facts about immigration status).

<sup>45</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (upholding the district court's protective order against immigration status discovery as "justified because the substantial and particularized harm of the discovery — the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights — outweighed [employer's] interests in obtaining the information").

<sup>46</sup> In a study of decisions from 2002 to 2012 that considered immigration law effects on FLSA and Title VII claims (among others), Professor LeRoy finds that most courts have denied discovery into immigration status during court proceedings. See Michael H. LeRoy, *Remedies for Unlawful Alien Workers: One Law for the Native and for*

Thus, the precise open implied obstacle preemption question here is whether a CALRB's finding — either to disregard the relevance of a worker's immigration status or to find that the employer's attempts to discover immigration status were retaliatory — would stand as an obstacle to federal immigration law.

## II. THE IMPLIED OBSTACLE PREEMPTION FRAMEWORK

Recall that in the implied obstacle preemption context, federal law will preempt state regulatory action when the state's actions are an obstacle to Congress' objectives.<sup>47</sup> There are two inquiries that inform this preemption analysis. To what extent is the presumption against preemption of state law operating? And, if the presumption is operating, is the tension between state and federal law significant enough to overcome the presumption?

It is widely acknowledged that when states are acting out of their historic police powers, courts must employ a presumption against federal law preemption of state law. In regards to police power, the Court has noted that states have “great latitude” when they are legislating to protect “the lives, limbs, health, comfort, and quiet of all persons.”<sup>48</sup> In these circumstances, Congress' intent to supersede these state regulations must be “clear and manifest” for preemption to occur.<sup>49</sup> Thus, in the absence of a clear intent expressed by federal law, courts should presume that the state regulation is constitutional.<sup>50</sup> While some scholars critique the presumption against preemption for

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*the Stranger Who Resides in Your Midst? An Empirical Perspective*, 28 GEO. IMMIGR. L.J. 623, 646-48 (2014) (citing relevant cases).

<sup>47</sup> E.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>48</sup> *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted); see also *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 456-57 (2016) (“This general police power permits states to legislate, and sometimes litigate, on behalf of the safety and health of those within its borders.”).

<sup>49</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

<sup>50</sup> See *id.*

its jurisprudential inconsistencies,<sup>51</sup> the Court undoubtedly commonly embraces it as a central canon of statutory construction.<sup>52</sup>

Once it has been established that the state is truly acting out of a historic police power interest, there is more to the inquiry. It is also important to gauge the depth of the state's interest in a particular area. As the strength of the state interest increases, the strength of the presumption against preemption increases. Actually, the Court has impliedly acknowledged this spectrum, sometimes referring to a "strong" presumption against preemption.<sup>53</sup> Thus, Part III considers the strength of California's interest to regulate in ways that reduce immigration status effects on state provided workplace rights.

Even when the presumption against preemption is operating, the question still remains whether the federal law's intent to preempt is so clear that we can imply federal preemption of state authority. Determining whether Congress' intent to preempt is "manifest" is a difficult question to answer when we are looking at what the federal government's statutory scheme is implying. To figure this out in the obstacle preemption context, the Court tells us to consider the statutory language as well as other indicators of a statute's "purpose and intended effects."<sup>54</sup>

Beyond this, however, in obstacle preemption cases, we should also inquire about the severity of potential tensions between federal and state law. Some scholars have contended that deciphering Congressional intent can be elusive when a statute is silent on an issue and have called for a focus on federal-state law tension rather than federal intent. Thomas Merrill, for instance, stresses that the inquiry should focus on whether the tensions between federal and state authority are "sufficiently severe to warrant the displacement of state law in light of all relevant factors that bear on this decision."<sup>55</sup>

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<sup>51</sup> See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (critiquing that as a matter of constitutional structure, there should be no presumption against or in favor of preemption); Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 HAMLINE L. REV. 727, 727 (2009) (critiquing case law on the presumption against preemption as "contradictory and convoluted").

<sup>52</sup> See, e.g., *Wyeth*, 555 U.S. at 565; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Bartlett v. Mut. Pharm. Co.*, 659 F. Supp. 2d 279, 305 (D. N.H. 2009).

<sup>53</sup> See *Cipollone v. Liggett Grp.*, 505 U.S. 504, 523 (1992); see also *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 687 (2d Cir. 1996) (referring to a "strong presumption" against preemption).

<sup>54</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>55</sup> Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 743 (2008).

A focus on the severity of tension is consistent with Court cases that have asserted that speculative obstacles between federal and state law are not sufficient to merit preemption. In *English v. General Electric Co.*, for example, the Court found that the argument that a state tort remedy would work against federal interests to have people move forward expediently in cases under the federal nuclear safety whistle blower law was “too speculative.”<sup>56</sup> Similarly, in *Hillsborough County v. Automated Medical Laboratories, Inc.* the Court concluded that if the effects of the state law on federal law are not direct or substantial, preemption is not warranted.<sup>57</sup> Part IV will use both the intent and tension analytical lenses to consider the degree of conflict between the Immigration Reform and Control Act and California’s initiatives to reduce immigration status effects.

### III. THE STRENGTH OF CALIFORNIA’S POLICE POWERS

#### A. *State Employment Laws Emanate from Police Powers*

California’s interest in reducing immigration status effects on state-provided workplace protections undoubtedly emanates from its historic police powers’ interest in regulating employment.

It is uncontroversial that state employment regulations spring from historic police powers. In 1911, the Court described the police power function to regulate employment relations in the following manner:

In dealing with the relation of employer and employed, the [state] legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.<sup>58</sup>

Courts have even characterized state employment laws that touch upon immigration status issues as emanating from states’ police powers authority. In its 1976 *De Canas* decision, the Court concluded that a state law that imposed sanctions on employers who employed unauthorized immigrants was squarely within the state’s “broad authority . . . to regulate the employment relationship to protect

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<sup>56</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72, 89-90 (1990).

<sup>57</sup> See *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721-22 (1985).

<sup>58</sup> *Chi., Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 570 (1911); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937).

workers within the State.”<sup>59</sup> Even though IRCA now explicitly preempts *De Canas*-style state employer sanctions laws,<sup>60</sup> the Court still cites *De Canas* to make the general proclamation that employment regulations emanate from the states’ historic police powers even if they relate to immigration.<sup>61</sup>

Similarly, the Court’s 2012 *Arizona v. United States* decision characterized Arizona’s misdemeanor for unauthorized work as touching upon the state’s historic police powers to regulate employment, even though one of the goals was to reduce unauthorized immigration.<sup>62</sup> Recently, the Ninth Circuit characterized Arizona’s identity theft regulations in the employment arena as regulations that “have effects in the area of immigration” but that have police power connections.<sup>63</sup>

Given that state employment initiatives aimed at reducing illegal immigration emanate from a state’s historic police powers, California’s initiatives to reduce immigration status effects on state-provided worker rights squarely fall within its police power authority over employment regulation. A state’s rationale in this context is that when unauthorized workers have fewer protections than their authorized counterparts, working conditions for everyone in the state are threatened.

The remaining subsections of this part illustrate the depth of California’s police powers interest, and thus the power of the presumption, in the particular circumstances at issue in this article. In the last two decades, California has exhibited a strong interest in reducing immigration status effects on state-provided worker protections in general. Since the enactment of CALRA in 1975, California has also demonstrated a committed interest in regulating

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<sup>59</sup> *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples.”).

<sup>60</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012).

<sup>61</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. at 2503; *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 588 (2011).

<sup>62</sup> *Arizona v. United States*, 132 S. Ct. at 2497, 2503 (quoting purpose of Arizona law as intended to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States”).

<sup>63</sup> *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016). It rejected a facial challenge to the law but is likely to face continued Supremacy Clause challenges moving forward. See Laura D. Francis, *Immigrants Vie to Reinstate Ban on Arizona ID Theft Laws*, DAILY LAB. REP., May 17, 2016, at A-4, Bloomberg BNA No. 95.

agricultural labor relations in particular, due to the history of labor relations in California and the federal government's decision to affirmatively put the regulation of agricultural relations in the hands of the states.

B. *The State's Interest in Reducing Immigration Status Effects on Worker Rights*

California's interest in reducing the negative effects of immigration status on worker protections is consistent with a growing literature exposing the negative effects of restrictive immigration measures on worker protections for authorized and unauthorized workers alike. California has addressed immigration status effects through its 2002 law enacted in the wake of *Hoffman* and its 2013 immigration-retaliation protections, both referenced above.

Various scholars have illuminated the ways that the exclusionary aspects of federal immigration law<sup>64</sup> have had negative effects on employees' collective activity and workplace protections.<sup>65</sup> Unauthorized immigrant workers occupy a contradictory and somewhat confusing legal terrain that inhibits their ability to fully take advantage of worker protections. On the one hand, unauthorized immigrant workers have not been granted permission to be legally present in the United States under federal immigration law. On the other hand, they are in the U.S. and are providing labor to U.S. employers. The act of providing labor gives rise to employer obligations and protections for workers as workers.

Some employers exploit this "legal limbo" to intimidate unauthorized workers who seek to improve their working conditions. Other times, even when employers do not use immigration status as a stick to intimidate, workers often fear that coming forward to their

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<sup>64</sup> Leticia Saucedo's work helpfully reminds us that exclusion of some individuals is only one principle of immigration law. Other aspects of our immigration regime promote humanitarian principles. See, e.g., Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 *FORDHAM URB. L.J.* 303 (2010).

