



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Articles and Chapters

ILR Collection


Spring 2012

Undocumented Workers: Crossing the Borders of Immigration and Workplace Law

Kati L. Griffith

Cornell University, kategriffith@cornell.edu

Follow this and additional works at: <https://digitalcommons.ilr.cornell.edu/articles>

 Part of the [Immigration Law Commons](#), [Labor and Employment Law Commons](#), and the [Labor Relations Commons](#)

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the ILR Collection at DigitalCommons@ILR. It has been accepted for inclusion in Articles and Chapters by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

Undocumented Workers: Crossing the Borders of Immigration and Workplace Law

Abstract

[Excerpt] This Article endeavors to comprehensively outline the emerging field of *immigration* law. As this Article specifies below, this field broadly includes empirical, legislative, administrative, judicial, and other analytical inquiries and trends involving workers who bridge the divide between immigration law and workplace law.

This Article also proposes directions for future research in this area. Namely, it raises a broad array of compelling questions that merit intensive scholarly, judicial, and policy analysis moving forward. As this Article will show, a hybrid analytical lens reveals otherwise obscured areas of inquiry. It thereby encourages scholars, policymakers, enforcement agency officials, and courts to more comprehensively develop *immigration* frameworks and research agendas that directly consider the interaction between immigration and employment protections for employees.

To support these contentions, this Article draws from a variety of recent scholarly, legislative, case law, enforcement, and advocacy developments in the *immigration* law area. It also builds on the contributions of leading experts and scholars in this issue of the *Cornell Journal of Law and Public Policy* and at a recent workshop organized by Cornell University's Institute for the Social Sciences. The workshop, similar to this Article, was entitled "Undocumented Workers: Crossing the Borders of Immigration and Workplace Law" (hereinafter the "Crossing the Borders Workshop").

Keywords

immigration law, immigration law, workplace law, undocumented workers

Disciplines

Immigration Law | Labor and Employment Law | Labor Relations

Comments

Required Publisher Statement

© [Cornell University](#). Reprinted with permission. All rights reserved.

Suggested Citation

Griffith, K. L. (2012). Undocumented workers: Crossing the borders of immigration and workplace law [Electronic version]. *Cornell Journal of Law and Public Policy*, 21(3), 611-640.

SYMPOSIUM

UNDOCUMENTED WORKERS: CROSSING THE BORDERS OF IMMIGRATION AND WORKPLACE LAW

*Kati L. Griffith**

INTRODUCTION.....	611
I. THE UNDOCUMENTED WORKFORCE	613
II. WORKPLACE LAW VIOLATIONS AGAINST THE UNDOCUMENTED	616
III. FEDERAL WORKPLACE-BASED IMMIGRATION LAW	617
IV. SUBFEDERAL WORKPLACE-BASED IMMIGRATION LAW	622
V. <i>EMPLOYMENT</i> LAW ANALYSIS IN THE COURTS.....	625
VI. IMMIGRATION LAW’S EFFECTS ON WORKPLACE PROTECTIONS.....	629
VII. <i>EMPLOYMENT</i> “FIXES”	635
VIII. <i>EMPLOYMENT</i> ADVOCACY	637
CONCLUSION.....	639

INTRODUCTION

Each year millions of immigrants labor in workplaces across the country, even though they do not have proper authorization from U.S. immigration authorities to do so. As “undocumented workers,” they uncomfortably straddle two legal regimes: immigration law and workplace law. Because of their undocumented immigration status, immigration law formally excludes these workers from such things as voting, the workplace, and access to most federal public benefits. As a matter of immigration law, they are not allowed to be present in the United States at all. Nonetheless, because of their status as employees who perform labor, “workplace law” simultaneously provides them with workplace protections related to wages, health and safety, collective action with

* Proskauer Assistant Professor of Employment and Labor Law, Industrial and Labor Relations School, Cornell University. I appreciate the insightful workshop presentations by Annette Bernhardt, Muzaffar Chishti, Ruben Garcia, and Leticia Saucedo, and the thoughtful comments from Lance Compa, Leslie Gates, Tamara Lee, Leticia Saucedo, and my fellow Immigration Team members at Cornell’s Institute for the Social Sciences (ISS) on an earlier draft. A special thank you to Vanessa Clarke, Tashlin Lakhani, and Patrick Oakford for their research efforts and to the editors of the *Cornell Journal of Law and Public Policy* for their careful editorial assistance. I take sole responsibility for all errors or omissions.

their co-workers, and employment discrimination based on race, color, religion, sex, ethnicity, and national origin.

In this way, undocumented workers exemplify a new trend in law that questions long-held notions about the separation between immigration law and workplace law. Typically, immigration law and workplace law have been considered discrete areas of legal inquiry with entirely separate policymaking processes.¹ Thus, it is no surprise that the majority of professional associations, law journals, law conferences, law school courses, and legal scholars separately address immigration law on the one hand and workplace law on the other. Moreover, there has been significant scholarly focus on the ways that these two areas of law have distinct policy rationales and enforcement schemes.² Legal scholars have often emphasized, for instance, that public entities traditionally enforce immigration law while private entities traditionally enforce workplace law through employee-initiated complaints.³

Despite these seemingly distinct lines of inquiry, a growing community of scholars has started to break down the boundaries between immigration and workplace law.⁴ As I have argued elsewhere, a new hybrid

¹ Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 740 (2003) (“Historically, immigration law and labor law have not been linked in the policymaking process.”). Nonetheless, at various historical moments there have been connections between labor and immigration agencies. A federal immigration agency, for instance, was housed within the U.S. Department of Labor for a number of decades before 1940. See Reorganization Plan No. V, 5 Reg. 2223 (June 14, 1940). Moreover, the immigration agency and labor agency, along with other agencies, “jointly administered” the *Bracero* guestworker program (1942-64) until its termination. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1118–19 (2011).

² See, e.g., Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389, 392 (2011) (describing workplace law’s “inclusiveness of a broad class of workers, including undocumented workers and the exclusiveness of [immigration] laws prohibiting the employment of undocumented workers entirely.”); Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in LABOR LAW STORIES 399, 400 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (noting the “sometimes contradictory legislative impulses” of immigration and workplace law).

³ See Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 134–35 (2002) (describing the largely public enforcement scheme of immigration law and the largely private enforcement scheme of workplace law).

⁴ See generally Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009); Garcia, *supra* note 1; Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125 (2009); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009); 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); Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479 (2009); Stumpf &

area of law has emerged, what I call *immigration law*, at the crossroads of immigration and employment policies.⁵ Through its focus on undocumented workers in particular, this Article further justifies the need to move away from the immigration law-workplace law dichotomy and to more fully embrace *immigration law* as a crucial field of inquiry.

Because this nascent “field” is somewhat fragmented and constituted by a diverse set of actors (scholars, legislators, courts, enforcement agents, and advocates), there is a pressing need for a more integrated understanding of the sometimes complementary, sometimes conflict prone, relationship between immigration law and employment policies. This Article endeavors to comprehensively outline the emerging field of *immigration law*. As this Article specifies below, this field broadly includes empirical, legislative, administrative, judicial, and other analytical inquiries and trends involving workers who bridge the divide between immigration law and workplace law.

This Article also proposes directions for future research in this area. Namely, it raises a broad array of compelling questions that merit intensive scholarly, judicial, and policy analysis moving forward. As this Article will show, a hybrid analytical lens reveals otherwise obscured areas of inquiry. It thereby encourages scholars, policymakers, enforcement agency officials, and courts to more comprehensively develop *immigration law* frameworks and research agendas that directly consider the interaction between immigration and employment protections for employees.

To support these contentions, this Article draws from a variety of recent scholarly, legislative, case law, enforcement, and advocacy developments in the *immigration law* area. It also builds on the contributions of leading experts and scholars in this issue of the *Cornell Journal of Law and Public Policy* and at a recent workshop organized by Cornell University’s Institute for the Social Sciences.⁶ The workshop, similar to this Article, was entitled “Undocumented Workers: Crossing the Borders of Immigration and Workplace Law” (hereinafter the “Crossing the Borders Workshop”).

I. THE UNDOCUMENTED WORKFORCE

Recent empirical trends in immigration demand that we embrace, and more thoroughly examine, the intensifying interaction between immigration and workplace law. Specifically, the large and growing number of undocumented workers in the United States is a compelling reason for crossing the borders of immigration and workplace law. These work-

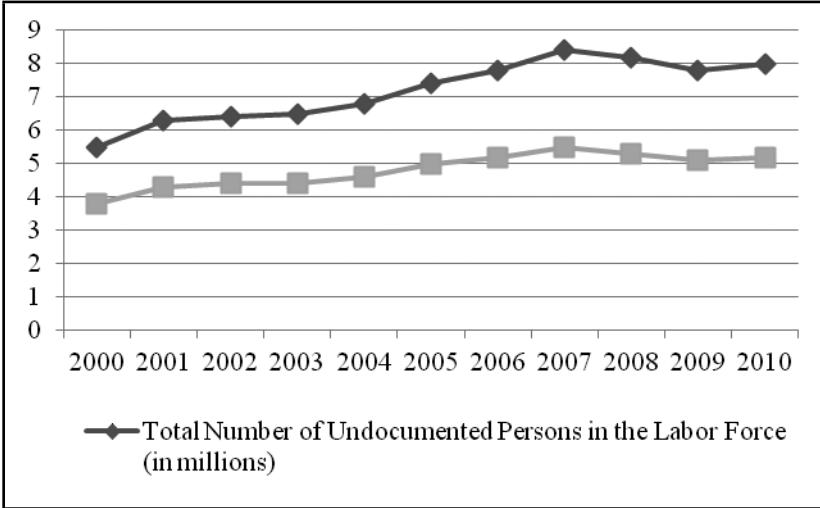
Friedman, *supra* note 3; Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

⁵ See generally Griffith, *supra* note 2.

