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# When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History

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# When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History

## **Abstract**

What happens when a person is simultaneously viewed as an unauthorized immigrant without rights according to a federal regime and as an employee with rights according to a subfederal regime? In the wake of widespread and inconsistent adjudication of this issue, this Article sheds new light on this pressing question. To date, pertinent court battles and scholarship have led to a virtual stalemate and often focus exclusively on normative policy arguments. By contrast, this Article employs an empirically-grounded review of fifteen years of legislative history to analyze this paradox. This review illustrates that the denial of workplace protections to unauthorized workers runs contrary to immigration law purposes. The Article, therefore, provides a fresh perspective on an otherwise intractable debate. In doing so, it also develops a more scientifically grounded forensic approach to legislative history which addresses some of the most salient and passionate critiques of legislative history and revives legislative history as a more reliable interpretive tool in law and policy analyses.

## **Keywords**

immigration law, unauthorized immigrant, federal regime, subfederal regime

## **Disciplines**

Immigration Law | Labor and Employment Law | Labor Relations

## **Comments**

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# WHEN FEDERAL IMMIGRATION EXCLUSION MEETS SUBFEDERAL WORKPLACE INCLUSION: A FORENSIC APPROACH TO LEGISLATIVE HISTORY

*Kati L. Griffith\**

*What happens when a person is simultaneously viewed as an unauthorized immigrant without rights according to a federal regime and as an employee with rights according to a subfederal regime? In the wake of widespread and inconsistent adjudication of this issue, this Article sheds new light on this pressing question. To date, pertinent court battles and scholarship have led to a virtual stalemate and often focus exclusively on normative policy arguments. By contrast, this Article employs an empirically-grounded review of fifteen years of legislative history to analyze this paradox. This review illustrates that the denial of workplace protections to unauthorized workers runs contrary to immigration law purposes. The Article, therefore, provides a fresh perspective on an otherwise intractable debate. In doing so, it also develops a more scientifically grounded forensic approach to legislative history which addresses some of the most salient and passionate critiques of legislative history and revives legislative history as a more reliable interpretive tool in law and policy analyses.*

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#### INTRODUCTION

What happens when a person is simultaneously viewed as an unauthorized immigrant without rights according to a federal statutory regime, and as an employee with rights according to a set of state and local (“subfederal”) workplace laws? By focusing on legalization programs, border enforcement strategies, employer verification requirements, and guest worker programs, debates about “comprehensive immigration reform” all too often overlook this perplexing question. Despite the inattention it receives in the policymaking arena, litigation on this question abounds. In the last decade there has been widespread and inconsistent adjudication of this issue in courts across the country. Some courts have responded by providing full workplace rights for employees regardless of immigration status. Others condition sub-federal workplace protections on an employee’s immigration status.<sup>1</sup>

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1. See *infra* Part I.C.

Moreover, the answer to this question has significant consequences. From a worker's perspective, it could mean the difference between payment and nonpayment for his or her work. Similarly, it could significantly reduce the amount of monetary support that a worker receives to address a serious workplace injury, even if the injury makes future employment difficult or impossible. For policymakers and courts, it has implications for the efficacy of both the immigration-law and workplace-law regulatory regimes, as well as for the constitutionally intended relationship between federal and state governments. Because a potential conflict between federal immigration law and subfederal law is at issue, the question about the statute's purposes becomes a constitutional question that implicates the Supremacy Clause.<sup>2</sup>

This Article is the first systematic review of fifteen years of legislative history. As such, it sheds new light on the high-stakes and intractable question of whether federal immigration law circumscribes unauthorized workers' subfederal workplace protections. These subfederal workplace protections include laws that address health and safety at work, the payment of wages for work performed, and employment discrimination based on race, gender, and other protected statuses. While some scholars have addressed this Supremacy Clause question, they have not employed a comprehensive analysis of legislative history to gain analytical leverage.<sup>3</sup> Moreover, the U.S. Supreme

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2. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