<sup>65</sup> For a discussion and cited sources regarding immigration law's effects on workplace protections, see, for example, Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 *CORNELL J.L. & PUB. POL'Y* 611, 630-35 (2012). See also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 *L. & SOC. INQUIRY* 561, 594 (2010) (contending that unauthorized immigration status reduces the likelihood that a worker will make a claim regarding workplace rights because of fears of deportation, a short-term view of a worker's employment experience in the U.S. and a hesitance to rock the boat because the workplace is a place of "belonging" in the U.S).

employer or to a government agency. They fear that seeking to redress workplace grievances might make them — or their family members — vulnerable to immigration law repercussions.<sup>66</sup> Kathleen Kim has declared that immigration policies that criminalize workers foster conditions for “workplace coercion” which lead to “workplace exploitation.”<sup>67</sup>

Scholars also contend that unauthorized status foments a constant fear of deportation, producing a chilling effect on workers’ reporting of wage violations and workplace threats to their health and personal safety.<sup>68</sup> Unauthorized immigrant workers undoubtedly tend to experience lower labor standards than their authorized counterparts. Empirical analyses from the Legalized Population Survey<sup>69</sup> and other studies illustrate that unauthorized immigrants receive lower wages, experience working conditions that are more dangerous, and suffer higher incidences of workplace violations.<sup>70</sup>

Consistent with these views, California made its first major legislative attempt to reduce immigration status effects on state-provided worker rights in 2002. In the wake of the Court’s *Hoffman* decision, California passed a law which explicitly made “immigration status irrelevant for the enforcement of state labor, employment, civil rights and employee housing laws.”<sup>71</sup> This state law, sometimes colloquially referred to as the “*Hoffman* fix” law, clarified that remedies under state law, such as backpay, should be provided

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<sup>66</sup> See Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL’Y 641, 657 (2012).

<sup>67</sup> Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1561-62 (2015).

<sup>68</sup> See, e.g., Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 779-86 (2013); Gleeson, *supra* note 65, at 594.

<sup>69</sup> See Sherrie A. Kossoudji & Deborah A. Cobb-Clark, *Coming out of the Shadows: Learning About Legal Status and Wages from the Legalized Population*, 20 J. LAB. ECON. 598, 622-24 (2002).

<sup>70</sup> See, e.g., ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* (2009); Matthew Hall & Emily Greenman, *The Occupational Cost of Being Illegal in the United States: Legal Status, Job Hazards, and Compensating Differentials*, 49 INT’L MIGRATION REV. 406, 431 (2015); Matthew Hall, Emily Greenman & George Farkas, *Legal Status and Wage Disparities for Mexican Immigrants*, 89 SOC. FORCES 491, 499-502 (2010).

<sup>71</sup> Maria Pabon Lopez, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina’s Legal System*, 15 IND. INT’L & COMP. L. REV. 301, 332 (2005) (referring to S.B. 1818, which was codified at CAL. CIV. CODE § 3339 (2016)).

regardless of immigration status.<sup>72</sup> Further, the bill prohibited inquiry into a person's immigration status in proceedings to enforce state laws, except where there is "clear and convincing evidence" that the inquiry regarding immigration is necessary under federal immigration law.<sup>73</sup>

The legislative history behind this state enactment reveals that California passed the bill in response to fears and widespread reporting that employer responses to the *Hoffman* decision would negatively affect California's ability to enforce the protections it provides to workers within the state.<sup>74</sup>

In October 2013, California legislated again to reduce the perceived negative effects of immigration status on the enforcement of state-provided worker rights. These series of provisions show California's interest in ensuring that workers report concerns about workplace rights violations without fear of retaliation or employer intimidation through the use of immigration-related threats.<sup>75</sup> The legislative history of California's 2013 immigration retaliation laws shows that the state recognized the significant labor force participation of immigrants<sup>76</sup> — especially in the low-wage labor market<sup>77</sup> — and was

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<sup>72</sup> See SENATE THIRD READING, S.B. 1818, 2001–2002 Reg. Sess., at 1 (Cal. 2002).

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* at 1, 3; S. RULES COMM., SENATE FLOOR ANALYSIS, S.B. 1818, 2001–2002 Reg. Sess. (Cal. 2002); ASSEMB. COMM. ON LABOR & EMP'T, ASSEMBLY COMMITTEE ANALYSIS, S.B. 1818, 2001–2002 Reg. Sess. (Cal. 2002); S. COMM. ON LABOR & INDUS. RELATIONS, SENATE COMMITTEE ANALYSIS, S.B. 1818, 2002 Reg. Sess. (Cal. 2002). For various reports about *Hoffman's* negative effects, which were cited in the legislative history, see Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. TIMES (Apr. 22, 2002), <http://articles.latimes.com/2002/apr/22/business/fi-workers22>.

<sup>75</sup> See 2013 Cal. Stat. ch. 732, § 1(e)–(j). These bills were A.B. 263, A.B. 524, and S.B. 666. These new laws provide California workers who seek to exercise their workplace rights with strengthened protections against employer retaliation, including specific protections for immigrant workers. The laws went into effect on January 1, 2014. S.B. 666 adds section 244 to the Labor Code, adds sections 494.6 and 6103.7 to the Business and Professions Code (B&P), and amends sections 98.6 and 1102.5 of the Labor Code. A.B. 263 (which has a few identical provisions to S.B. 666) adds section 1019 to the Labor Code.

<sup>76</sup> See S. RULES COMM., SENATE FLOOR ANALYSIS, S.B. 666, 2013–2014 Reg. Sess., at 6 (Cal. 2013) (noting the 2.6 million unauthorized immigrants and that one-fourth of the unauthorized population nationwide resides in California).

<sup>77</sup> *Id.* (noting that most unauthorized immigrants work in low-wage jobs in agriculture, construction, manufacturing, and service industries where they are at greater risk of exploitation and violations of the workplace rights). The analysis drew from a study of low-wage work in Los Angeles. This study showed that more than 75 percent of unauthorized workers had worked without being paid and 85 percent did not receive overtime pay in the previous week. RUTH MILKMAN ET AL., WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 45, 48 tbl.7 (2010), <https://escholarship.org/uc/item/>

concerned about reports that immigration status was impeding the enforcement of state-provided workplace protections.<sup>78</sup>

Specifically, California's protections from immigration retaliation provided for the suspension of business licenses for employers who threaten to report the immigration status of a worker or the worker's family members in retaliation for the worker's attempt to exercise his or her workplace rights.<sup>79</sup> According to the law, exercising workplace rights includes the filing of a complaint, informing others about workplace rights or seeking information about an employer's compliance with state-provided workplace protections.<sup>80</sup> It also made it an "unfair immigration-related practice" for an employer to request documentation that goes beyond what is required by federal law.<sup>81</sup>

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<sup>78</sup> See S. RULES COMM., SENATE FLOOR ANALYSIS, S.B. 666, 2013–2014 Reg. Sess., at 7. Moreover, the author of the bill expressed its purpose to empower workers to exercise their rights without fear of immigration status retaliation. SENATE THIRD READING, S.B. 666, 2013–2014 Reg. Sess., at 3 (Cal. 2013).

<sup>79</sup> CAL. BUS. & PROF. CODE § 494.6 (West 2016) (stating a business license may be subject to suspension if the employer violates § 244 of the Labor Code). Under California Labor Code section 244(b), the report or a threat to report an employee's citizenship or immigration status or that of a family member because the employee has exercised a right under the California Labor Code is prohibited. CAL. LAB. CODE § 244(b) (West 2016). A court may order the suspension of an employer's business license if it is found to have engaged in a retaliatory "unfair immigration-related practice" against a person exercising a right protected under the California Labor Code or a local workplace ordinance. *Id.* § 1019 (West 2016).

<sup>80</sup> *Id.* § 1019(a)(1)-(3) (West 2016).

<sup>81</sup> See *id.* It builds in a presumption that an employer violates the provision if it takes this act within 90 days of the worker's exercise of his or her rights. *Id.* § 1019(c) (West 2016). An employee or other person subject to an unfair immigration-related practice may bring a civil action for equitable relief and any damages and penalties, and may recover attorneys' fees and costs. *Id.* § 1019(d)(1) (West 2016). In addition, S.B. 666 includes discipline for attorneys who threaten to report immigrant workers involved in an administrative or civil employment suit. An attorney may be disciplined, suspended, or disbarred by the California State Bar if he or she reports or threatens to report the suspected immigration status of an individual (or family member) or a witness in an administrative or a civil proceeding because the individual has exercised a right related to employment. CAL. BUS. & PROF. CODE § 6103.7 (West 2016). There is also California Labor Code section 1024.6, which prohibits an employer from retaliating against or terminating an employee that updates his or her "personal information," unless the changes are directly related to skill set, qualification or knowledge required for the job. CAL. LAB. CODE § 1024.6 (West 2016). The statute appears to be "intended to prevent employers from discharging employees who update their immigration status, including social security numbers but it is not clear whether it also prohibits an employer from discharging the employee for originally providing false information." Erin Holyoke, *California Supreme Court Allows Undocumented Workers to Recover Damages in Discrimination Cases*, NIXON PEABODY (July 21, 2014), <http://www.nixonpeabody.com/>

California's deep public policy interest in reducing the effects of immigration status on state-provided workplace protections is also evidenced by the criminal provisions that California added to the 2013 immigration retaliation laws.<sup>82</sup> Threats to report immigration status in order to obtain property may constitute criminal extortion in serious cases.<sup>83</sup> Given that the law is relatively new, it is not clear yet how it may apply to an employer's private inquiries into immigration status during proceedings to enforce state workplace protections. In *Cal. Artichoke and Vegetable Corp. v. Hernandez*, referenced in Part I, the CALRB noted in *dicta* that the employer's hiring of a private investigator to discover immigration status may violate California's immigration retaliation law, but did not rule on the issue.<sup>84</sup>

California's interest in reducing immigration status effects in the CALRA context are particularly compelling given the legacy of CALRA. Even though many referred to CALRA as *La Esperanza de California* (the Hope of California) when California enacted it in 1975, it has not led to widespread worker organizing or unionization in California's agricultural sector. Moreover, many farmworkers still face extremely challenging working conditions due to such things as long hours, low wages, unpaid wages for work they perform, sexual harassment and assault, pesticide exposure and other health and safety concerns on California's farms.<sup>85</sup>

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<sup>82</sup> Criminalizing behavior illustrates deep public interest. The Court has acknowledged that criminal as well as civil enforcement measures can highlight the "private-public character" of a right. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709-10 (1945).