⁶ See discussion *infra* Parts II, VI, and VIII.

ers, as described above, have a legally-constructed dual personality as they are simultaneously regulated by immigration law and workplace law.

TABLE 1: UNDOCUMENTED IMMIGRANTS IN THE LABOR FORCE*



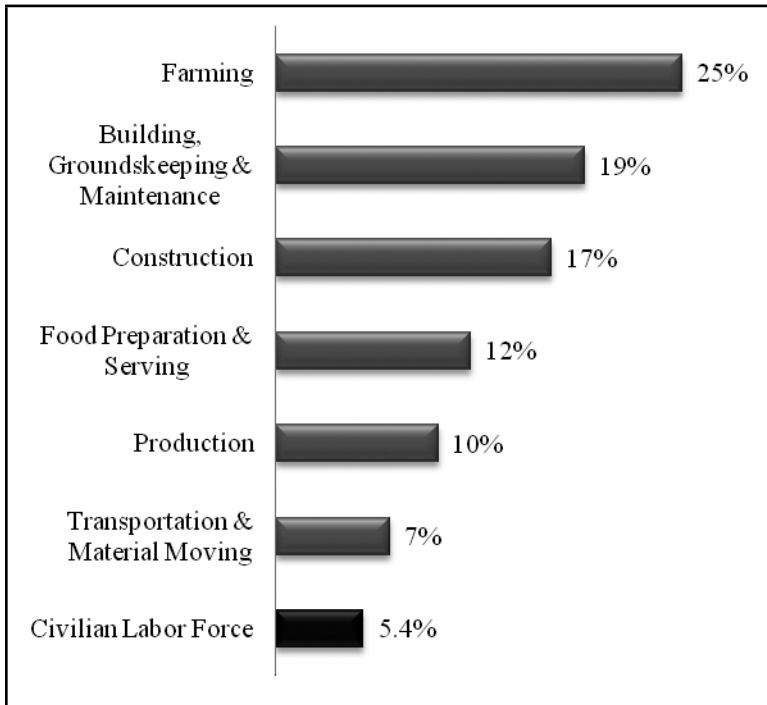
* JEFFREY S. PASSEL & D'VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, 17, tb. 6 (Pew Hispanic Center 2011), available at <http://pewhispanic.org/files/reports/133.pdf>.

Empirical studies illustrate that undocumented workers are increasingly participating in the U.S. labor force in recent decades. In 1980, undocumented workers comprised an estimated two percent of the total U.S. labor force.⁷ As Table 1 shows, by 2010, undocumented workers represented 5.2 percent of the U.S. labor force. There has been an increase in the total number of undocumented workers in the United States as well. In 2000, there were 5.5 million undocumented workers in the U.S. labor force. By 2010, the number of undocumented workers reached 8 million.

While the percentage of undocumented workers in the U.S. labor force (5.2 percent) may seem fairly modest to some observers, data show that undocumented workers represent a significant presence in particular occupations. Table 2 illustrates that, in 2008, twenty-five percent of individuals engaged in the farming occupational group were undocumented. Some analysts believe that this estimate is conservative and that the percentage of undocumented workers in this occupation is actually

⁷ B. LINDSAY LOWELL ET AL., MIGRATION POLICY INSTITUTE, IMMIGRANTS AND LABOR FORCE TRENDS: THE FUTURE, PAST, AND PRESENT 11 (2006), available at http://www.migrationpolicy.org/ITFIAF/TF17_Lowell.pdf.

TABLE 2: PERCENTAGE OF UNDOCUMENTED WORKERS
BY OCCUPATION, 2008*



* JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 15, fig. 19 (Pew Hispanic Center 2009) (tabulations from augmented March 2008 CPS), available at <http://pewhispanic.org/files/reports/107.pdf>.

much higher.⁸ The U.S. Department of Labor, for instance, has estimated that more than half of all of the farmworkers in the United States are undocumented immigrants.⁹ As Table 2 demonstrates, undocumented workers play a prominent role in other occupational groups as well. An estimated seventeen percent of construction workers and nineteen percent of workers in building, grounds-keeping, and maintenance are undocumented.

Along with their concentration in particular occupational groups, undocumented workers are concentrated in particular states and regions

⁸ See, e.g., Workforce Challenges Facing the Agriculture Industry: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce, 112th Cong. 1 (2011) (statement of Bruce Goldstein, President, Farmworker Justice) (“More than one-half of the approximately 2 million seasonal workers on our farms and ranches lack authorized immigration status.”).

⁹ Garance Burke, *Few Americans Seem Eager to Try Their Hands at Farm Work*, WASH. POST, Oct. 10, 2010, at A9 (reporting that, according to the Labor Department, “[m]ore than half of the farmworkers in the United States are illegal immigrants”).

of the U.S. as well. Among the states with the highest percentages of undocumented workers in their state workforces are, for instance, Nevada with 10 percent, California with 9.7 percent, Texas with 9 percent, and New Jersey with 8.6 percent.¹⁰

Thus, the recent data on undocumented workers' labor force participation challenges the historical divide between immigration and workplace law. This is the case because these significant labor force participants are simultaneously subject to both legal regimes.

II. WORKPLACE LAW VIOLATIONS AGAINST THE UNDOCUMENTED

The apparent rise of workplace law violations against undocumented immigrant workers is another reason to scrutinize the crossroads between immigration and workplace law. Annette Bernhardt's presentation at the Crossing the Borders Workshop, entitled "Unregulated Work: The Perfect Storm of Economic Restructuring and Immigration Policy," illustrated the prevalence of workplace law violations against low-wage workers in general and undocumented immigrant workers in particular.¹¹ Her presentation was based largely on 2008 survey data of low-wage workers in the three largest U.S. cities.¹² This study is one of the few existing empirical evaluations of workplace law violations in low-wage and immigrant industries.

According to the survey, low-wage undocumented workers are more than twice as likely to suffer minimum wage violations in the workplace as low-wage U.S.-born workers.¹³ While 15.6 percent of all of the U.S.-born workers surveyed experienced minimum wage violations in the week before the survey, 37.1 percent of undocumented workers experienced minimum wage violations during that same period.¹⁴

The survey results on overtime violations against low-wage workers follow a similar pattern. Almost 85 percent of undocumented workers experienced an overtime violation in the workweek before the survey.¹⁵

¹⁰ Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CENTER (Feb. 1, 2011) 17, available at <http://pewhispanic.org/files/reports/133.pdf>.

¹¹ Annette Bernhardt, *Unregulated Work: The Perfect Storm of Economic Restructuring and Immigration Policy*, Presentation at the Cornell ISS Workshop on Labor Immigration: Good or Bad for America? (Sept. 23, 2011) (presentation available at <http://www.ctl1.com/publicaccess/iss/iss-sem-20110923-eng-ab/index.htm>).

¹² See generally ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2009), available at http://nelp.3cdn.net/b294e0aad2ba7008e3_2pm6br7gi.pdf.

¹³ NAT'L EMPLOYMENT LAW PROJECT, *WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: SUMMARY OF FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY* (2011), available at http://nelp.3cdn.net/56a1b2d09120b5c83c_2qm6idnf4.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

In contrast, 68.2 percent of U.S.-born workers suffered an overtime violation in the week before the survey.¹⁶ Strikingly, the survey results signify that undocumented women workers experienced these violations at much higher rates than undocumented males. Undocumented women workers suffered minimum wage violations at a rate of 47.4 percent.¹⁷ In comparison, 29.5 percent of undocumented men experienced minimum wage violations.¹⁸

Since there is such scarce empirical data on workplace law violations in low-wage and immigrant workforces, scholars should continue to research these trends. The existing data on workplace law violations in low-wage and immigrant workforces provides, nonetheless, another justification for evaluating the interaction between immigration and workplace law. The above survey findings demonstrate a significant correlation between undocumented immigration status and instances of workplace law violations, when compared to workplace law violations against U.S.-born workers. Given these survey findings, future scholarship should investigate both why low-wage undocumented immigrant workers experience workplace law violations at higher rates than their U.S.-born counterparts and what can account for the gender differences in the findings.

III. FEDERAL WORKPLACE-BASED IMMIGRATION LAW

A substantial change to federal immigration law in 1986 was undoubtedly the most crucial legislative development in the *immigration* law area in recent history. In that year, the U.S. Congress enacted the Immigration Reform and Control Act (IRCA).¹⁹ IRCA itself can be characterized as an “*immigration* law” because it introduced, for the first time in U.S. immigration law history, an immigration enforcement scheme that targeted the workplace as a key site to deter undocumented immigration. As the U.S. Supreme Court has stated, “IRCA forcefully made combating *the employment of illegal aliens* central to the policy of immigration law.”²⁰

¹⁶ *Id.* For another study illustrating that undocumented workers experience workplace law violations at higher rates than documented workers see CHIRAG MEHTA ET AL., UNIV. OF ILL. AT CHI. CTR. FOR URBAN ECON. DEV., CHICAGO’S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS AND ECONOMIC CONTRIBUTIONS 27 (2002), available at http://www.urbaneconomy.org/sites/default/files/undoc_wages_working_64.pdf.

¹⁷ See UNREGULATED WORK SURVEY *supra* note 13.

¹⁸ *Id.*

¹⁹ Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

²⁰ Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002) (emphasis added) (internal quotation marks omitted).