3. See, e.g., Robert I. Corrales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENV. U. L. REV. 347, 371–78 (2003) (describing case law on the preemptive effect of federal immigration reform law); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1362 (2009) (analyzing the legal rights of unauthorized immigrants in context of employment law); Hugh Alexander Fuller, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After Hoffman Plastic Compounds, Inc. v. NLRB*, 58 BAYLOR L. REV. 985, 998–1006 (2006) (discussing the preemptive scope of federal immigration reform legislation); Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT'L L.J. 127, 131–37 (2008) (examining the preemptive effect of federal immigration legislation on state and local employment law); Michael H. LeRoy, *Overruling Precedent: "A Derelict in the Stream of the Law"*, 66 SMU L. REV. 711, 748–50 (2013) (describing this paradox at play in worker compensation cases); María Pabón López, *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.

Court's review of a related question about the relationship between federal immigration law and federal labor law only considered "a single Committee Report from one House of a politically divided Congress," which the justices in the majority dismissed and characterized as "a rather slender reed" of legislative intent.<sup>4</sup>

This Article does more than bring needed insight to the pressing question about whether federal immigration law conflicts with sub-federal attempts to provide workplace protections to unauthorized immigrants. It also builds toward a more empirically-grounded and reliable approach to the use of legislative history as an interpretive tool in law and policy analysis. When statutory text is unclear, legislative history could be a potent analytical tool to help unravel statutory meaning.<sup>5</sup> The proposed approach responds to some of the most salient and passionate critiques of legislative history. Currently, one of the most common critiques is what social scientists refer to as a tendency toward "selective observation": the tendency to "seek out evidence that confirms what we already believe and ignore contradictory information."<sup>6</sup> The often voluminous and heterogeneous reports, debates, hearings, and presidential signing statements which make up the legislative history of a statute can invite opportunistic "cherry-picking" of only legislative materials that support one's position.<sup>7</sup> As is often

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INT'L & COMP. L. REV. 301, 303 (2005) (examining recent developments with respect to the legal system's attitude toward undocumented workers); Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 302 (2006) (asserting that federal immigration law does not displace subfederal workers' compensation law); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 499–508 (2004) (outlining modern jurisprudence on employment law and undocumented immigrants).

4. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–50 n.4 (2002); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (discussing H.R. Rep. No. 99-682, pt. 1, at 58 (1986)).

5. See Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as a Tool of Legal Interpretation*, 39 Sw. L. REV. 103, 145–46 (2009) (arguing that when the text is ambiguous, interpreters of statutes need to find sources beyond the text itself).

6. W. LAWRENCE NEUMAN, *BASICS OF SOCIAL RESEARCH: QUALITATIVE AND QUANTITATIVE APPROACHES* 6 (3d ed. 2012).

7. It is common for scholars and courts to employ the "cherry-picking" critique of the use of legislative history. See, e.g., Roessler, *supra* note 5, at 108 ("That school of thought that rejects legislative history as a proper tool of interpretation holds that legislative history is simply unreliable and that inevitable cherry-picking occurs so that the interpreter can find in the legislative history that meaning of the text before her that she personally prefers as a matter of policy.").

stated, “consulting legislative history is like entering a crowded room and looking around for one’s friends.”<sup>8</sup>

This Article’s proposed approach draws from insights and methodology typically associated with social science as well as recent legal scholarship to turn legislative history inquiries into systematic and comprehensive assessments of opposing viewpoints.<sup>9</sup> The Article refers to the proposed approach as a “forensic approach” because, like forensics, it promotes “the use of scientific knowledge or methods.”<sup>10</sup> Rather than applying scientific methods to solve crimes, however, it applies them to legislative history to help solve interpretive dilemmas about the meaning of federal law.

In Part I, this Article explains the origins of the Supremacy Clause question about federal immigration law’s impact on subfederal workplace protections for unauthorized workers. It describes the relevant statutory language in the Immigration Reform and Control Act (IRCA)<sup>11</sup> and the courts’ divided views on congressional intent in this area. Part II draws from legal scholarship on empirical approaches to legislative history as well as social science research methods to propose a forensic approach to legislative history. Part III then applies the proposed approach to the question of whether, or to what extent, federal immigration law conflicts with subfederal workplace protections for unauthorized immigrants. The Article concludes by placing the analysis into the broader context of debates about immigration law’s impact on subfederal workplace law and by proposing next steps in the development of a forensic approach to legislative history.