<sup>83</sup> AB 524 clarifies that a threat to report any individual's immigration status or suspected immigration status in order to obtain his or her property may constitute criminal extortion. CAL. PENAL CODE § 519 (West 2016) (codified from Assemb. B. 524 (Cal. 2013)). The penalty for criminal extortion is imprisonment of up to one year and/or a fine of up to \$10,000. *Id.* § 524. Extortion is the obtaining of property from another person, with his or her consent, through the use of wrongful force or fear. *Id.* § 518.

<sup>84</sup> *Cal. Artichoke & Vegetable Corp.*, 41 A.L.R.B. No. 2, 26-28 (2015).

<sup>85</sup> See, e.g., *Bristol-Myers Squibb Foundation Awards Eight Grants Totaling Nearly \$11.5M to Make Lung and Skin Cancer Screening, Care More Accessible in High-Risk U.S. Communities*, BUS. WIRE (Feb. 1, 2016), <http://www.businesswire.com/news/home/20160201005019/en/> ("Although farmworkers in the U.S. are exposed to living and working conditions that double their risk of developing melanoma and other skin cancers, access to skin cancer prevention, screening and specialty care and services are difficult to obtain."); *California's Working Poor Grow Poorer*, PASADENA STAR NEWS (Dec. 18, 2015, 10:47:18), <https://www.bloomberglaw.com/s/news/1f5938b95e7d2355776d7c48117ae731/document/O0UJUUIH8N6?headlineOnly=false&highlight=california+AND+%28farmworker+OR+%26quot%3Bfarm+worker%26quot%3B%29+AND+organiz%2>; Alex Darocy,

Scholars and commentators have put forth a variety of theories to explain why worker organizing is so scarce and union density is so low in California's agricultural sector. These theories include high turnover rates on farms, low investment and decisions of unions in organizing this sector<sup>86</sup> and changes in the make-up of the agricultural sector, such as a move away from direct employment, that make it

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*Community Members in Watsonville Demonstrate in Support of Driscoll's Berry Boycott*, SANTA CRUZ INDYMEDIA (Jan. 3, 2016, 8:16 PM), <https://www.indybay.org/newsitems/2016/01/03/18781454.php>; Robert Digitale, *Sonoma County Business Leaders Told Economy is 'Vibrant,' as Protesters Disagree*, PRESS DEMOCRAT (Jan. 27, 2016), <http://www.pressdemocrat.com/home/5136958-181/sonoma-county-business-leaders-told?artslide=0>; Julie Fidler, *Agricultural Workers Diagnosed with Cancer Sue Monsanto*, NAT. SOC'Y (Oct. 2, 2015), <http://naturalsociety.com/u-s-agricultural-workers-diagnosed-with-cancer-sue-monsanto/>; Paul Koberstein, *EPA Mulls Ban on Nation's Most Heavily Used Insecticide*, SALON (Jan. 30, 2016, 12:00 PM PDT), [http://www.salon.com/2016/01/30/why\\_the\\_potential\\_epa\\_ban\\_on\\_the\\_nations\\_most\\_heavily\\_used\\_insecticide\\_pins\\_farmers\\_between\\_a\\_rock\\_and\\_a\\_hard\\_place\\_partner/](http://www.salon.com/2016/01/30/why_the_potential_epa_ban_on_the_nations_most_heavily_used_insecticide_pins_farmers_between_a_rock_and_a_hard_place_partner/) (documenting farmworker exposure to insecticides); Anna Lappé & Joanna Lo, *The Best Way to Give Thanks? How About a Raise?*, TIME (Nov. 26, 2015), <http://time.com/4122947/the-best-way-to-give-thanks-how-about-a-raise/> ("It's not just poor wages; it's also dangerous working conditions. Workers on conventional farms are exposed to a barrage of toxic chemicals, many of which have been associated with a variety of cancers and hormonal and neurological problems. Studies published by the California Cancer Registry have found that farmworkers have higher risks of lymphomas and leukemia, as well as brain, stomach, prostate and cervical cancers."); Esther Yu Hsi Lee, *A Whole Lot of California Farmworkers Are Landing in the Hospital. Why?*, THINK PROGRESS (Sept. 3, 2015), <http://thinkprogress.org/immigration/2015/09/03/3697705/temperatures-rise-farmworkers-heat-illness/>; Cora Lewis, *Child Farmworkers Banned from Handling Pesticides, But Not Tobacco*, BUZZFEED (Sept. 28, 2015, 3:36 PM), <http://www.buzzfeed.com/coralewis/child-farmworkers-banned-from-handling-pesticides#.xawzPNjD6>; Tracie McMillan, *Activists Demand a Bill of Rights For California Farm Workers*, N.P.R. (Jan. 29, 2016, 11:35 AM EST), <http://www.npr.org/sections/thesalt/2016/01/29/464758284/activists-demand-a-bill-of-rights-for-california-farm-workers> (noting concerns about payment of wages, sexual harassment and violence, the need for rest breaks, and health risks due to pesticide exposure and other dangers); Sonia Narang, *Why Are Kids Going Hungry in One of California's Most Productive Farming Regions?*, P.R.I. (Jan. 28, 2016, 8:30 AM EST), <http://www.pri.org/stories/2016-01-28/why-are-kids-going-hungry-one-california-s-most-productive-farming-regions>; José R. Padilla & David Bacon, *Protect Female Farmworkers*, N.Y. TIMES (Jan. 19, 2016), [http://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html?emc=edit\\_tnt\\_20160119&nlid=67410322&ntemail0=y&r=1](http://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html?emc=edit_tnt_20160119&nlid=67410322&ntemail0=y&r=1); Claire Simonich, *Your Vegetables Are Grown by Exploited Labor*, HUFFINGTON POST: THE BLOG (Aug. 21, 2016), [http://www.huffingtonpost.com/claire-simonich/your-vegetables-are-grown\\_b\\_8016312.html](http://www.huffingtonpost.com/claire-simonich/your-vegetables-are-grown_b_8016312.html).

<sup>86</sup> See, e.g., Matt Garcia, *Cesar Chavez and the United Farmworkers Movement*, in OXFORD RESEARCH ENCYCLOPEDIA 1, 14 (2016); Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 277, 277-79 (Austin Sarat & Stuart Scheingold eds., 2006); Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California*, 32 POL. & SOC'Y 291 (2004).

more difficult to challenge the large food brands that drive the bulk of California's agricultural industry.

Philip Martin has persuasively argued that one of the primary, and too-often underappreciated, reasons that CALRA has not lived up to its potential as the Hope of California is due to the significant presence of the unauthorized immigrant workforce in the agricultural industry. The precarious nature of the unauthorized workforce over the last four decades has challenged organizing efforts.<sup>87</sup> Thus, California's police powers' interest in regulating agricultural labor relations in ways that reduce negative effects of unauthorized immigration status on CALRA's protections for worker organizing efforts is particularly salient.

### *C. The State's Interest in Regulating Agricultural Labor Relations*

California also has a strong police power interest to regulate California's agricultural labor relations in ways that reduce inequalities of bargaining power between employers and employees and in ways that ameliorate disruptive conflict between employers and employees in this sector. Recently, on September 12, 2016, Governor Brown signed legislation granting agricultural laborers the right to receive overtime premiums on the wages they receive when they work more than forty hours in one week.<sup>88</sup> As this subsection will illustrate, this recent change in California's overtime law echoes California's attempts, with CALRA, to provide rights to agricultural laborers that are comparable to workers' rights in other sectors.

As CALRA's language states, in 1975 it became "the policy of the State of California" not only to "protect" but also "to encourage" California's farmworkers' "full freedom of association."<sup>89</sup> This meant that the legislation needed to help keep them "free from the interference, restraint, or coercion of employers . . . [when engaging in] concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>90</sup>

This statement of policy, along with executive branch, legislative history and court interpretations of the need for CALRA illustrate

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<sup>87</sup> See PHILIP MARTIN, *IMPORTING POVERTY? IMMIGRATION AND THE CHANGING FACE OF RURAL AMERICA* 36-39 (2009).