IRCA regulates the relationship between employers and their employees, a relationship that is also the focal point of workplace law, in a number of ways. Whereas workplace law requires employers to provide certain protections to their employees and to avoid discriminating against them based on a number of employee characteristics, IRCA requires employers to verify whether immigration law authorizes their employees to work in the United States. Under federal law, most employers can choose to use a paper-based verification system (I-9 forms) or an electronic verification system (E-Verify).²¹ Moreover, IRCA imposes civil and, in serious cases, criminal sanctions on employers who knowingly employ undocumented workers.²² While it does not make employees' performance of labor illegal, it does provide sanctions for employees who knowingly use fraudulent documents to gain employment.²³

IRCA also brings immigration law into the employer-employee relationship in ways that explicitly complement existing workplace protections for employees. Indeed, "IRCA's 15-year legislative history illustrates Congress's concern about employees' workplace rights and the employment discrimination that could result from the imposition of workplace-based immigration enforcement."²⁴ When Congress enacted IRCA, it included two main elements that further illustrate this concern for employees' workplace protections. First, as part of the legislation, it appropriated funding to the U.S. Department of Labor's efforts to enforce wage and hour law on behalf of undocumented workers.²⁵

Second, it included employment discrimination prohibitions which, among other things, make it unlawful for employers to take adverse employment actions against employees or prospective employees because of their national origin or their citizenship status.²⁶ Federal immigration law's protection against citizenship-status discrimination prohibits employers from favoring a U.S.-citizen applicant/employee over a work-authorized non-citizen applicant/employee.²⁷ Lawmakers included these protections due to ongoing concerns that employer sanctions would cre-

²¹ 8 U.S.C. § 1324a(b) (2006). Federal contractors, however, do not have a choice. By executive order, they are required to use the E-Verify system. *See* Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008).

²² 8 U.S.C. § 1324a(e)-(f) (2006). For a comprehensive discussion of the private sector's extensive role in immigration enforcement post-IRCA, *see* Lee, *supra* note 4.

²³ 8 U.S.C. § 1324c(a) (2006).

²⁴ Kati L. Griffith, *ICE Was Not Meant to be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement in the Workplace*, 53 ARIZ. L. REV. 1137, 1144-45 (2011).

²⁵ Immigration Reform and Control Act of 1986 § 111(d), 8 U.S.C. § 1101 (2006).

²⁶ 8 U.S.C. § 1324b(a)(1) (2006).

²⁷ Unlike Title VII of the Civil Rights Act (a workplace law protecting employees from discrimination based on race, color, religion, sex, and national origin), IRCA's protection reaches employers with fewer than fifteen employees and explicitly includes citizenship status as a protected class. 8 U.S.C. § 1324b(a)(2)(A) (2006) (exempting only employers with three or fewer employees).

ate incentives for employers to “play it safe” by making employment decisions based on such things as national origin, ethnicity, race, or accent.²⁸ To enforce IRCA’s employment discrimination protections, Congress created a new federal agency.²⁹ In these ways, employees gained additional workplace protections through a change in immigration law.³⁰

IRCA’s main enforcement measures illustrate another way that immigration enforcement has permeated the workplace since 1986. Employer audits, workplace raids, and workplace arrests have consistently been the centerpieces of workplace-based immigration enforcement since IRCA’s enactment. Nonetheless, the frequency of the federal government’s use of each type of *immigration* enforcement measure has shifted over time and presidential administrations.³¹

In recent years, for example, federal immigration authorities have intensified IRCA enforcement measures that target employers at the same time that they have reduced their reliance on workplace immigration raids that target employees.³² Over the last few years, the number of employer audits has risen substantially.³³ As Table 3 shows, the number of employers audited by federal immigration authorities increased from

²⁸ Griffith, *supra* note 24, at 1147.

²⁹ 8 U.S.C. § 1324b(c) (2006).

³⁰ For another example of workplace protections that come from immigration law, see Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 952–53 (2008) (describing use of “U” immigration visas to protect victims of workplace law violations).

³¹ See ANDORRA BRUNO, CONG. RESEARCH SERV., RL 40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 2–4 (2010) (“The federal government’s approach to immigration-related worksite enforcement has changed over the years.”). See also Julia Preston, *Illegal Workers Swept from Jobs in ‘Silent Raids’*, N.Y. TIMES, July 9, 2010, at A1 (reporting that “ICE is looking primarily for ‘egregious employers’ who commit both labor abuses and immigration violations”).

³² See Amber McKinney, *Napolitano Says DHS Has Made Smart, Effective Immigration Enforcement Changes*, Daily Lab. Rep. (BNA) No. 193, at A-18 (Oct. 5, 2011) (quoting Department of Homeland Security Secretary’s statement that the federal government has “focused targeted worksite enforcement programs like I-9 audits and criminal prosecutions of employers who egregiously violate employment laws” rather than workplace raids); Adriana Gardella, *As Immigration Audits Increase, Some Employers Pay a High Price*, N.Y. TIMES, Jul. 14, 2011 (“While the administration of George W. Bush focused on headline-making raids that resulted in arrests of immigrant workers, the Obama administration has gone after employers with ICE’s I-9 audits on the theory that employers who hire unauthorized workers create the demand that drives most illegal immigration.”).

³³ For critiques of this trend, see Miriam Jordan, *‘Silent Raids’ Squeeze Illegal Workers; Critics on Right and Left Fault Obama’s Pressure on Employers for Fostering Underground Economy*, WALL ST. J., Mar. 29, 2011, at A6 (“[I]t has become increasingly clear that the policy [of audits] is pushing undocumented workers deeper underground, delivering them to the hands of unscrupulous employers, depressing wages and depriving federal, state and local coffers of taxes, according to unions, companies and immigrant advocates.”); David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 79 (2010) (stating that “the end result” of audits is that “workers lose their jobs” and noting that the employer sanctions “pretend to punish employers, but in reality, they punish workers.”).

254 in 2007 to 2,496 for the first ten months of 2011. Similarly, as a result of IRCA enforcement in 2011, the federal government debarred 115 individuals and 97 businesses from the opportunity to contract with the federal government.³⁴ In 2008, workplace-based immigration enforcement measures did not result in any debarments from federal contracts.³⁵

TABLE 3: WORKSITE IMMIGRATION ENFORCEMENT AUDITS**

<u>Year</u>	<u>Number of Employer Audits</u>
2007	254
2008	503
2009	1444
2010	2196
2011*	2496

* As of November 4, 2011.

** *ICE Data Show Immigration Audits Up*, [Sept.] Daily Lab. Rep. (BNA) No. 180, at A-11 (9/20/2010); *ICE to Conduct Audits of 1,000 Employers*, [Feb.] Daily Lab. Rep. (BNA) No. 36, at A-2 (2/24/2011); Miriam Jordan, *Immigration Audits Drive Illegal Workers Underground*, WALL ST. J., Aug. 15, 2011, <http://online.wsj.com/article/SB10001424053111904480904576496200011699920.html>; News Release, United States Immigration and Customs Enforcement Agency, Several major US employers join ICE employment compliance program, ICE News (Nov. 4, 2011), available at <http://www.ice.gov/news/releases/1111/111104washingtondc.htm>.

In contrast to its heightened enforcement focus on employers, the federal government has recently downplayed workplace-based immigration enforcement measures that target employees. Homeland Security Secretary Janet Napolitano, for instance, recently stated that workplace immigration raids “made no sense” as an immigration enforcement strategy.³⁶ According to Napolitano, while federal immigration authorities expended considerable time and resources to conduct large-scale workplace immigration raids during the Bush administration, too many law-breaking employers were left unpunished and “criminal aliens were free to roam our streets.”³⁷ As a result of this reduction in workplace immigration raids, the total number of arrests that result from the federal gov-

³⁴ News Release, ICE, Several major US employers join ICE employment compliance program (Nov. 4, 2011), available at <http://www.ice.gov/news/releases/1111/111104washingtondc.htm>.

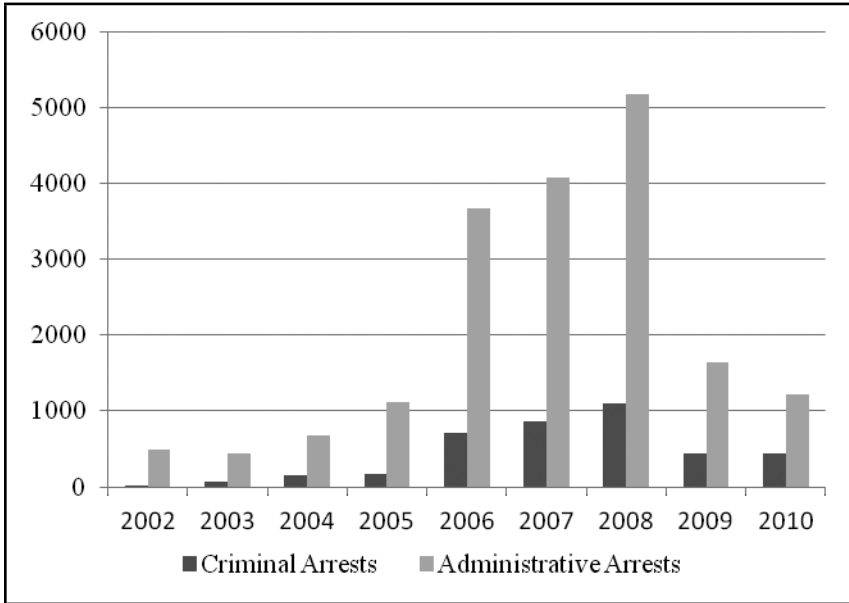
³⁵ *Id.*

³⁶ McKinney, *supra* note 32.

³⁷ *Id.*

ernment's workplace-based immigration efforts has decreased. Table 4 illustrates this trend.

TABLE 4: WORKSITE IMMIGRATION ENFORCEMENT ARRESTS*



* For 2002–08 data, see Fact Sheet, United States Immigration and Customs Enforcement Agency, Worksite Enforcement Overview (Apr. 30, 2009, <http://www.ice.gov/news/library/factsheets/worksite.htm>). For 2009–10 data, see ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION-RELATED WORKSITE ENFORCEMENT MEASURES 7, tb. 3 (2011), available at http://assets.opencrs.com/rpts/R40002_20110301.pdf.