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8. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1874 (1998).

9. Scholars have identified the need to produce reliable approaches to the use of legislative history. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1840 (2010) (“Courts also might try to make legislative history use less manipulable by articulating standards about what makes it reliable. The U.S. Supreme Court’s stalemate over whether legislative history should be used at all has prevented a more productive conversation from emerging about when legislative history is actually helpful.”) (emphasis omitted); Roessler, *supra* note 5, at 115 (“Analysis of legislative history’s reliability and value in a particular context always must be performed in tandem with the use of other tools of interpretation, such as text, structure, and precedent.”).

10. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (deluxe ed. 1998) (defining “forensics”).

11. 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.).

## I.

THE UNRESOLVED QUESTION: FEDERAL EXCLUSION  
MEETS SUBFEDERAL INCLUSION

Why are courts asking whether subfederal workplace protections for unauthorized workers conflict with federal immigration law? There are essentially two reasons. First, the relevant immigration law statute, IRCA,<sup>12</sup> introduced mechanisms which enforce immigration restrictions through the workplace but does not explicitly state whether, or to what extent, Congress intended to affect subfederal workplace law protections for unauthorized workers. Second, a 2002 U.S. Supreme Court case concluded that some federal labor law protections may conflict with IRCA's purposes,<sup>13</sup> which led some courts to question whether subfederal workplace protections may conflict as well. Part I will describe each of these reasons. It will then detail how courts have varied their responses to this question in cases involving the subfederal workplace protections of unauthorized employees.

A. *Ambiguous Statutory Language*

IRCA's text is somewhat ambiguous about the intended relationship between federal immigration regulation in the workplace and subfederal workplace protections. IRCA's express preemption provision does not lend guidance to this analysis. According to the provision, IRCA "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."<sup>14</sup> This provision clarifies that IRCA preempts subfederal attempts to sanction employers for employing the unauthorized (except through licensing and similar laws)<sup>15</sup> but does not directly address whether IRCA preempts subfederal attempts to protect unauthorized

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12. *Id.*

13. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137–53 (2002).

14. 8 U.S.C. § 1324a(h)(2) (2013).

15. There has been a lot of debate about how broadly to read this provision when states pass laws intending to restrict immigration. *Compare* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981 (2011) (concluding that federal law did not expressly or impliedly preempt local licensing law), *with* Chamber of Commerce v. Edmondson, 594 F.3d 742, 765–66 (10th Cir. 2010) (concluding that federal law preempted local law). *See generally* Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 605–08 (2010) (discussing the tension between federal revenue and state costs resultant from alien workers).

workers who experience violations of their subfederal workplace rights.<sup>16</sup>

There is some disagreement about what IRCA's remaining provisions tell us about congressional purposes with respect to unauthorized workers' workplace protections. IRCA's workplace-based immigration-enforcement scheme led some to argue that Congress intended to circumscribe the workplace protections of unauthorized workers.<sup>17</sup> IRCA, unlike its immigration law predecessors, "forcefully" brought immigration enforcement into the workplace.<sup>18</sup> The rationale behind this legislative strategy was simple. Because many unauthorized immigrants come to the United States to find employment, the legislation aimed to make those jobs more difficult to obtain.<sup>19</sup> IRCA tries to curb unauthorized immigration via the workplace through (1) requiring that employers verify the immigration status of all of their employees;<sup>20</sup> (2) sanctioning employers who knowingly employ unauthorized immigrants;<sup>21</sup> and (3) sanctioning employees who use fraudulent documents to gain employment.<sup>22</sup> Given these provisions, some have claimed that curtailing workplace protections for unauthorized workers is in line with congressional intent because it further reduces unauthorized immigrants' incentives to pursue jobs in the United States.<sup>23</sup>

On the other hand, some have highlighted IRCA's protections of workplace rights to argue that Congress intended to bolster workplace protections for unauthorized workers. For example, they cite IRCA's section 111(d), which states:

There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment

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16. See § 1324a(h)(2).