<sup>88</sup> See Laura Mahoney, *California Overtime Bill for Agricultural Workers Becomes Law*, *DAILY LAB. REP.*, Sept. 12, 2016, at A-9, Bloomberg BNA No. 176 (referring to Assemb. B. 1066).

<sup>89</sup> CAL. LAB. CODE § 1140.2 (West 2016).

<sup>90</sup> *Id.*

California's strong police power interests in regulating California's agricultural labor relations. Moreover, soon after Californians elected Jerry Brown as their governor for the first time, he dedicated part of his January 6, 1975 inaugural address to the need for a farmworker relations bill in California.<sup>91</sup>

CALRA arose out of California's concern about farmworkers who had been left out of the NLRA's protections of collective activity in the workplace. It also emerged in response to concerns with rising tensions between growers and farmworkers and jurisdictional disputes between unions interested in organizing this sector.

CALRA exemplified a state's attempt to fill the gap left by the NLRA's exclusion of agricultural laborers. Herman Levy, one of the main architects of CALRA, noted that CALRA was the state's attempt to fill the NLRA's void.<sup>92</sup> California courts have often acknowledged that the state legislature explicitly intended to fill the hole left by the NLRA.<sup>93</sup> In a similar vein, at a May 12, 1975 hearing to consider the proposed bill (which would later become CALRA), one of the bill's drafters, Howard Berman, described the purpose of the bill as "an effort to correct an [egregious] omission of 40 years standing."<sup>94</sup>

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<sup>91</sup> See Edmund G. "Jerry" Brown, Governor of Cal., First Inaugural Address (Jan. 6, 1975), <http://governors.library.ca.gov/addresses/34-Jbrown01.html> ("And while we remove the special privileges of the few, we should not overlook the sacrifices of the many. It is time that we treat all workers alike, whether they work in the city or toil in the fields . . . I also believe it is time to extend the rule of law to the agriculture sector and establish the right of secret ballot elections for farm workers. The law I support will impose rights and responsibilities on both farm worker and farmer alike. I expect that an appropriate bill that serves all the people will not fully satisfy any of the parties to the dispute, but that's no reason not to pass it.").

<sup>92</sup> See Levy, *supra* note 17, at 783-85.

<sup>93</sup> See 29 U.S.C. §§ 151-159 (2012); *id.* § 152(3); *Pasillas v. Agric. Labor Relations Bd.*, 202 Cal. Rptr. 739, 745 (1984); see also CAL. LAB. CODE Div. 2, Pt. 3.5, Ch. 1 note (2017) (Legislative Intent); *Tex-Cal Land Mgmt., Inc. v. Agric. Labor Relations Bd.*, 595 P.2d 579, 584 (Cal. 1979) (noting that ALRA "is designed to provide agricultural workers with protection of their collective bargaining rights comparable to that provided nonagricultural workers by the NLRA[,] and that "the ALRA was patterned after the NLRA, with changes necessary to meet special needs of California agriculture.").

<sup>94</sup> *Hearing on A.B. 1533 Before Assemb. Comm. on Labor Relations*, 1975 Leg., 3d Ex. Sess. 2 (Cal. 1975) (statement of Rep. Howard Berman, Co-Author, CALRA). He went on to state:

In 1935, the Congress excluded agricultural workers from the protection of the National Labor Relations Act. As a result, farm workers in contrast to nearly every other employee in the private sector have been unable to use existing federal machinery to enforce their rights to bargain collectively, to obtain secret ballot elections, and to receive protection from interference and

California also had a strong interest in legislating in this area because labor relations had become extremely disruptive in the 1960s and 1970s. As the *Los Angeles Times* reported in 1975, CALRA was “designed to end 10 years of turmoil” in California’s agriculture industry.<sup>95</sup> In the early 1970s, a bitter dispute erupted between the United Farm Workers (UFW) and the Teamsters, two unions interested in representing California’s farmworkers for collective bargaining purposes.<sup>96</sup>

The UFW’s inspirational leader, Cesar Chavez, believed that contracts between growers and the Teamsters in the early 1970s<sup>97</sup> had been “sweetheart” agreements that did not give workers the opportunity to choose their own representation.<sup>98</sup> In February and March 1975, the UFW called public attention to the need for legislation in this area<sup>99</sup> when it engaged in a successful 110-mile march from San Francisco to the E & J Gallo Winery in Modesto, California.<sup>100</sup> By the time the marchers reached Modesto on March 1, more than 15,000 people had joined the march.<sup>101</sup> The bill was introduced on April 10, 1975 and the governor signed it into law on June 4, 1975.<sup>102</sup>

The legislative history of the proposed bill, which eventually became CALRA, illustrates California’s police powers interest in bringing labor relations peace to California’s agricultural sector.<sup>103</sup> Senator John

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coercion by either employers or unions in the free selection of a bargaining representative.

*Id.*

<sup>95</sup> Jerry Gilliam, *Assembly Sends Farm Bill to Brown for Signing*, L.A. TIMES, May 30, 1975, at B1.

<sup>96</sup> See Harry Bernstein, *Teamsters President Proposes Alliance with Growers Group*, L.A. TIMES, Dec. 13, 1972, at A1; Harry Bernstein, *Teamsters to Seek New Farm Pacts: Chavez Fight Seen*, L.A. TIMES, Dec. 14, 1972, at A3; *Teamsters End a Truce with Chavez’s United Farm Workers*, N.Y. TIMES, Dec. 15, 1972, at 33; *Teamsters Gain California Farms*, N.Y. TIMES, Apr. 16, 1973, at 40; Frank Del Olmo, *Teamsters Sign First Grape Pacts: Chavez Boycott Looms*, L.A. TIMES, Apr. 16, 1973, at A1.

<sup>97</sup> See Frank Del Olmo, *Chavez Forces Gather for Rally: Demonstrators at Gallo Aim for Farm Labor Law*, L.A. TIMES, Feb. 28, 1975, at 3.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*; Frank Del Olmo, *Chavez Union Marches to Back Winery Boycott*, L.A. TIMES, Feb. 25, 1975, at C1.

<sup>102</sup> See *Governor Signs Historic Farm Labor Legislation*, L.A. TIMES, June 5, 1975 at A3; *Sweeping Farm Labor Bill Introduced in Sacramento*, L.A. TIMES, Apr. 10, 1975 at 3.

<sup>103</sup> Rose Bird, California Secretary of Agriculture, for instance, noted that the bill “is an attempt to resolve a potentially volatile situation and to bring legitimacy, due

Dunlap, co-Author of CALRA, stated that California was attempting “to establish some initial ground rules to cover a situation of unrest that’s existed for many years.”<sup>104</sup> In a similar vein, when describing why he voted in favor of the legislation, Member Gordon Duffy expressed some urgency about legislating to “resolve the problem of employer–employee relationships in agriculture.”<sup>105</sup>

While CALRA was modeled after the NLRA, California intentionally included special features to address the particular nature of California’s agricultural sector. California courts have often acknowledged that the state legislature explicitly adapted it to the unique nature of the state’s agricultural context.<sup>106</sup> For instance, because of the jurisdictional disputes between the UFW and the Teamsters and allegations that some Teamsters unions were essentially company unions, California required designation of collective bargaining representatives solely through secret ballot election.<sup>107</sup> This

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process, and fair play to the agricultural fields of California.” *Hearing on AB 1533 Before Assemb. Comm. on Labor Relations*, 1975 Leg., 3d Ex. Sess. 4 (Cal. 1975) (statement of Rose Bird, Sec., Cal. Dept. of Agric.).

<sup>104</sup> *Hearing on S. Bill 1 Before the S. Indus. Labor Relations Comm.*, 1975 Leg., 3d Extraordinary Sess. 40 (Cal. 1975) (statement of Sen. Dunlap, Co-Author, CALRA).

<sup>105</sup> ASSEMB. JOURNAL, 3d Extraordinary Sess., at 31 (Cal. 1975), <http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/DailyJournal/1975/Volumes/756133e.pdf>. Moreover, during the November 1975 hearings reviewing the Act’s early implementation Chairman of the CALRB, Bishop Roger Mahony, reminded legislators of the purposes underlying CALRA. He noted that California is “truly in a transitional period — a time of moving away from ten years of bitterness, conflict and deep polarization to a new era of improved labor relations in our State’s agricultural industry. . . . The new law attempted to bridge the three-way cross fire with which we were all familiar. The law, with its strengths and weaknesses, sought to fill a vast void where no law or regulation had ever before existed.” *Review of the Implementation of the Alatorre–Zenovich–Dunlap–Berman Agricultural Labor Relations Act of 1975: Joint Hearing Before S. Comm. on Indus. Relations and Assemb. Comm. on Labor Relations*, 1975 Leg., Reg. Sess. 1, at 4 (Cal. 1975) (statement of Bishop Roger Mahony, Chairman, Agric. Labor Relations Bd.).

<sup>106</sup> See 29 U.S.C. § 152(3) (2012) (excluding agricultural laborer under the definition of ‘employee’); *Pasillas v. Agric. Labor Relations Bd.*, 202 Cal. Rptr. 739, 745 (1984); see also CAL. LAB. CODE Div. 2, Pt. 3.5, Ch. 1 note (2017) (Legislative Intent); *Tex-Cal Land Mgmt., Inc. v. Agric. Labor Relations Bd.*, 595 P.2d 579, 584 (Cal. 1979) (noting that ALRA “is designed to provide agricultural workers with protection of their collective bargaining rights comparable to that provided nonagricultural workers by the NLRA[,]” and that “the ALRA was patterned after the NLRA, with changes necessary to meet special needs of California agriculture.”).