Federal agencies have acknowledged the interaction between workplace-based immigration enforcement and employees' workplace protections to some extent. The Obama administration's "Comprehensive Worksite Strategy," for instance, proclaims that it "promotes national security, protects critical infrastructure and *targets employers who violate employment laws or engage in abuse or exploitation of workers.*"³⁸

Coordination between immigration authorities and the U.S. Department of Labor (DOL) similarly illustrates a kind of *immigration* law enforcement strategy. Namely, the two agencies have stated that they would like to better coordinate their efforts in order to reduce immigration law's negative effects on workplace protections. For example, the

³⁸ Worksite Enforcement, U.S. Immigration. & Customs Enforcement, available at <http://www.ice.gov/worksite/> (last visited Jan. 17, 2012) (emphasis added).

DOL has coordinated with federal immigration authorities to obtain “U” visas for undocumented workers who are victims of workplace crimes.³⁹

Moreover, the DOL and the U.S. Immigration and Customs Enforcement agency (ICE) recently co-signed a Memorandum of Understanding (MOU), which states that immigration authorities will not misrepresent themselves to workers as DOL agents and will refrain from worksite immigration enforcement when there is an ongoing DOL investigation at that worksite.⁴⁰ Among other things, the MOU states that immigration authorities will be cautious of “tips and leads” which “are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.”⁴¹ Similarly, the MOU clarifies that the DOL will have a chance to interview undocumented workers who are detained as a result of workplace-based immigration enforcement measures but who may have suffered workplace law abuses.⁴²

As this Part illustrated, since 1986, the federal government has endeavored to restrict unauthorized immigration by regulating the employment relationship (employers in particular) and the workplace more broadly. IRCA’s status as a legal hybrid challenges the traditional separation between immigration and workplace law. As the next Part will elaborate upon, a similar legislative trend has recently appeared at the state and local levels as well.

IV. SUBFEDERAL WORKPLACE-BASED IMMIGRATION LAW

While changes to federal immigration law in 1986 and subsequent enforcement actions have intertwined immigration and employees’ workplace protections in crucial ways, recent dynamics at the state and local

³⁹ See Saucedo, *supra* note 4, at 315 (stating that immigration “regulations specifically mention the EEOC and the DOL among the authorized certifiers for U visas”). The DOL has also issued guidance about its role in “U” visa enforcement. See Department of Labor U Visa Process and Protocols Question – Answer (April 28, 2011), available at <http://www.dol.gov/opa/media/press/whd/whd20110619-qa.pdf>.

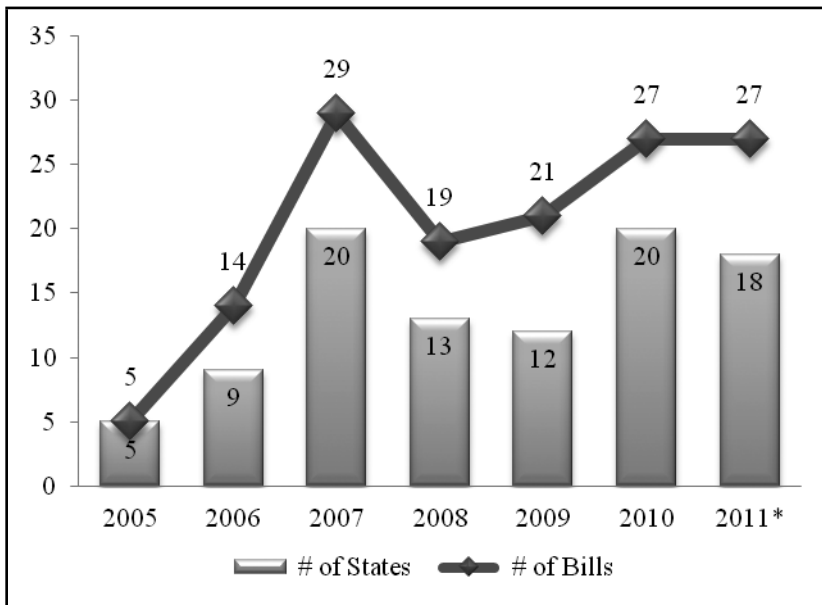
⁴⁰ See Revised Memorandum of Understanding Between U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor 1 (Mar. 31, 2011), available at http://www.dol.gov/_sec/media/reports/HispanicLaborForce/dhs-dol-mou.pdf. [hereinafter *Revised Memorandum*]; Gayle Cinquegrani, *Collaboration Is the Watchword at the Labor Department*, Daily Lab. Rep. (BNA) No. 15 at S-10 (Jan. 24, 2012) (stating that the US Solicitor of Labor “is brokering formal collaboration agreements between the Labor Department and the Department of Homeland Security to prevent the two departments from “stepping on each other’s toes” while conducting their respective enforcement activities at work sites.”). For another federal agency’s attempt to reduce conflict between immigration and workplace policy, see Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, Nat’l Labor Relations Bd. to all Regional Directors, Officers in Charge, and Resident Officers of the NLRB (June 7, 2011), available at <http://www.ilw.com/immigrationdaily/news/2011,0609-nlrb.pdf>.

⁴¹ *Revised Memorandum*, *supra* note 40.

⁴² *Id.*

levels have extended the scope and have further complicated the *immigration* law story. Specifically, state and local (subfederal) governments have recently enacted a number of laws that regulate immigration via the workplace. While it has some historical predecessors, this trend largely began to reemerge in 2005.⁴³ In that year, as Table 5 represents, five states passed immigration laws that regulated the workplace in some way (employment-related immigration laws). The pace of subfederal activity in this area has continued to rise swiftly. For instance, in 2011, seventeen states as well as Puerto Rico passed twenty-seven employment-related immigration laws. If we consider the number of bills introduced, rather than enacted, the numbers are even more striking. In the first

TABLE 5: SUBFEDERAL EMPLOYMENT-RELATED IMMIGRATION LAWS**



* Includes Puerto Rico.

** NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRATION AND IMMIGRANTS, 2005–2011 (2011), available at <http://www.ncsl.org/default.aspx?tabid=19897>; NATIONAL CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES, (2011), available at <http://www.ncsl.org/default.aspx?TabId=23960>.

⁴³ While this surge is new, there was an increase in subfederal employment-related immigration laws in the 1970s which died down after IRCA's enactment. See Griffith, *supra* note 2, at 395–97 (stating that “approximately twelve states and local authorities passed some form of employer-sanctions law” but that these were directly preempted by IRCA in 1986).

quarter of 2011, forty-four states proposed a total of 279 employment-related immigration bills.⁴⁴

While these subfederal laws could be generally characterized as “mini IRCAs” because they are immigration regulations that target the workplace, there are relevant distinctions between federal and subfederal employment-related immigration requirements. Subfederal laws often contain requirements and penalties that go beyond federal requirements. For instance, as of November 2011, at least eight states had required private employers to use the electronic E-Verify system to check employees’ work authorization.⁴⁵ Because the use of E-Verify is not mandatory at the federal level, these subfederal verification requirements surpass IRCA.

Moreover, a handful of states allow documented employees to bring court actions against their prospective or former employers because of the employers’ alleged use of undocumented labor.⁴⁶ Some of these lawsuits can result in monetary damages against employers.⁴⁷ Under IRCA, these kinds of private rights of action are not available. Some states have even criminalized an undocumented employee’s act of working or soliciting work.⁴⁸ IRCA, as described above, does not make it illegal for an employee to work or to look for work.⁴⁹

Also unlike IRCA, subfederal employment-related immigration laws do not include enhancements in funding for wage and hour enforcement or specific employment discrimination protections that are comparable to IRCA’s protections.⁵⁰ Furthermore, unlike the federal MOU between ICE and DOL, there are no reported agency efforts to coordinate subfederal immigration and labor enforcement in ways that minimize immigration enforcement’s impact on employees’ workplace protections.

⁴⁴ NATIONAL CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS, BILLS AND RESOLUTIONS IN THE STATES, (Jan. 1–Mar. 31, 2011), available at <http://www.ncsl.org/issues-research/immig/immigration-laws-and-bills-spring-2011.aspx>.

⁴⁵ See Ann Morse, NAT’L CONFERENCE OF STATE LEGISLATURES, E-VERIFY FAQ, available at <http://www.ncsl.org/default.aspx?TabId=13127> (Nov. 4, 2011).

⁴⁶ See, e.g., MISS. CODE ANN. § 71-11-3(4)(d) (2011); MONT. CODE ANN. § 39-2-305(3) (2009); S.C. CODE ANN. § 41-1-30(A) (2011); UTAH CODE ANN. § 63G-12-302(4)(a), (c) (2011). A district court recently issued a temporary injunction against Alabama’s private right of action provision. See *United States v. Alabama*, 2011 U.S. Dist. LEXIS 112362, at 9, 144–55 (N. D. Ala. Sept. 28, 2011).

⁴⁷ See, e.g., S.C. CODE ANN. § 41-1-30(d)(1)–(3) (2011). For an argument that these provisions are preempted because of their conflicts with federal employment laws, see Griffith, *supra* note 2, at 411–41.

⁴⁸ See, e.g., ALA. CODE § 31-13-11(a) (2011) (“It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.”).

⁴⁹ See 8 U.S.C. § 1324c(a) (2006).

⁵⁰ See Griffith, *supra* note 2, at 417–27 (identifying this as one way that subfederal employment-related immigration laws are in conflict with federal employment protections).