17. See *infra* Part I.C.

18. *Hoffman Plastic Compounds*, 535 U.S. at 147; see also *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012) (describing how "Congress enacted IRCA as a comprehensive framework" for deterring the employment of unauthorized individuals (citing *Hoffman*, 535 U.S. at 147)).

19. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 231 (2d Cir. 2006) ("Employment is the magnet that attracts aliens here illegally . . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment." (citations and internal quotation marks omitted)).

20. 8 U.S.C. § 1324a(a)–(b) (2013).

21. 8 U.S.C. § 1324a(a)(1)(A) (2013).

22. 8 U.S.C. § 1324c(a) (2013).

23. See *infra* Part I.C.

of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.<sup>24</sup>

Thus, along with the employer verification requirements and sanctions listed above, Congress included monetary support for federal wage and hour enforcement on behalf of the unauthorized in the legislation. Given this provision, some have claimed that Congress intended to bolster workplace protections for unauthorized workers at the federal and subfederal levels as a way to reduce employer incentives to employ unauthorized workers.<sup>25</sup>

### *B. A Supreme Court Case Fuels the Fires of Statutory Ambiguity*

A 2002 U.S. Supreme Court decision, which addressed the relationship between federal immigration law and federal labor law, exacerbated the ambiguity about IRCA's purposes. In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Court asked whether IRCA foreclosed a back pay remedy to an unauthorized employee who had suffered a National Labor Relations Act (NLRA) violation due to his involvement in labor union organizing activities.<sup>26</sup> The Court did not question whether the unauthorized worker had NLRA rights to engage in concerted activity to improve the workplace.<sup>27</sup> The Court reasoned, however, that the provision of a federal labor law back pay remedy to an unauthorized employee to address the employer's NLRA violation "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of immigration laws, and encourage future violations."<sup>28</sup>

Because the Court concluded that IRCA did indeed foreclose this federal labor law remedy, IRCA's effects on the workplace protections available under federal and state workplace laws outside of the NLRA context became even more unclear.<sup>29</sup>

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24. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (codified as amended at 8 U.S.C. § 1101 (2013)).

25. See e.g., Kati L. Griffith, *Discovering "Immemployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 442-44 (2010-2011).

26. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140-42 (2002).

27. See *Hoffman*, 535 U.S. at 149-50 n.4.

28. *Id.* at 151.

29. See 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, 271-74 (2010) (reporting on the "cascade of litigation" after *Hoffman*).

### C. Diverging Case Law

A review of post-*Hoffman* cases that addressed the question of IRCA's influence on subfederal workplace protections demonstrates extensive inconsistency. Courts vary widely in their conclusions as well as their rationales for reaching those conclusions. A review of over 200 cases reported on LexisNexis that cited *Hoffman* in the context of a subfederal workplace law claim yielded thirty-seven cases that directly answered this question.<sup>30</sup>

The holdings of these cases are split fairly evenly. In sixteen cases, judges modified the subfederal workplace protections available to unauthorized workers in order to avoid a potential conflict with IRCA (hereinafter referred to as the "IRCA conflict" cases or courts).<sup>31</sup> The extent of modification varied widely. In some cases, for instance, IRCA conflict courts categorically excluded unauthorized immigrants from the lost future earnings remedy or back pay.<sup>32</sup> In others, they only excluded unauthorized immigrants who violated IRCA by procuring fraudulent documents to gain employment or conditioned the amount of future earnings on the wages of the worker's home country.

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30. A LexisNexis search of all federal and state cases that cited *Hoffman* from March 21, 2002, the date of the *Hoffman* decision, until May 31, 2013, yielded 217 cases to review. All cases were reviewed. Cases qualified for inclusion if they cited *Hoffman*, involved a worker's subfederal statutory or tort claim against an employer, and made a conclusion about whether immigration status conditions an employee's claim or remedies in any way.