<sup>107</sup> For instance, referring to this aspect of CALRA, Secretary Bird stated that “it was a strong feeling . . . that if you were going to bring some kind of resolution to the question of legitimacy, that if you allowed the employer to trigger the election mechanism, there would always be raised the question of whether or not he coerced the employees and forced an election upon employees in some way.” *Hearing on S. Bill*

is unlike the NLRA, which allows employers to voluntarily recognize a collective bargaining representative through a showing of majority status via authorization cards.<sup>108</sup>

Another special feature of agricultural relations that California acknowledged was the high mobility of this workforce. Given the nature of farming, farmworkers often move from farm to farm, making it difficult to determine which employees are eligible to vote in a union representation election in some contexts.<sup>109</sup> In the May 21, 1975 hearing, for example, committee members and interested parties discussed this issue.<sup>110</sup> Republican Senators and those representing growers' interests were concerned that the migratory nature of farm work would allow workers who were not truly a part of the bargaining unit to vote.<sup>111</sup> In response, Secretary Bird retorted that the CALRB was set up to be an expert in this area and its members are "going to recognize the specific needs of agriculture."<sup>112</sup>

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*1 Before the S. Indus. Labor Relations Comm.*, 1975 Leg., 3d Extraordinary Sess. 51 (Cal. 1975) (statement of Rose Bird, Sec., Cal. Dept. of Agric.).

<sup>108</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 579 (1969).

<sup>109</sup> CALRA legislators also modeled the legislation to acknowledge the extreme variation in the workforce depending on the harvest season. For instance, during a May 27, 1975 hearing Senator Dunlap explained that election petitions may only be filed when the number of employees is more than 50% of "peak employment," which is the time of year when the most employees are working. *Hearing on S. Bill 1 Before the S. Ways & Means Comm.* 1975 Leg., 3d Extraordinary Sess. 23-24 (Cal. 1975) (statement of Sen. Berman quoting California Labor Code sections 1156.3(a)(1), 1156.4, "in this connection peak agricultural employment for the prior season shall alone not be basis for such determination, but rather the Board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the state of California and upon all other relevant data").

<sup>110</sup> See *Hearing on S. Bill 1 Before the S. Indus. Labor Relations Comm.*, 1975 Leg., 3d Extraordinary Sess. 11-36 (Cal. 1975).

<sup>111</sup> See *id.* at 26.

<sup>112</sup> Secretary Bird also said, "we can sit here all day and conjure up all sorts of scare stories about who is going to be able to vote and who is not going to be able to vote. We have five reasonable people sitting on that board who recognize that in agriculture we're dealing with a different industry than we are, perhaps, in the automobile industry." *Id.* at 29-30 (statement of Rose Bird, Sec., Cal. Dept. of Agric.); see also *Hearing on S. Bill 1 Before the S. Ways & Means Comm.*, 1975 Leg. 3d. Extraordinary Sess.16 (statement of Sec. Bird quoting Cal. Lab. Code § 1153(c)) (Cal. 1975) (responding to Assemblyman Z'berg's question about whether farmworkers need to pay union dues at two farms by calling attention to Section 1153(c) of the bill, which states "[n]o employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker during any calendar month, shall be required to pay dues to another labor organization by virtue of similar employment during such month"). These questions about voter eligibility continued after the enactment of CALRA. In November 1975 the Senate Committee on Industrial

Unauthorized immigrant farmworkers were explicitly discussed very minimally. During the November 1975 hearings reviewing CALRA's early implementation, Assembly Member Kenneth L. Maddy suggested that CALRA should be amended to prohibit unauthorized workers from voting for or against a labor union.<sup>113</sup> This suggested amendment did not receive traction with the other legislators. As part of the proceedings, the CALRB defended its ruling that unauthorized workers can vote if they are "employees" under CALRA. Chairman of the CALRB, Bishop Roger Mahony explained that the CALRB's position was that "if they're on the payroll period, they meet the qualification [to vote]."<sup>114</sup> He went on to note that "as long as these are farm workers out there who wish to express a view on joining a union or not, and they're employees, it seems to be that they should be allowed to vote and participate."<sup>115</sup> The CALRB's General Counsel made a similar argument, pointing out that figuring out a worker's immigration status is "an extremely complex question" and noting that a state labor relations agency is not "equipped as a forum to make that determination." Instead, the agency can and should consider who

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Relations and the Assembly Committee on Labor Relations held a hearing to address the "confusion" and "serious problems" evident in the first months of operation of CALRA. *Review of the Implementation of the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975: Joint Hearing Before S. Comm. on Indus. Relations and Assemb. Comm. on Labor Relations*, 1975 Leg., Reg. Sess. 1, at 1 (Cal. 1975) (statement of Sen. George N. Zenovich, Chairman of Joint Hearing and Co-Author of CALRA). The committee expressed a concern that some of the workers petitioning for representation elections were not employees of that farm. *Review of the Implementation of the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975: Joint Hearing Before S. Comm. on Indus. Relations and Assemb. Comm. on Labor Relations*, 1975 Leg., Reg. Sess. 2, at 258 (Cal. 1975). Regional Director of the CALRB Fresno office acknowledged the challenges and noted that one of the difficulties is due to the role of labor contractors as intermediaries between farmworkers and growers. He noted that sometimes growers call the regional office and say "[l]isten, I don't know who is working here but my contractor is so and so." *Id.* at 280. He went on to suggest that the CALRB works with the contractors, who are required to keep records, in these cases to help sort out any confusion.

<sup>113</sup> See *Review of the Implementation of the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975: Joint Hearing Before S. Comm. on Indus. Relations and Assemb. Comm. on Labor Relations*, 1975 Leg., Reg. Sess. 1, at 34-35 (Cal. 1975) (statement of Assemb. Kenneth L. Maddy, Member, Assemb. Comm. on Labor Relations).

<sup>114</sup> *Id.* at 35 (statement of Bishop Roger Mahony, Chairman, Agric. Labor Relations Bd.).

<sup>115</sup> *Id.*

is an “employee” and adjudicate the rights that emanate from that designation.<sup>116</sup>

In conclusion, the context giving rise to CALRA illustrates the state’s deep interest in reducing inequalities of bargaining power and disruptive conflict in the agricultural sector.

#### *D. Exclusion from Federal Protection Amplifies State Interest*

Federal exclusion from collective action rights is another indicator of California’s strong police power interest in regulating California’s agricultural labor relations in ways that reduce inequalities of bargaining power.

In 1935, the U.S. Congress affirmatively put the regulation of farmworker organizing in the hands of the states. While there are a number of theories for why the federal government excluded agricultural workers from the National Labor Relation Act’s (NLRA’s) protections in 1935, including racism and political pragmatism to get the bill passed, the reasons stated in the NLRA’s legislative history had to do with concerns about regional variation in the size and nature of the agricultural sector. Even if the “real reason” farmworkers were excluded was for political expediency reasons (to get Southern legislators to sign onto the bill), in the author’s view that is just further justification for giving the states’ wide police powers latitude to provide rights to this vulnerable sector of workers.

While the Court and commentators have often noted the extreme breadth of the NLRA’s preemption of subfederal initiatives in the area of labor relations,<sup>117</sup> the NLRA does not preempt state-level regulation of farmworker organizing. Congress affirmatively put the regulation of farmworker organizing in the hands of the states. On its face, the NLRA’s definition of “employee” excludes “any individual employed as an agricultural laborer,” among other categories of workers.<sup>118</sup>

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<sup>116</sup> *Id.* at 112 (statement of Walter Kintz, General Counsel, Agric. Labor Relations Bd.).

<sup>117</sup> *See, e.g.,* Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n, 427 U.S. 132, 149 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *see also* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154 (2011) (“It would be difficult to find a regime of federal preemption broader than the one grounded in the . . . (NLRA).”). *See generally* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 32-37 (2009).

<sup>118</sup> 29 U.S.C. § 152(3) (2012). Indeed, the NLRB describes agricultural laborers as one of the groups that are excluded from NLRB jurisdiction. *See Jurisdictional Standards*, NLRB, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Nov. 18, 2016) (“The following employers are excluded from NLRB

When Congress intended to leave excluded groups free of subfederal regulation, it said so explicitly. Section 14(a) of the NLRA states that employers subject to the NLRA should not be compelled to deem supervisors (another group explicitly excluded from the NLRA's definition of employee) "as employees for the purpose of any law, either national or local, relating to collective bargaining."<sup>119</sup> The U.S. Supreme Court has interpreted Section 14(a) to restrict state governments from providing supervisors with collective activity rights.<sup>120</sup>

There is no such prohibitory language with respect to the agricultural exclusion in the NLRA's language. As the U.S. Court of Appeals for the Ninth Circuit characterized it, "[w]e find nothing in the [NLRA] to suggest that Congress intended to preempt such state action by legislating for the entire field. Indeed, we draw precisely the opposite inference from Congress's exclusion of agricultural employees from the Act."<sup>121</sup>

Moreover, the reports, debates and hearings that make up the NLRA's legislative history support the notion that Congress intended to leave the regulation of farmworker organizing to the states. The author's comprehensive review of the NLRA's legislative history revealed that regulation of collective activity among agricultural laborers was not a salient federal interest for the New Deal legislators who considered the legislation.