The emergence of immigration regulatory initiatives at both the federal and subfederal levels, which target the employer-employee relationship and the workplace more broadly, has blurred the traditional boundaries between immigration and workplace law. To fully understand the *immigration* law trend at the subfederal level, scholars should continue to categorize and define the quickly shifting contours of subfederal employment-related immigration laws.⁵¹ While the National Conference of State Legislatures regularly tracks the passage and enactment of immigration legislation at the state level,⁵² there is no comparable systematic data on the many immigration laws passed at the local level each year by counties and cities. Moreover, given the scope of this trend, scholars should investigate why subfederal governments have legislated in the *immigration* law area since 2005 and what can account for variation across the states.⁵³

V. *IMMIGRATION* LAW ANALYSIS IN THE COURTS

Federal and state courts have increasingly considered both immigration and workplace policy goals within the same cases. To resolve an immigration law legal dispute, or to resolve a workplace law legal controversy, some courts have simultaneously considered the policies underlying immigration and workplace law. In other words, even though the original dispute specifically involved only one area of law, the courts jointly considered both areas of law when they made their determinations. Their concurrent consideration of these otherwise distinct areas of law affirms the emergence of *immigration* law analyses in practice.

The U.S. Supreme Court's 1984 *Sure-Tan v. NLRB* decision marks the first major contemporary development in *immigration* law analysis.⁵⁴ While *Sure-Tan* involved questions arising solely from the National Labor Relations Act (NLRA), the Court considered both immigration and NLRA policy goals to resolve the NLRA questions.

⁵¹ For a recent book on some of the key emerging trends in this area, see *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* (Monica W. Varsanyi ed., 2010).

⁵² See generally NAT'L CONFERENCE OF STATE LEGISLATURES, *Immigration*, available at <http://www.ncsl.org/issues-research.aspx?tabs=951,119,851>.

⁵³ While it does not focus on employment-related immigration provisions in particular, there is a growing body of scholarship that is examining the origins of subfederal immigration laws more generally. See Katharine M. Donato & Amada Armenta, *What We Know About Unauthorized Migration* 37 ANN. REV. SOC. 529, 534 (2011) ("[S]tudies suggest that subnational and restrictionist antiimmigrant policies are more likely to emerge in Republican areas . . . [and] find[] that local anti-immigrant policies are most likely in communities that experienced a sudden growth in the immigrant population and when national rhetoric about immigration is most salient and threatening."). See generally *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* (Monica W. Varsanyi ed., 2010).

⁵⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

Among other things, the Court was asked whether an undocumented worker who fell within the formal definition of an NLRA “employee” lost his NLRA collective action rights because of his immigration status. The *Sure-Tan* Court ultimately concluded that undocumented employees enjoy the same NLRA collective action rights as documented employees.⁵⁵

To justify this conclusion, the *Sure-Tan* Court drew upon both workplace law and immigration law policy goals. With respect to NLRA policy, the Court reasoned that excluding undocumented employees from NLRA rights would foster “a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.”⁵⁶ In turn, the *Sure-Tan* Court reasoned that its conclusion bolstered immigration policy goals as well, stating that providing the undocumented with NLRA rights would “lessen” employers’ “incentive to hire” undocumented workers.⁵⁷

Immemployment law analyses in the courts have intensified since Congress enacted IRCA in 1986, and especially since the U.S. Supreme Court decided *Hoffman Plastic Compounds v. NLRB* in 2002. In *Hoffman*, the Supreme Court considered the policies underlying both the NLRA and IRCA to conclude that an undocumented employee could not have access to NLRA backpay to remedy an NLRA violation.⁵⁸ Thus, while the undocumented employee had the NLRA right to engage in collective activity without employer interference, he could not receive backpay to remedy the employer’s violation of this right.⁵⁹ According to the *Hoffman* Court, providing backpay to this employee would “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”⁶⁰ The *Hoffman* Court also considered the workplace law consequences of its decision to some extent, concluding that the NLRA had other ways (besides backpay) to remedy NLRA violations against undocumented employees.⁶¹

The doctrinal analysis of the four dissenting justices in *Hoffman* can be similarly characterized as *immemployment* law analysis.⁶² The dissent-

⁵⁵ *Id.* at 891–92.

⁵⁶ *Id.* at 892.

⁵⁷ *Id.* at 893–94.

⁵⁸ *Hoffman Plastic Compounds*, 535 U.S. at 144–49, 151–52 (2002).

⁵⁹ *Id.*

⁶⁰ *Id.* at 151.

⁶¹ The remaining remedies were a cease and desist order and an order that the employer post a notice about the NLRA violation at his workplace. *Id.* at 152.

⁶² See *id.* at 155 (Breyer, J., dissenting) (stating that the denial of backpay to undocumented employees “lowers the cost to the employer of an initial labor law violation” and “thereby increases the employer’s incentive to find and to hire illegal-alien employees.”).

ing justices' simultaneous consideration of immigration and NLRA policy concerns, however, led them to a diametrically opposed conclusion about how to solve the NLRA backpay question. For the dissenters, granting backpay to an undocumented employee would help, not hurt, immigration policy goals by making these employees less attractive to employers in the future. According to these justices, despite the availability of the remaining NLRA remedies of notice posting and a cease-and-desist order, failing to provide backpay to undocumented employees would severely impede the NLRA's ability to deter employers from taking adverse employment actions against employees who engage in collective activity at the workplace.⁶³

Since the Court's 2002 *Hoffman* decision, the agency in charge of NLRA enforcement (National Labor Relations Board—NLRB) and lower courts have been increasingly engaged in *immigration* law analyses. Because an employee's immigration status is clearly relevant to whether an undocumented employee can receive a backpay remedy in an NLRA case, the NLRB often must make an immigration law assessment about an individual's immigration status as part of its labor law decision about NLRA remedies.⁶⁴ In a recent NLRB decision, however, the NLRB limited the circumstances under which an employer can raise immigration status as a defense to an NLRA backpay remedy. In *Flaum Appetizing Corp.*, the NLRB concluded that employers must have a sufficient "factual basis" for contending that their employees lack proper immigration status.⁶⁵

Hoffman's reliance on immigration policy considerations in an NLRA case not only raised a host of procedural and substantive questions related to the NLRB's enforcement of the NLRA. It also opened up a series of questions about how immigration law may affect workplace law controversies not involving the NLRA. The ways that these lower courts have weighed immigration goals on the one hand and workplace policy goals on the other have varied significantly across courts.⁶⁶ Indeed, post-*Hoffman*, there is widespread legal ambiguity (and therefore ongoing litigation) about which workplace law remedies are available to

⁶³ See *id.* at 154 (Breyer, J., dissenting) ("Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.").

⁶⁴ The NLRB recently concluded that an undocumented employee cannot receive backpay even if the employer violates IRCA and the employee does not. See *Mezonos Maven Bakery, Inc.* 357 NLRB No. 47 (2011).

⁶⁵ See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011).

⁶⁶ See generally Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009).

undocumented employees who are victims of federal and state workplace law violations.⁶⁷

Courts, however, have not solely applied *immployment* law analyses to resolve workplace law disputes. A few courts have utilized a form of *immployment* law analysis in immigration law disputes as well. An immigration judge in New York, for example, considered immigration and workplace law concerns when he ruled to suppress evidence against immigrants who were in deportation proceedings. The evidence had been obtained as a result of a worksite immigration raid. To make the evidentiary ruling, the immigration judge considered the effects of an “Operation Instruction” (OI) for immigration authorities, which had directed them to take certain precautions when there is an ongoing labor dispute at a particular establishment that they would like to target for immigration enforcement.⁶⁸ These precautions, according to the judge, are intended to protect the immigrant employees’ “rights under federal labor law.”⁶⁹ Thus, the immigration judge suppressed evidence against these individuals because immigration authorities had relied on a tip from an employer during an ongoing labor dispute and had failed to follow the OI.⁷⁰

Immployment law analysis also has played a limited role in some of the ongoing Constitutional challenges to the subfederal immigration laws described above. The United States Court of Appeals for the Third Circuit, for instance, considered both immigration and employment policies to determine whether Hazleton, Pennsylvania’s employment-related immigration law was constitutional. Because Hazleton’s subfederal law included burdens on employers that went beyond the burdens that IRCA created, the Third Circuit concluded that it was in conflict with IRCA’s intent to reduce an employer’s incentive to engage in employment discrimination.⁷¹

In contrast, the Supreme Court’s recent *Chamber of Commerce vs. Whiting* case concluded that Arizona’s employment-related immigration

⁶⁷ See *id.* at 1372 (“[W]hat I call an ‘ambiguous rights’ scenario, reflects the current, muddled state of affairs. Because employers have experienced limited success in their attempts to extend remedial limitations in labor law to other employment laws . . . unauthorized immigrants do not know which claims remain viable.”).

⁶⁸ See *In re Herrera-Priego*, Decision and Order of the Immigration Judge 22-24 (July 10, 2003), available at http://v2011.nilc.org/immsemplymnt/IWR_Material/Attorney/attorney_index.htm. But see *Monteso v. INS*, 124 F.3d 385 n.4 (2d Cir. 1997).

⁶⁹ *Herrera-Priego* at 23.

⁷⁰ *Id.* at 22–24.

⁷¹ See *Lozano v. City of Hazleton*, 620 F.3d 170, 211–12 (3d Cir. 2010). This case was vacated and remanded in light of the U.S. Supreme Court’s decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). For a reference to IRCA’s *immployment* law qualities, see *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 767 (10th Cir. 2010) (describing IRCA’s main goals as “preventing the hiring of unauthorized aliens, lessening the disruption of American business, and minimizing the possibility of employment discrimination”).

provisions (a licensing provision and mandatory E-Verify requirement for all employers) were not in conflict with IRCA's protections against employment discrimination.⁷² Because Arizona's employment-related immigration law provisions differ markedly from Hazleton's provisions and the patchwork of subfederal provisions in other parts of the country, it is difficult to predict what effect, if any, *Whiting* will have on the Third Circuit's and other lower courts' applications of *immigration* law analysis.