31. See *Romero v. Reiman Corp.*, No. 11-Civ-216-F, 2011 U.S. Dist. LEXIS 157839, at \*16–20 (D. Wyo. Dec. 21, 2011); *Ulin v. ALAEA-72*, No. C-09-3160-EDL, 2011 U.S. Dist. Lexis 17468, at \*24–28 (N.D. Cal. Feb. 23, 2011); *Zuniga v. Morris Material Handling, Inc.*, No. 10-C-696, U.S. Dist. LEXIS 14352, at \*4–20 (N.D. Ill. Feb. 14, 2011); *Hocza v. City of New York*, No. 06-3340, 2009 U.S. Dist. LEXIS 3574, at \*8-11 (S.D.N.Y. Jan. 20, 2009); *Ambrosi v. 1085 Park Ave. LLC*, No. 06-CV-8163 (BSJ), 2008 U.S. Dist. LEXIS 73930, at \*34–45 (S.D.N.Y. Sept. 25, 2008); *Morejon v. Terry Hinge & Hardware*, No. B162878, 2003 Cal. App. Unpub. LEXIS 10394, at \*27–31 (Cal. Ct. App. Nov. 4, 2003); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 512, 520–21 (Mich. Ct. App. 2003); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005); *Crespo v. Evergo Corp.*, 841 A.2d 471, 473–74, 477 (N.J. Super. Ct. App. Div. 2004); *Gonzalez v. Performance Painting, Inc.*, 303 P.3d 802, 807–08 (N.M. 2013); *Matter of Ramroop v. Flexo-Craft Printing, Inc.*, 896 N.E.2d 69, 71–73 (N.Y. 2008); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1251–60 (N.Y. 2006); *Coque v. Wildflower Estates Developers, Inc.*, 867 N.Y.S.2d 158, 160, 162–66 (App. Div. 2008); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798, 799–801 (Okla. Civ. App. 2003); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 104–105, 108–109 (majority opinion), 110–12 (Neuman, J., dissenting) (Pa. 2002); *Xinic v. Quick*, No. 2004-226030, 2005 WL 3789231, at \*1–2 (Va. Cir. Ct. Nov. 14, 2005).

32. See, e.g., *Crespo*, 841 A.2d at 473–74, 477.

In twenty-one cases, judges did not view a potential conflict between workplace protections and IRCA and refused to modify the subfederal protections available to unauthorized workers in any way.<sup>33</sup> The judges in such cases viewed the provision of subfederal workplace protections to unauthorized workers as consistent with IRCA's purpose to reduce unauthorized immigration (hereinafter referred to as the "IRCA harmony" cases or courts).

This Article gains analytical leverage on this intractable question through the development of a forensic approach to legislative history<sup>34</sup> and the application of that approach to fifteen years of IRCA's legislative history.<sup>35</sup> It focuses on subfederal workplace protections, which fall within the police powers of subfederal governments, because honing in on Congress' purposes through an empirically rigorous approach is especially crucial in these cases. As a matter of Supremacy Clause jurisprudence, federal immigration law can only preempt these assertions of state police power if it was Congress' "manifest purpose" to foreclose or circumscribe subfederal governments in this way.<sup>36</sup>

Because there is no applicable express preemption provision, courts must engage in implied conflict preemption analyses. Specifically, the Supremacy Clause question in these cases is whether subfederal workplace protections for unauthorized workers "stand [ ] as an obstacle to the accomplishment and execution of the full purposes and

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33. See *Bordejo v. Exclusive Builders, Inc.*, 865 F. Supp. 2d 617, 624–25 (M.D. Pa. Aug. 22, 2011); *Flores v. Limehouse*, No. 2:04-1295-CWH, 2006 U.S. Dist. LEXIS 30433, at \*6–7 (D.S.C. May 11, 2006); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 76 (Cal. Ct. App. 2007), *cert. denied*, 128 S. Ct. 1222 (2008); *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.* 35 Cal. Rptr. 3d 23, 28 (Ct. App. 2005); *Del. Valley Field Servs. v. Ramirez*, No. 12A-01-007-JOH, 2012 Del. Super. LEXIS 622, at \*30 (Del. Super. Ct. Sept. 13, 2012); *Asylum Co. v. D.C. Dep't of Emp't Servs.*, 10 A.3d 619, 628 (D.C. 2010); *Safeharbor Emp'r Services I, Inc. v. Velazquez*, 860 So.2d 984, 985–86 (Fla. Dist. Ct. App. 2003); *Cont'l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 629–30 (Ga. Ct. App. 2004); *Econ. Packing Co. v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 915, 926 (Ill. App. Ct. 2008); *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 652–53 (Iowa 2013); *Coma Corp. v. Kansas Dep't of Labor*, 154 P.3d 1080, 1091–94 (Kan. 2007); *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754–56 (Ky. 2011); *Rodriguez v. Integrity Contracting*, 38 So. 3d 511, 519–20 (La. Ct. App. 2010); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 824–30 (Md. 2005); *Pontes v. New Eng. Power Co.*, No. 03-00160A, 2004 Mass. Super. LEXIS 340, at \*5–9 (Mass. Super. Ct. 2004); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 325, 331 n.4 (Minn. 2003); *Amoah v. Mallah Mgmt., LLC*, 866 N.Y.S.2d 797, 800 (App. Div. 2008); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 62 (App. Div. 2005); *Garcia v. Pasquareto*, 812 N.Y.S.2d 216, 217–18 (App. Div. 2004); *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 392 (Sup. Ct. 2007); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003).