Instead, the NLRA's legislative history starkly illustrates that the federal legislative authority that passed the NLRA was motivated by the plight of industrial workers, barely mentioning agricultural laborers.<sup>122</sup> As a Minnesota federal district court observed in the

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jurisdiction . . . [e]mployers who employ only agricultural laborers.").

<sup>119</sup> 29 U.S.C. § 164(a) (2012).

<sup>120</sup> See *Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 189-90 (1965) (interpreting section 14(a) as explicitly preempting state laws that protect collective activity among supervisors). States can, however, restrict collective activity among supervisors. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 657-62 (1974) (interpreting section 14(a) as allowing states to restrict collective activity among supervisors).

<sup>121</sup> *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982); see also *NLRB v. Comm. of Interns & Residents*, 566 F.2d 810, 815 n.5 (2d Cir. 1977) (stating that NLRA exclusion of agricultural workers provides states with rights to regulate in this area); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) (stating the same); *United Farm Workers Org. Comm. v. Super. Ct. of Monterey Cty.*, 483 P.2d 1215, 1221 (Cal. 1971) (en banc) (indicating that state regulation of agricultural workers' collective activity is not preempted).

<sup>122</sup> See Karen S. Koziara, *Collective Bargaining in Agriculture: The Policy Alternatives*, 24 LAB. L. J. 424, 425-26 (1973); LeRoy, *supra* note 46 (describing paucity of

1970s, the “paucity” of NLRA legislative history on the agricultural exclusion communicates that “neither Congress nor virtually anyone else was much concerned with the problems of agricultural labor.”<sup>123</sup> It then concluded that the NLRA Congress intended to let Minnesota and the other states regulate agricultural worker collective activity in any ways they saw fit within their police power authority.<sup>124</sup>

Despite the paucity, the NLRA’s legislative history illustrates that the stated reasons for excluding agriculture were that this was an area of regulation better left to the states. Admittedly, the reasons legislators vocalize might not be the “real reasons” they voted in favor of a bill. Many scholars have made compelling arguments that the exclusion of agriculture had more to do with racism<sup>125</sup> or political pragmatism (winning support from Southern Democrats for New Deal legislation) than anything else.<sup>126</sup>

Nonetheless, as Justice Breyer has said, the “personal motives” of legislators “do not change the purpose of the bill’s language.”<sup>127</sup> As a

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legislative history on agricultural workers); Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1951-56 (1966) (describing the same).

<sup>123</sup> *Willmar Poultry Co.*, 430 F. Supp. at 578; see Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 162, 164-65 (2005) (citing *Willmar Poultry Co.*, 430 F. Supp. at 576, and stating that agriculture is one of those “situations involving local regulations that ‘touch and concern’ the complex employment relationship” and are thus left in the hands of the states); see also Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL’Y 599, 612 n.67 (2004) (“The exclusion of agricultural workers from the NLRA permits states to regulate their collective labor activity. . . . States, by contrast, are not permitted to regulate the collective labor activity of groups as to which Congress or one of its designated agencies has affirmatively desired an unregulated labor market, such as supervisors.”).

<sup>124</sup> See *Willmar Poultry Co.*, 430 F. Supp. at 578.

<sup>125</sup> See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 98 (2011) (“[S]outhern congressmen wanted to exclude black employees from the New Deal to preserve the quasi-plantation style of agriculture that pervaded the still-segregated Jim Crow South.”).

<sup>126</sup> See CAROLINE FREDERICKSON, *UNDER THE BUS: HOW WORKING WOMEN ARE BEING RUN OVER* 21 (2015); see also IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 59 (2005) (“It is not hard to see why southern members were so intensely concerned with [the agricultural exclusion] . . . . The status of subaltern black labor in agriculture — a structure that often came close to resembling nineteenth-century conditions under slavery — was a consistent concern for southern members in the 1930s . . . .”).

<sup>127</sup> Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865-66 (1992).

matter of legal analysis, we can work with the stated purposes found in the legislative history to gain insight into a statute's meaning.<sup>128</sup> Moreover, even if a salient motivator was to allay Southern legislator fears that African American farmworkers and domestic workers would organize against employer interests or to bow to powerful growers in California,<sup>129</sup> that motivation is just further support for the notion that states' police powers to protect workers who labor within their borders are implicated.

The original bill, introduced by Senator Wagner in March of 1934, did not exclude agricultural laborers.<sup>130</sup> Once the bill was reported out of committee a few months later, however, the exclusion of agricultural laborers appeared.<sup>131</sup> The only insight that can be gleaned from a report on the legislation came in May of 1935, which stated that the committee had exempted agricultural labor "for administrative reasons."<sup>132</sup>

Some dialogue from the debates and hearings suggests that one of these administrative reasons might have been due to variation in the agricultural sector across the states, which made it a difficult area for federal regulation. In a June 19, 1935 debate, Congressman Boileau from Wisconsin noted that the vast majority of farms in the Middle West "are smaller and more or less a family affair."<sup>133</sup> As a result,

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<sup>128</sup> See Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 881, 894 (2014) [hereinafter *Immigration Exclusion*] ("As Justice Breyer has stated, the 'personal motives' of legislators 'do not change the purpose of the bill's language.' Even if an individual legislator votes for a bill because he or she is beholden to a powerful interest group and solely intends to please that group, the bill nonetheless carries with it legislative purposes that must be interpreted and carried forth within our legal system.").

<sup>129</sup> See Victoria V. Johnson, Note, *Did Old MacDonald Have a Farm?: Holly Farms Corp. v. National Labor Relations Board*, 69 U. COLO. L. REV. 295, 295 n.7 (1998) (stating that "the strength of the agricultural lobby" was one reason explaining the exclusion).

<sup>130</sup> Labor Disputes Act, S. 2926, 73d Cong. 2d Sess. (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1 (1949) ("[T]he term 'employee' . . . shall not be limited to mean the employee of a particular employer . . . unless the Act explicitly states otherwise."); Labor Disputes Act, H.R. 8423, 73d Cong. 2d Sess. (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1128 (1949) (stating the same).

<sup>131</sup> See S. REP. No. 73-1184, at 1 (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1099 (1949).

<sup>132</sup> S. REP. No. 74-573, at 7 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2306 (1949).

<sup>133</sup> 79 CONG. REC. 9721 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 3203 (1949).

Boileau concluded that “[t]he agricultural worker is not a problem in some of the states.”<sup>134</sup>

Testimony at the hearings on the legislation by farmer advocates echoed the concern about vast regional variation in the situation of agriculture, and the prevalence of small farmers. A representative of a national farmer organization, the National Grange, reported that there were “protests from various parts of the country” about the inclusion of agriculture in the NLRA because most farmers are small farmers and farm size and dynamics “vary wildly” across the country.<sup>135</sup>

Congressman Vito Marcantonio, a legislator representing Manhattan NY, was the lone legislative voice on behalf of agricultural workers’ organizing rights at the time. Marcantonio proposed an amendment to the NLRA in June 1935 to remove the exclusion for agricultural laborers, which did not pass.<sup>136</sup> In his view, agricultural laborers experienced the “worst conditions”<sup>137</sup> and were organizing against “the most outrageous exploitation in America.”<sup>138</sup> He cited child labor concerns in the beet-sugar fields, which the National Child Labor Committee had brought to light, the “reign of terror” and extreme intimidation by growers in California’s Imperial Valley, the “terribly exploited” farmworkers in Ohio’s Hardin County as well as the suffering of the Southern Tenant Farmers Union (STFU) in Arkansas.<sup>139</sup>

As a result, Marcantonio repeatedly implored his fellow legislators to accept that there “is not a single solitary reason” to exclude agricultural workers from this bill.<sup>140</sup> Marcantonio’s proposed

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<sup>134</sup> *Id.*

<sup>135</sup> *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. and Labor*, 73d Cong. 1000 (1934) (statement of representative of the National Grange). See generally *id.* at 340 (statement of the National Manufacturers Association opposing the bill and arguing that it is too broad and would sweep up farms).

<sup>136</sup> 79 CONG. REC. 9,720 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 3201 (1949) (stating, in the June 19, 1935 debate, that “[i]t is a matter of plain fact that the worst conditions” are suffered by agricultural workers).

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

<sup>138</sup> *Id.* at 3202.

<sup>139</sup> *Id.* at 3201. For Marcantonio, the STFU’s experience was the “most conclusive proof” that agricultural laborers should be included within the NLRA’s protective umbrella. He noted that even though the STFU had used peaceful tactics and made “reasonable” demands, armed grower representatives were patrolling the streets and union organizers were experiencing physical assaults and threats of lynching.