In sum, the growing use of *immigration* law analysis in the courts is an additional reason to explore the intersections between immigration and workplace law. The courts' inconsistent use of *immigration* law analyses in cases involving *Hoffman*'s legacy and the constitutionality of subfederal immigration laws also calls for intensive scholarly, judicial, and legislative attention. For instance, scholars, courts, and policymakers, should develop comprehensive *immigration* law frameworks that can resolve ongoing legal ambiguity about the workplace law remedies available to undocumented workers.

Additionally, scholars and courts should more aggressively and consistently apply *immigration* law analyses to resolve ongoing questions about the constitutionality of a wide array of subfederal employment-related immigration laws. To date, Supremacy Clause preemption analyses have largely focused on whether subfederal employment-related protections conflict with federal immigration law, neglecting potential conflicts involving federal employment policy goals. As I have argued previously, subfederal employment-related immigration laws conflict with federal employment protections in a number of ways.⁷³

VI. IMMIGRATION LAW'S EFFECTS ON WORKPLACE PROTECTIONS

Another reason to consider immigration and workplace policies together is that immigration law may affect employees' workplace protections and collective activity in a number of ways. In accordance with Congressional intent, sometimes immigration law enhances, or comple-

⁷² Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1971–72 (2011) (stating that employment discrimination is not an issue because “[I]f license termination is not an available sanction for merely hiring unauthorized workers, but is triggered only by far more egregious violations. And because the Arizona law covers only knowing or intentional violations, an employer acting in good faith need not fear the law’s sanctions. Moreover, federal and state antidiscrimination laws protect against employment discrimination and provide employers with a strong incentive not to discriminate. Employers also enjoy safe harbors from liability when using E-Verify as required by the Arizona law. The most rational path for employers is to obey both the law barring the employment of unauthorized aliens and the law prohibiting discrimination.”).

⁷³ See Griffith, *supra* note 2, at 393 (developing a preemption framework that both considers the preemptive force of FLSA and Title VII of the Civil Rights Act and “simultaneously considers the policy goals of federal immigration law and federal employment law.”).

ments, employees' workplace protections. Part III's description of IRCA's civil rights protections for employees who experience national origin or citizenship status discrimination in the workplace serves as one example.⁷⁴

Recent case law and scholarship, however, illustrate that all too often immigration policies have had a negative effect on employees' workplace protections and collective activity in practice. The Court's *Hoffman Plastics* decision and its progeny, discussed in Part V, demonstrates that judicial consideration of immigration policies has heightened legal ambiguity and has sometimes lead to a reduction in the workplace law remedies available to undocumented workers. Scholars have argued that *Hoffman's* negative effects go beyond the court rulings that follow in its wake. As Professor Ruben Garcia's Essay in this issue contends, *Hoffman* stands as "a powerful legal symbol," which emboldens unscrupulous employers and "sends a message of exclusion to undocumented workers, and by extension, to many immigrant workers in society."⁷⁵

Restrictive aspects of immigration law may be in tension with the incentives that Congress intended workplace law to promote and thereby have negative effects on employee protections.⁷⁶ The fostering of incentives is essential to effective workplace regulation. As Professor Adam Cox has stated, "[l]aw pervasively regulates behavior by generating incentives" rather than "solely through the direct exertion of coercive force."⁷⁷ Numerous scholars have argued that restrictive immigration policies have reduced immigrant employees' willingness to come forward to complain about workplace law violations, even in the face of the most severe violations.⁷⁸ Professors Janice Fine and Jennifer Gordon,

⁷⁴ For another example of how the interaction between immigration law and workplace law can expand employees' workplace protections see Kati L. Griffith & Tamara L. Lee, *Immigration Advocacy as Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. L. (forthcoming 2012) (contending that the NLRA protects many forms of employees' collective immigration advocacy because of the close relationship between immigration and labor concerns).

⁷⁵ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. vs. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y, 659, 662. See also *id.* at 3 ("The fact that *Hoffman* might apply to a more limited number of cases than originally feared, or only to the remedy of back pay for all immigrants, does not make it less of a threat to the labor rights of all immigrants. The specter of *Hoffman* has sometimes been used more effectively than the reality; employers have tried to use *Hoffman* to seek discovery of immigration status in depositions and to deny workers' compensation in some cases.").

⁷⁶ For extensive legislative history examples of Congress's intent to avoid conflict between immigration and workplace law, see Griffith, *supra* note 24, at 1144–54. Incentives play an important role in legal analysis.

⁷⁷ Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 387 (2008).

⁷⁸ See Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 44 (2008) ("Unauthorized immigrants are acutely aware of their tenuous presence in the United States . . . [they] often chose to remain silent in the face of egregious workplace violations."); Griffith, *supra* note 2, at 437 n.228

for example, recently contended that “immigrants [are] increasingly unwilling to come forward to report wage violations” because of “work site raids and employer sanctions enforcement.”⁷⁹

Immigrant workers’ failure to seek government intervention when they are experiencing workplace law abuses is particularly problematic from a workplace law perspective. The U.S. workplace law enforcement scheme promotes and largely relies on the initiative of employees, rather than government inspections, to maintain baseline workplace protections for employees.⁸⁰ In this way, workplace law contains what some political scientists have referred to in other contexts as a “fire-alarm oversight” scheme, which depends on employee initiative. This is in contrast to “police-patrol oversight” schemes, which would involve such things as widespread government inspections and would operate regardless of employee initiative.⁸¹ Thus, workplace law enforcement is severely compromised when employees do not have the proper incentive to fulfill their intended role as private attorneys general who will pull the workplace law fire alarm when necessary.⁸²

Scholars have shown that immigration policy not only narrows workplace protections but also impedes collective activity among employees. The modest empirical evidence that exists on employers’ retaliatory actions, for instance, suggests that some employers do indeed threaten employees with immigration law consequences if they engage in collective activity or step forward to make workplace law complaints.⁸³ For instance, the three-city survey of low-wage workers, described in

(2011) (collecting authority on this issue). This may vary to some extent depending on whether collective activity is present and which workplace law is at issue. Professor Benjamin Sachs, for example, has argued that the exclusion of undocumented workers from key NLRA remedies has had “a hydraulic effect,” such that organized immigrant workers have turned to employment law, rather than labor law, as a way to protect their collective activity. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008).

⁷⁹ Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 555 (2010).

⁸⁰ See Griffith, *supra* note 2, at 431–36 (using statutory text, legislative history and Supreme Court precedent to illustrate that private attorneys general are the cornerstone of the enforcement schemes of FLSA and Title VII of the Civil Rights Act); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-962T, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 7 (2008), available at <http://www.gao.gov/new.items/d08962t.pdf> (estimating that employee-initiated complaints are responsible for three-fourths of DOL’s investigations).

⁸¹ The fire alarm and police patrol concepts were originally developed in the context of Congressional oversight. See Mathew D. Cummins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. OF POL. SCIENCE 165, 166 (1984).

⁸² See Griffith, *supra* note 2, at 431–36.

⁸³ See Lee, *supra* note 4, at 1107 (citing and discussing “growing anecdotal evidence” on this issue); see also Michael J. Wishnie, *Immigrants and the Right To Petition*, 78 N.Y.U. L. REV. 667, 667–80 (2003).

Part II, found that some employers use threats to call immigration authorities as a way to intimidate employees who engage in union organizing efforts or who file workplace law complaints against their employers.⁸⁴ Of the workers who were retaliated against by their employers because they had filed a workplace law complaint or participated in union organizing efforts, 47.1% were subject to employer threats that they would fire employees or call immigration authorities.⁸⁵

Scholars and commentators have also identified ways that the agency in charge of workplace-based immigration enforcement, the U.S. Immigration and Customs Enforcement agency (ICE), has impeded workplace law enforcement and employee organizing in some circumstances. ICE agents, for instance, have misrepresented themselves to workers as employee health and safety agents in order to capture undocumented workers.⁸⁶ On other occasions, ICE has reportedly initiated workplace immigration raids in response to “tips” from employers who contact immigration authorities as a way of deterring employee organizing and workplace law claims.⁸⁷

Moreover, the National Employment Law Project recently reported on three cases that involved “ICE surveillance of picket lines or other labor activities” and four cases that involved immigration enforcement activities at workplaces despite “ICE knowledge of an ongoing organizing campaign or labor dispute.”⁸⁸ Therefore, despite the DOL-ICE Memorandum of Understanding described in Part III, ICE’s interventions have sometimes sent the message to employees that labor disputes bring about immigration enforcement and that undocumented employees are

⁸⁴ BERNHARDT, *supra* note 12, at 3, 24–25.

⁸⁵ *See id.* at 24–25. A study of campaigns related to NLRB-supervised union elections found that “[i]n 7% of all campaigns—but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants—employers make threats of referral to Immigration Customs and Enforcement (ICE).” *See* KATE BRONFENBRENNER, ECON. POLICY INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 12 (2009), available at http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf; *see also* LANCE COMPA, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 30 (2004) (describing threats by employers to call immigration authorities in response to union organizing efforts).

⁸⁶ *See Lee, supra* note 1, at 1092.

⁸⁷ *See id.* For a description of five additional cases involving “ICE enforcement actions undertaken at the behest of employers, their surrogates, and other police agencies” see Nat’l Emp’t Law Project, *ICED OUT: How Immigration Enforcement Has Interfered with Workers’ Rights* 15–21 (2009), available at http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf. *See also* Gayle Cinquegrani, *Collaboration Is the Watchword at the Labor Department*, Daily Lab. Rep. (BNA) No. 15 at S-10 (Jan. 24, 2012) (reporting on the Labor Solicitor’s comment that the DOL has “seen instances where employers threaten to call ICE” as a response to a DOL investigation.”).