<sup>140</sup> *Id.* He also attached a minority view to several NLRA reports, which laid out his disagreement about excluding agricultural laborers. H.R. REP. NO. 74-1147, at 26-30 (1935), reprinted in 2 Legislative History of the National Labor Relations Act 1935, at

amendment to remove the exclusion of farmworkers from collective action rights was easily voted down. Representative Connery, one of the bill's sponsors responded to this proposed amendment with pragmatism. He persuasively said to his fellow legislators that the agricultural exclusion had been considered carefully by the committee and that he believed "in biting off one mouthful at a time," noting that there would be a future opportunity "to take care of the agricultural workers."<sup>141</sup>

In the hearings associated with the NLRA there were no witnesses who explicitly represented farmworkers or their interests. There were two witnesses, however, who contended that the agricultural exclusion should only apply to small farms. At the first hearing, William Morris Leiserson, an economics professor and New Deal Administrator who later served as a Member of the National Labor Relations Board, testified that it made sense to exempt small farmers, but not to exempt industrial agriculture like what was common in California's Imperial Valley at the time.<sup>142</sup>

In one of the later hearings, a long testimony by a journalist, James Rorty, also made the argument that agricultural laborers should not be excluded from the NLRA when "the type of agriculture is a highly industrial type of agriculture".<sup>143</sup> He had spent some time in the Imperial Valley reporting on a lettuce strike. He noted the "difficulties arising from alien labor" and the difficulty that "Mexican field workers" in particular had maintaining "a decent existence."<sup>144</sup>

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3077-82 (1949); H.R. REP. NO. 74-972, at 24-28 (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act 1935, at 2979-84 (1949); H.R. REP. NO. 74-969, at 24-28 (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act 1935, at 2933-37 (1949).

<sup>141</sup> 79 CONG. REC. 9, 721 (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act 1935, at 3202 (1949). Representatives Boileau and Knutson verbally rejected the amendment. *Id.*

<sup>142</sup> *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. and Labor*, 73d Cong. 239 (1934).

<sup>143</sup> *Labor Disputes Act: Hearing on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 38 (1935) (statement of James Rorty, newspaper correspondent).

<sup>144</sup> *Id.* at 35 (referencing Glassford report); cf. LeRoy & Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L. J. 489, 506 (1999) ("On June 23, the Committee received a report from Pelham D. Glassford, special conciliator for the Imperial, California Board of Supervisors. His report urged enactment of public policies to provide farm workers . . . greater protection from exploitation. Although Glassford's report became part of the Committee's record, no one followed-up on its findings or recommendations. Instead, the Senate Committee's attention was diverted to the apparent influence that large growers used in having county sheriffs intimidate pesky news reporters and union sympathizers.").

Worker complaints included lost wages, long hours and child labor.<sup>145</sup> He also noted that farmworkers' rights to engage in collective activities are "completely abrogated in the valley."<sup>146</sup>

The NLRA's exclusion and legislative history strongly suggests that Congress affirmatively left the regulation of agricultural relations in the hands of the states. All of the subsections of this part have shown the depth of the state's interest in this area. Thus, a strong presumption against federal preemption of state regulatory efforts is operating. In the next part, the article considers whether the tension between federal and state law is sufficient to overcome this presumption against preemption.

#### IV. THE WEAKNESS OF THE FEDERAL–STATE TENSION

IRCA's text is silent on the question of its intended effects on labor and employment law protections for unauthorized employees at the federal and state levels. The reason some assert that Congress did intend to preempt some state labor and employment law protections is that IRCA's underlying philosophy is to curb unauthorized immigration by making it more difficult for unauthorized immigrants to gain employment in the United States.<sup>147</sup> According to this logic, one way to reduce the attractiveness of jobs in the United States (the magnet) would be to limit the labor and employment law protections unauthorized immigrant workers enjoy once they are here.

This argument, however, is undercut by a careful obstacle preemption analysis. As this Part will illuminate, IRCA's plain language, Supremacy Clause jurisprudence, and IRCA's legislative history reveal that a state's provision of labor and employment law protections to unauthorized immigrant workers is not in tension with

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<sup>145</sup> *Labor Disputes Act: Hearing on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 43 (1935).

<sup>146</sup> *Id.* at 40. He also recounted a story of an organizing effort among Mexican field workers that had experienced a "very aggressive, terroristic campaign" by growers which resulted in arrests of the union organizers and the end of the organizing campaign. *Id.* at 44-45 (stating that there are many unauthorized Mexican farmworkers and that "most of the forces of law are completely in the hands of the growers"); *id.* at 46 (stating that the AFL thinks it is "impossible" to organize field workers in the Imperial Valley but the conditions were "so abominable that they did take an interest in that" and stating that the arrest and jailing of AFL organizers "has broken many a strike, and that is exactly what it did to the Mexican field workers in Imperial last year and in San Joaquin Valley").

<sup>147</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

IRCA's purposes or enforcement mechanisms. If there is any tension, it is weak at best.

A. *IRCA's Plain Language and Supremacy Clause Jurisprudence*

IRCA's plain language communicates that the main thrust of the regulation is on employer behavior, rather than employee behavior.<sup>148</sup> IRCA sanctions employers for knowingly hiring unauthorized immigrants and requires that employers verify the work authorization status of its employees.

Moreover, IRCA's section 111(d) communicates that protections for unauthorized employees are in line with IRCA's goals. This section provided funds to the U.S. Department of Labor to enforce wage and hour law on behalf of unauthorized immigrant employees "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."<sup>149</sup> This provision does not explicitly state IRCA will not affect any state labor and employment law protection provided to unauthorized employees. It does, however, show a federal legislative policy decision to enforce wage and hour law on behalf of unauthorized employees as a way to remove employers' economic incentives to prefer unauthorized employees over authorized employees.

The Court's *Arizona v. United States*<sup>150</sup> decision further reveals that Congress intended to direct the majority of its enforcement machinery on employer behavior and that it was concerned about abuses against unauthorized workers. In an effort to reduce unauthorized immigration and the perceived problems it creates, in 2010 Arizona enacted a law which made it a misdemeanor for an unauthorized alien to work or solicit work.<sup>151</sup> This aspect of the law, along with others, was challenged primarily on Supremacy Clause grounds.<sup>152</sup> The Court concluded that federal immigration law (IRCA) preempted this aspect of Arizona's law.<sup>153</sup>

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<sup>148</sup> See 8 U.S.C. § 1324a (2012); H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal meaning of closing the back door, or curtailing future illegal immigration, is through employer sanctions.").

<sup>149</sup> Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381.

<sup>150</sup> 132 S. Ct. at 2504.

<sup>151</sup> *Id.* at 2503.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 2505.

The Court's analysis highlighted that Arizona's misdemeanor for unauthorized work was in direct tension with IRCA's purposes and enforcement mechanisms. The Court reasoned that Congress, through IRCA's workplace-based enforcement scheme, intended to regulate immigration primarily through verification requirements and employer sanctions for hiring unauthorized immigrants. Congress also intended some civil sanctions against unauthorized immigrants, which it enumerated in the statute.<sup>154</sup> It did not intend to place criminal sanctions on unauthorized immigrants for engaging in work.<sup>155</sup> Doing so, the Court added, would criminalize people "who already face the possibility of employer exploitation because of their removable status" and thus "would be inconsistent with federal policy and objectives."<sup>156</sup>

Similarly, state-level identity laws that criminalize unauthorized immigrants for using false documents to gain employment are also treading in unconstitutional waters. Leticia Saucedo persuasively maintains that this is the case because the federal government's workplace immigration enforcement is primarily focused on "disincentivizing the employer preference for undocumented workers rather than placing the blame on the workers who are drawn into the migration stream."<sup>157</sup>

#### B. IRCA's Legislative History

IRCA's legislative history suggests that state efforts to reduce immigration status effects on workplace rights are consistent with IRCA's purpose to reduce employer incentives to prefer unauthorized workers over authorized workers and to reduce the exploitation of unauthorized workers.

The author's comprehensive and systematic review of thousands of pages of IRCA's legislative history (1972–1986)<sup>158</sup> illustrated that the

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<sup>154</sup> *Id.* at 2504 ("Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. . . . Aliens also may be removed from the country for having engaged in unauthorized work . . . In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means . . . Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct . . .").

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

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

<sup>157</sup> Saucedo, "Wrongfully" Documented Worker, *supra* note 6, at 1507-08.

<sup>158</sup> See generally Griffith, *Immigration Exclusion*, *supra* note 128.

primary focus was on altering employer behavior. When legislators considered how the legislation would affect “incentives,” they focused on curbing employer incentives to prefer unauthorized workers over authorized workers. The review also showed that concerns about the working conditions of authorized and unauthorized workers were central throughout IRCA’s fifteen-year long legislative history.

Congress’ view was that “full workplace protections for unauthorized workers would disincentivize employers from hiring unauthorized employees” more than it would incentivize unauthorized immigrants to immigrate to the United States.<sup>159</sup> Of the thirteen reports included in IRCA’s legislative history, eight mentioned incentives in relationship to unauthorized immigrant workers’ workplace protections somewhere in the report. All eight of these reports project the view that the provision of workplace protections to unauthorized immigrant workers helpfully disincentivizes employers from preferring them over authorized workers.<sup>160</sup> IRCA’s final conference report in 1986 stated that money was going to the U.S. Department of Labor to “deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.”<sup>161</sup>

The legislative history also communicates Congressional intent to allow federal and state workers’ rights agencies to work on behalf of unauthorized immigrant workers. A 1986 House Report stated that the committee did not intend that IRCA “would limit the powers of” worker rights agencies “to remedy unfair practices committed against undocumented employees for exercising their rights.”<sup>162</sup> It went on to say that limiting these agencies’ ability to remedy workplace law violations “would be counter-productive of our intent to limit the hiring of undocumented employees.”<sup>163</sup>

The *Hoffman* Court dismissed this report as a “slender reed” of legislative intent.<sup>164</sup> That said, because *Hoffman* was not an implied

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<sup>159</sup> *Id.* at 914.