⁸⁸ *See* Nat’l Emp’t Law Project, *ICED OUT: How Immigration Enforcement Has Interfered with Workers’ Rights* 21–27 (2009), available at http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf.

not safe to organize or to come forward with complaints related to their workplace rights.⁸⁹

Regardless of whether employers actually make immigration threats as a response to employees' workplace law complaints and regardless of whether ICE actually intervenes in a specific workplace, immigration law may still be in tension with collective activity and a workplace law enforcement scheme that relies on employee-led complaints.⁹⁰ As one scholar adeptly states, "[e]ven second-hand experiences, those that come to the employee via organizational networks, can have the effect of pushing unauthorized immigrants deeper into the margins of society."⁹¹ Moreover, a 2008 survey of Latino immigrants in North Carolina illustrates that "rumors" about immigration enforcement measures can chill immigrant employees' claimsmaking.⁹² Thus, even though the total number of worksite enforcement measures currently hovers below 3,500 per year,⁹³ the effects of these measures can be amplified through news and rumors that travel via immigrant networks.

Even when specific employer threats, immigration enforcement actions, and rumors are not present, immigration law continues to be in tension with employees' collective activity and the enforcement of employees' workplace protections. Professors Leticia Saucedo and Cristina Morales have convincingly argued, for instance, that a worker's immigration status serves as a formidable disincentive to engage in worker organizing efforts or to come forward when that worker experiences wage, safety or some other kind of workplace law violation. As their co-authored Essay in this issue contends, undocumented workers cannot adequately effectuate their private attorneys general role within our workplace law enforcement scheme if they "feel they have no rights or protection in the workplace."⁹⁴

⁸⁹ See Lee, *supra* note 1, at 1092.

⁹⁰ See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064–66 (9th Cir. 2004) (contending that both documented and undocumented immigrant workers may fear coming forward with workplace law complaints because they do not want to risk immigration law consequences for themselves or for their friends and families).

⁹¹ Lee, *supra* note 1, at 1105.

⁹² See Michael Jones-Correa, Gov't Dep't, Cornell Univ. and Katherine Fennelly, Hubert Humphrey Inst. of Pub. Affairs, Univ. of Minn., *Immigration Enforcement and Its Effects on Latino Lives in Two Rural North Carolina Communities*, Conference on "Undocumented Hispanic Migration: On the Margins of a Dream," Conn. Coll. (Oct. 16–18, 2009) ("The survey indicates that fear itself has a negative consequence on immigrant life, and the interviews indicate that *rumors* of immigration enforcement can have negative effects as real as the enforcement itself.").

⁹³ See News Release, ICE, *Several major US employers join ICE employment compliance program* (Nov. 4, 2011), available at <http://www.ice.gov/news/releases/1111/111104washingtondc.htm> (reporting 3,291 work site enforcement actions as of November 2011).

⁹⁴ Leticia M. Saucedo and M. Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 657.

The Saucedo and Morales study, which is based on over 100 interviews with workers in Las Vegas, Nevada and Hidalgo, Mexico, shows that undocumented people often view their workplace rights through the prism of their experience as undocumented immigrants and, therefore, their experience of having few rights.⁹⁵ The study illustrates that immigrant narratives about their experiences crossing the U.S.–Mexico border are similar to immigrant narratives about their experiences in the workplace. Both of these narratives, according to Saucedo and Morales, are “rooted in masculinity,” encouraging immigrants to endure “increasingly greater risks” with border crossings and to “tolerate difficult conditions in the workplace.”⁹⁶

This Part’s description of potential tensions between immigration and workplace law demonstrates the need for future research which considers immigration policy in relationship to workplace policy. More empirical work is necessary in this area. Professor Garcia’s Essay, for instance, implores scholars to engage in “empirical work . . . to measure the impact of *Hoffman* on union organizing.”⁹⁷ Moreover, scholars should empirically examine what can explain the correlation between immigration status and a higher prevalence of workplace law violations described in Part II.

Professor Jayesh Rathod reminds us that understanding what motivates or deters low-wage and immigrant workers is a crucial area of inquiry moving forward. Rathod encourages scholars to conduct empirical research which considers immigration status as just one of multiple factors that influence a worker’s actions or inactions.⁹⁸ Rathod effectively contends that “the emphasis on status to the exclusion of other factors contributes to an incomplete understanding of immigrant worker behavior and obscures the rich interplay between immigration status, other structural forces, worker characteristics, and expressions of individual agency.”⁹⁹ A deeper understanding of the factors affecting workers’ be-

Similarly, Professor Shannon Gleeson’s analysis of interviews with forty-one Latino workers in the California and Texas restaurant industries suggests that immigration status shapes employees’ activities “irrespective of the extent of rights offered to” undocumented workers by workplace law. See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 563 (2010). See also *id.* at 592 (stating that their exclusion as immigrants but inclusion as workers “creates a cognitive dilemma whereby undocumented immigrants . . . are left wondering if, indeed, they have the right to have rights.”).

⁹⁵ See Saucedo & Morales, *supra* note 94.

⁹⁶ *Id.* at 642–43.

⁹⁷ Garcia, *supra* note 75, at 671.

⁹⁸ Jayesh M. Rathod, *Beyond the “Chilling Effect”: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL’Y J. 267 (2010).

⁹⁹ *Id.* at 293.

havior, Rathod argues, can tell us how to develop legal rules that better protect marginalized workers.¹⁰⁰

VII. *EMPLOYMENT* “FIXES”

Scholars, commentators, and some state governments have begun to develop proposals, what I call *immigration* “fixes,” to address many of the negative effects identified above in Part VI. While it is beyond the scope of this Article to discuss all of them here,¹⁰¹ a brief outline of some of the major developments in this area should underscore the growing interest in ameliorative proposals to address immigration law’s negative effects on collective activity and employees’ workplace protections.

Scholars have proposed to address the current conflicts between immigration law and workplace law through comprehensive immigration reform, which would, among other things, legalize the status of currently undocumented workers. According to Professor Michael Wishnie, for instance, this kind of immigration reform “may reasonably be characterized as the most significant *labor reform* in a generation” because it would bolster workplace protections for both documented and undocumented workers.¹⁰² As an additional solution, Wishnie and others have also called for the repeal of IRCA’s employer sanctions regime in its entirety.¹⁰³

¹⁰⁰ *Id.* at 293–94. For studies that explore worker narratives to explain worker behavior see Saucedo and Morales, *supra* note 94 (finding that status does affect behavior); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561 (2010) (same).

¹⁰¹ For other proposals not specifically discussed here see Griffith, *supra* note 2, at 411–50 (developing a preemption framework that recognizes conflicts between subfederal employment-related immigration laws and federal employment policies); Lee, *supra* note 4, at 1142–45 (proposing audits of employers who report their employees to immigration authorities and widespread use of “the exclusionary rule” in immigration cases that rely on evidence obtained during a worksite action instigated by an employer report); Michael C. Duff, *Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace*, 30 BERKELEY J. EMPL. & LAB. L. 133, 139 (2009) (calling for the NLRB’s “development of immigration-conscious investigative procedures” to improve the enforcement of the NLRA).

¹⁰² Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1447 (2008) (emphasis added). See also *id.* at 1447–48 (“The proposed legislation would have given millions of undocumented workers more robust labor and employment rights. These workers would have also been able to assert the limited workplace rights they already had, even as undocumented workers, with a vastly diminished risk of deportation. Millions more U.S. workers also would have benefited from the increased protections arising from the enforcement of workplace rights by noncitizen workers.”).

¹⁰³ See Bacon & Hing, *supra* note 33, at 104–05 (“We need to see migrants as human beings first and then formulate a policy to protect their human and labor rights, along with those of other working people in this country. Repealing employer sanctions is critical in moving us in that direction.”); Wishnie, *supra* note 4, at 217 (calling for the repeal of employer sanctions). But see Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 79 (2007) (disagreeing with the proposal to repeal the employer sanc-

There is a group of proposals that specifically relates to the Supreme Court's *Hoffman* case. Some call for a "*Hoffman* fix" which would entail federal and state legislative responses that overturn or minimize the effect of the Supreme Court's interpretation of IRCA's effects on the NLRA.¹⁰⁴ California passed such a law in 2002, making "immigration status irrelevant for the enforcement of state labor, employment, civil rights and employee housing laws."¹⁰⁵ Along with legislative solutions, scholars have proposed that courts adopt post-*Hoffman* legal analyses that are consistent with both immigration and workplace policy goals.¹⁰⁶

Along with the legislative and judicial proposals above, scholars have proposed what may be best characterized as administrative or agency fixes. One common solution is for labor agencies to heighten their enforcement of existing employee protections in low-wage and immigrant workplaces.¹⁰⁷ Another recommendation is for labor inspectors to work closely with worker organizations to improve enforcement.¹⁰⁸ Moreover, Professor Leticia Saucedo has called on agencies to enhance their use of "U" visas as immigration law remedies in cases involving undocumented employees who are in removal proceedings but have suffered serious workplace law abuses.¹⁰⁹

In a complimentary vein, Professor Stephen Lee has proposed that the DOL closely monitor ICE's workplace-based immigration enforcement efforts. Unlike Saucedo's fix, this coordination would occur before

tions regime entirely and stating that "[e]ven weakly enforced sanctions are likely to have some deterrent effect (since many if not most employers presumably want to comply with the law), and there are a number of ways to strengthen sanctions.").

¹⁰⁴ See, e.g., Maria Pabon Lopez, *The Place of the Undocumented Worker in the United States Legal System After Hoffman* *Plastics Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV., 301, 332 (2004).

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 765 (2003) ("Labor law and immigration law reform are both needed, but until that happens, courts must reconcile separate bodies of law in a way that serves the stated policy objectives of both statutory schemes."). See generally Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009).