<sup>160</sup> *Id.* at 915 n.111 (citing H.R. REP. No. 99-1000, at 25 (1986); H.R. REP. No. 99-682, at 106 (1986); H.R. REP. No. 98-115, at 37 (1983); S. REP. No. 98-62, at 22, 120 (1983); H.R. REP. No. 97-890, at 195 (1982); S. REP. No. 97-485, at 120 (1982); STAFF OF S. AND H.R. COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NAT’L INTEREST 344 (J. Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SELECT COMM’N OF IMMIGRATION AND REFUGEE POLICY, 96TH CONG., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, at 134 (Comm. Print 1980)).

<sup>161</sup> *Id.*, n.112 (citing H.R. REP. No. 99-1000, at 25 (1986)).

<sup>162</sup> *Id.*, n.113 (citing H.R. REP. No. 99-682, pt. 2, at 8-9 (1986)).

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

<sup>164</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 n.4 (2002).

conflict preemption case it did not comprehensively review IRCA's legislative history and did not view the issue under the more deferential analytical lens necessary when a state's police powers are implicated. Once we view this report "in the context of a long line of reports that echo this sentiment" we see consistent emphasis on the preservation of labor and employment law protections for unauthorized employees.<sup>165</sup> No report suggested that workplace protections for the unauthorized workforce would hurt IRCA's policy goals by providing incentives for immigrants to violate immigration law.

Labor concerns and concerns about mistreatment of unauthorized immigrant workers are central features of IRCA's legislative history. All thirteen reports on the legislation between 1973 and 1986 that discussed IRCA's purposes cited labor concerns as one of the primary motivators of the legislation.<sup>166</sup> While most of the emphasis focused on the working conditions of authorized workers, due to the presence of unauthorized workers (driving down labor standards), almost all of them also expressed concern about unauthorized workers' working conditions. As one report described it:

Undocumented/illegal migrants, at the mercy of unscrupulous employers and 'coyotes' who smuggle them across the border, cannot and will not avail themselves of the protection of U.S. laws. . . . The presence of a substantial number of undocumented/illegal aliens in the United States has resulted . . . in the breaking of minimum wage and occupational safety laws.<sup>167</sup>

Eleven of the thirteen reports went so far as to describe the working conditions of unauthorized immigrant workers as "exploitation."<sup>168</sup>

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<sup>165</sup> Griffith, *Immigration Exclusion*, *supra* note 128, at 915 & n.114, 916 nn.115-17 (quoting one report and citing six congressional reports spanning 1981-1983).

<sup>166</sup> *Id.* at 909 & n.97 (citing H.R. REP. No. 99-682, pt. 1, at 49 (1986); H.R. REP. No. 99-1000 (1986); S. REP. No. 99-132, at 1 (1985); S. REP. No. 98-62, at 1 (1983); H.R. REP. No. 98-115, pt. 1, at 30 (1983); S. REP. No. 97-485, at 1 (1982); H.R. REP. No. 97-890, pt. 1, at 29 (1982); STAFF OF S. AND H.R. COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POL'Y AND THE NAT'L INTEREST (J. Comm. Print 1981); STAFF OF SELECT COMM'N OF IMMIGRATION AND REFUGEE POL'Y, 97TH CONG., SEMIANNUAL REPORT TO CONG. (J. Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SELECT COMM'N OF IMMIGRATION AND REFUGEE POL'Y, 96TH CONG., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES (Comm. Print 1980); H.R. REP. No. 96-1301, at 11, 23 (1980); H.R. REP. No. 94-506, at 2 (1975); H.R. REP. No. 93-108, at 3 (1973)).

<sup>167</sup> *Id.* at 909 & n.98 (quoting STAFF OF S. AND H.R. COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POL'Y AND THE NAT'L INTEREST 42 (J. Comm. Print 1981)).

<sup>168</sup> *Id.* at 910 & n.99 (citing H.R. REP. No. 98-115, pt.1, at 37 (1983); H.R. REP. No. 97-890, pt. 1, at 193 (1982); STAFF OF S. AND H.R. COMMS. ON THE JUDICIARY, 97TH

Federal legislators often explicitly connected the concern for unauthorized immigrant workers with the effects they had on the working conditions and wages of authorized workers.<sup>169</sup> In this way, they acknowledged that some employers might prefer unauthorized workers *because* they had fewer protections as employees. Three of the Senate Reports that were released in the years immediately preceding IRCA's enactment (1982, 1983, and 1985) discussed how unauthorized immigrant workers bring down wages and working conditions for authorized workers because of their "weak bargaining position," which makes them "a fearful and clearly exploitable group."<sup>170</sup>

It was not just the reports associated with IRCA that showed this underlying intent. Comments in the legislative debates overwhelmingly showed that concerns about labor conditions were a prime motivator. Legislators who sponsored or introduced the bill, for instance, consistently stated that labor concerns were a main purpose of the legislation.<sup>171</sup> Ninety percent of all legislators that spoke about the purposes of the bill on a given date of debate mentioned labor concerns as a driving policy concern behind IRCA.<sup>172</sup>

Given this overwhelming sentiment in IRCA's legislative history it is hard to believe that Congress clearly and manifestly intended to preempt states from reducing immigration status effects on state-provided workplace rights in the circumstances at issue in this article. Even if IRCA's structure and legislative history could be viewed as standing for the proposition that state labor and employment law protections might conflict with federal immigration policy goals, this conflict is not direct enough to merit preemption in a context that requires a strong presumption against preemption. A finding of preemption would require a conclusion that providing unauthorized

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CONG., U.S. IMMIGRATION POL'Y AND THE NAT'L INTEREST 13 (J. Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SELECT COMM'N OF IMMIGRATION AND REFUGEE POL'Y, 96TH CONG., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 109 (Comm. Print 1980); H.R. REP. No. 94-506, at 7 (1975); H.R. REP. No. 93-108, at 8 (1973).

<sup>169</sup> *Id.* at 910-11.

<sup>170</sup> *Id.* at 910 & n.101 (citing S. REP. No. 99-132, at 16 (1985); S. REP. No. 98-62, at 20 (1983); S. REP. No. 97-485, at 19 (1982)).

<sup>171</sup> *Id.* at 912 & n.107 (citing 132 CONG. REC. 25,752, 30,038, 30,157, 30,181, 30,904, 31,572, 31,639-41, 32,248, 33,208, 33,213, 33,226 (1986); 131 CONG. REC. 23,317, 23,534, 23,719, 23,815, 23,841-42, 23,815, 23,967-69, 23,972-73, 24,267-68, 24,401 (1985); 129 CONG. REC. 12,369-70, 12,575-76, 12,808, 12,811, 12,821, 12,836 (1983); 128 CONG. REC. 20,829, 20,862, 21,665, 31,785-86, 31,797, 32,013-14 (1982); 119 CONG. REC. 14,181, 14,185 (1973); 118 CONG. REC. 30,154, 30,158 (1972)).

<sup>172</sup> *Id.* at 913 tbl. 1.

immigrant workers with state labor and employment law protections will increase unauthorized immigration to the U.S. — a very speculative inferential leap.

#### CONCLUSION

California is taking leadership as a laboratory for policy experimentation related to unauthorized immigrant workers' rights. No other state, to date, has advanced comparable policy initiatives in this area. Justice Brandeis famously stated that "one of the happy incidents of the federal system" is that "a single courageous State, may . . . try novel social and economic experiments."<sup>173</sup> Importantly, however, Brandeis saw this role as legitimate when there was no "risk to the rest of the country."<sup>174</sup> In other words, this laboratory role is possible when the state's acts are independent and, in the words of Keith Cunningham-Parmeter, do not create "negative externalities."<sup>175</sup> As this article has argued, California's attempts to reduce immigration status effects on state-provided workplace protections do not create risks for other states or for the federal government's immigration policy goals.

Given the long stalemate on immigration legislative initiatives at the federal level, states should (as a policy matter) and can (as a constitutional matter) play a key role in serving as laboratories for immigrant workers rights in the age of *immemployment* law. The growing area of research showing the negative effects of immigration status on workplace rights suggests that there are compelling policy reasons for states to regulate to reduce immigration status effects on worker protections. Moreover, as this article has elaborated upon, it is within a state's constitutional authority to reduce immigration status effects through (a) providing employees with full backpay remedies where

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<sup>173</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1261 (2009) ("State autonomy helps create laboratories of democracy, diffuse power, foster choice, safeguard individual rights, and promote vibrant participatory opportunities for citizens. So central is the notion of autonomy to most theories of federalism that Adam Cox has suggested that the mere perception that states are not autonomous might undermine their power."). For more on the notion of safeguarding individual state's rights, see generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987).

<sup>174</sup> *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

<sup>175</sup> Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 *HASTINGS L.J.* 1673, 1710 (2011). For an article describing the opposing visions of state as "sovereign" versus state as "servant" to the federal government, see Bulman-Pozen & Gerken, *supra* note 173, at 1258.

appropriate and (b) limiting employer inquiries into immigration status in the midst of state workplace law enforcement when federal law does not require these inquiries.