¹⁰⁷ See, e.g., Garcia, *supra* note 75 at 671 (stating that "legal status is necessary but not sufficient to protect immigrant workers and that "[t]here must also be attention to the enforcement of existing rights for immigrants and citizens alike.").

¹⁰⁸ See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 553, 560-62 (2010).

¹⁰⁹ See generally Saucedo, *supra* note 4 (proposing enhanced use of "U" visas while acknowledging some of its limitations for fully addressing the scope of the problem). See also Press Release, U.S. Dep't of Labor, *U.S. Labor Department to Exercise Authority to Certify Applications for U visas* (Mar. 18, 2010), available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.htm>.

ICE initiates an enforcement action at a particular workplace.¹¹⁰ This kind of interagency monitoring, according to Lee, would heighten the incentives for immigration authorities to “stop and think” about effects on employees’ workplace protections before they engage in worksite immigration enforcement.¹¹¹

In her article, *Transnational Labor Citizenship*, Professor Jennifer Gordon proposes a more international solution to the problem.¹¹² In doing so, she joins other scholars who have ventured beyond the domestic sphere to develop proposed solutions.¹¹³ Gordon advocates a “model that would tie immigration status to membership in organizations of transnational workers rather than to a particular employer.”¹¹⁴ Workers who become members of these transnational worker organizations “would commit to the core value of labor citizenship” which Gordon describes as “solidarity with other workers in the United States, expressed as a commitment to refuse to work under conditions that violate the law or labor agreements.”¹¹⁵

As the above discussion illustrates, these wide ranging proposals challenge the workplace law-immigration law dichotomy and constitute yet another branch of the burgeoning *immployment* law field.

VIII. *IMPLOYMENT* ADVOCACY

Finally, the integration of immigration and workplace issues is evident in the legislative efforts of advocates. Some policy advocacy proposals, for instance, embrace some of the ways that immigration policy intertwines with workplace protections.¹¹⁶ Muzaffar Chishti’s presentation at the Crossing the Borders Workshop, entitled “Admitting Foreign Workers in a Comprehensive Immigration Reform,” serves as an exam-

¹¹⁰ Lee, *supra* note 1, at 1136.

¹¹¹ *Id.* at 1123. See also Griffith, *supra* note 24, at 1142 (contending that labor protections are primary to ICE’s mission and that education about the separation between immigration and labor enforcement is key to the efficacy of Lee’s proposal).

¹¹² Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

¹¹³ For others that propose international strategies, see generally Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the ‘Brown Collar’ and Migration Paradigm*, 42 N.Y.U. J. INT’L L. & POL. 389 (2010) and Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Standards*, 4 U. PA. J. LAB. & EMP. L. 529 (2002). These proposals suggest that *immployment* law is not purely a domestic phenomenon.

¹¹⁴ See Gordon, *supra* note 112, at 509.

¹¹⁵ *Id.*

¹¹⁶ See Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 A.B.A. J. LAB. & EMP. L. 295, 308 (2011) (“From the perspective of low-wage immigrant workers, any meaningful legal reform effort must encompass the realms of employment and immigration law as well as labor law.”).

ple.¹¹⁷ He described the Migration Policy Institute's immigration proposal to create "provisional visas," which could build in more flexibility for workers whose intent to stay in the United States is neither purely temporary nor purely permanent.¹¹⁸ Mr. Chishti underscored that these employment-based immigration visas need to "maximize" workplace protections for foreign workers and "minimize" negative impacts on workplace protections for U.S.-born workers.¹¹⁹

The focus on workers within the immigrant rights movement as well as the focus on immigrants within the labor movement further demonstrates what could be described as an emerging *immigration* advocacy agenda. Indeed, today's immigrant rights movement has been aptly described as "both a civil rights movement and a labor movement" because of its overlapping policy concerns.¹²⁰ Even though the immigrant rights movement's main focus is to advocate intensively for comprehensive immigration law reform at the federal level and against what it views as anti-immigrant legislation at the state level, workplace concerns are part of this broader agenda. One of the key policy goals of the immigrant rights movement is to achieve safe and just economic opportunities for undocumented workers.¹²¹

Recently, the labor movement has been engaged in *immigration* advocacy as well. Professor Ruben Garcia's Essay in this issue highlights the labor movement's marked shift to a pro-immigrant policy advocacy agenda over the last decade.¹²² Currently, the labor movement's view is that "America needs an immigration system that works for workers" regardless of immigration status.¹²³

In recent years, the labor movement has often framed the need for immigration reform squarely as a workplace issue. From labor's point of view, immigration law reform could positively affect wages, working

¹¹⁷ Muzaffar Chishti, *Admitting Foreign Workers in a Comprehensive Immigration Reform*, Presentation at the Cornell ISS Workshop on Labor Immigration: Good or Bad for America? (Sept. 23, 2011) (presentation available at <http://www.ctl1.com/publicaccess/iss/iss-sem-20110923-eng-mc/index.htm>).

¹¹⁸ *Id.* See generally DEMETRIOS G. PAPADEMETRIOU ET AL., MIGRATION POLICY INST., ALIGNING TEMPORARY IMMIGRATION VISAS WITH US LABOR MARKET NEEDS: THE CASE FOR A NEW SYSTEM OF PROVISIONAL VISAS (2009), available at http://www.migrationpolicy.org/pubs/Provisional_visas.pdf (describing full provisional visa proposal).

¹¹⁹ Chishti, *supra* note 117.

¹²⁰ Milkman, *supra* note 116, at 295.

¹²¹ *Id.*

¹²² Garcia, *supra* note 75, at 668–69.

¹²³ See AFL–CIO, IMMIGRATION, <http://www.aflcio.org/Issues/Immigration> (last visited Nov. 5, 2011); see also Milkman, *supra* note 116, at 295 (“[I]mmigrant organizing and advocacy have infused the beleaguered U.S. labor movement with new energy, new tactics, and new ideas.”).

conditions, workplace rights, job security, and job opportunities.¹²⁴ For instance, in May 2011, AFL–CIO President Richard Trumka proclaimed that workers across the country were “standing together on May Day to remind the President and Congress that the fight for workers’ rights and immigrant rights are cut of the same cloth.”¹²⁵ These shifts, along with the *Hoffman* decision, have fostered ties between the immigrant rights and labor movements.¹²⁶

In short, *immigration* advocacy appears to have taken hold. The inclusion of concerns for employees’ workplace protections within a wider immigration policy advocacy agenda challenges the historical separation between immigration and workplace law. This trend also raises a number of burgeoning questions. For instance, could New Deal era legal protections of some forms of collective “labor advocacy” reach employees’ contemporary *immigration* advocacy efforts?¹²⁷ What implications do these hybrid advocacy efforts have for scholars interested in how “subordinate groups” use “legality claims” to advance their interests?¹²⁸

CONCLUSION

It is not just the expanding undocumented workforce and its greater likelihood of experiencing workplace law violations that should convince us to jointly analyze immigration and workplace law. The rise of federal and subfederal *immigration* laws as well as *immigration* enforcement initiatives, analyses, tensions, “fixes,” and advocacy have also established the existence of, and the need for, further examination of this increasingly critical field of inquiry.¹²⁹

While this Article focused largely on undocumented workers, it is important to note that the scope of the *immigration* law field reaches

¹²⁴ See Griffith & Lee, *supra* note 74 (examining labor’s recent immigration advocacy statements and illustrating how they relate to wages, working conditions, workplace rights, job security, and job opportunities).

¹²⁵ Richard Trumka, *Workers must unite for better immigration policy*, THE HILL’S CONG. BLOG (Apr. 28, 2011), <http://thehill.com/blogs/congress-blog/civil-rights/158107-workers-must-unite-for-better-immigration-policy>.

¹²⁶ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 914 (2008) (contending that *Hoffman* encouraged “greater coordination among immigrant rights advocates and greater investments in immigrant rights from organized labor.”).

¹²⁷ For a comprehensive discussion of the ways that labor’s recent framing of its immigration advocacy falls within NLRA protection, see Griffith & Lee, *supra* note 74.

¹²⁸ Maria Lorena Cook, “*Humanitarian Advocacy Is Never a Crime*”: *Humanitarianism and Illegality in Migrant Advocacy*, 45 LAW & SOC’Y REV. 561, 587 (2011).

¹²⁹ The process of immigration itself also affects domestic workplace law. See Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico’s Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL’Y J. 383, 425 (2008) (“Given that it is increasingly common that citizens of one nation will work in another future research should continue to explore theories of foreign law influence on U.S. labor and employment law.”).

beyond undocumented workers. Many documented immigrant workers, for instance, also straddle immigration and workplace law.¹³⁰ Moreover, the treatment of immigrant workers, documented and undocumented alike, may have broader effects on the wages, working conditions, and collective organizing efforts of U.S.-born workers.¹³¹

Through an illustration of the myriad ways that immigration law and employment protections interact in both positive and negative ways, this Article has argued for an *immigration* law agenda. It also raised lines of inquiry that demand the attention of courts, agencies, scholars, and policymakers. An analytical lens that simultaneously considers immigration law and workplace law allows us to examine the effects that these two areas of law have on each other and to develop ways to better harmonize these two areas of law in the future. In sum, it is time to cross the borders of immigration and workplace law.

¹³⁰ See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 137–38 (2009) (describing barriers to workplace protections for documented guest workers). For a recent labor-based critique of an immigration visa category, see Amber McKinney, *Increased Scrutiny of J-1 Visa Program Means Employers Must Step Up Compliance*, Daily Lab. Rep. (BNA) No. 214, at B-3 (Nov. 4, 2011) (stating that the J-1 visa program “was designed to encourage cultural exchanges” for foreign students but that worker groups cite labor violations and view the program “as a source of cheap labor” for employers).

¹³¹ See Fisk & Wishnie, *supra* note 2, at 399–400 (describing how treatment of individual employees affects workplace standards of employees more broadly).