34. See *infra* Part II.

35. See *infra* Part III.

36. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

objectives of Congress.”<sup>37</sup> A focus on the federal immigration law’s effects on subfederal law, rather than the relationship between federal immigration law and federal workplace laws, also moves us away from the well-tread scholarly endeavor of “beat[ing] the *Hoffman Plastics* decision like some piñata . . . .”<sup>38</sup>

## II.

### TOWARD A FORENSIC APPROACH TO LEGISLATIVE HISTORY

Judges and scholars are increasingly locking horns over whether it is a futile endeavor to turn to legislative history to help us understand congressional purposes behind a piece of legislation.<sup>39</sup> Thus, before turning to the specific elements of the proposed forensic approach to legislative history, the Article first addresses the threshold question of whether the documents forming legislative history can ever be reliable sources to consult in law and policy interpretation.

#### A. *Why Is a Forensic Approach to Legislative History Necessary?*

Despite calls to abandon legislative history, developing a forensic approach to legislative history is worthwhile because (1) divining the “true intents” of legislators is not necessary in order to attribute stated purposes to a piece of legislation<sup>40</sup> and (2) courts inevitably will

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

38. Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431, 432 (2009). For other articles on *Hoffman* that do not significantly focus on subfederal issues, see, for example, Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003); Angel A. Darmer, *Reconciling IRCA with the Anti-Retaliation Provisions of the NLRA: How Far Should Hoffman Plastic Compounds Be Extended?*, 34 AM. J. TRIAL ADVOC. 687 (2011); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473 (2004–2005); David L. Hudson Jr., *Tales of Hoffman: A 2002 High Court Case Figures Prominently in Immigrant Rights Battle*, 92 A.B.A. J. 12 (2006).

39. *Compare Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 108, 122 (2007) (Scalia, J., dissenting), with *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (Breyer, J., concurring). See also Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2061–73 (2002) (summarizing the criticisms of legislative history).

40. See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CALIF. L. REV. 845, 864 (1992) (“Conceptually, however, one can ascribe an ‘intent’ to Congress in enacting the words of a statute if one means ‘intent’

continue to turn to legislative history in their legal analyses (and will continue to experience the pitfalls) even if futility arguments have merit as a theoretical matter.

Many arguments against legislative history are based on the observation that there is no such thing as legislative intent, and that therefore reviewing legislative history is a fool's errand. In this vein, Judge Easterbrook has said that "intent is elusive for a natural person, fictive for a collective body."<sup>41</sup> Along these same lines, scholars have highlighted that Congress is a complex body of hundreds of people that simply cannot share one intent about the meaning of statutory language.<sup>42</sup> In 1930, Max Radin wrote a still-influential article on this topic. He stated:

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in its, here relevant, sense of 'purpose,' rather than its sense of 'motive.'"); Roessler, *supra* note 5, at 111–12 (noting that it is not useful to consider the "individual legislators' subjective intent").

41. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that "the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway"). Both are cited in John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 74 n.12 (2006). Moreover, some have critiqued legislative history as futile because it is an unconstitutional delegation of power to a subgroup of legislators. See John F. Manning, *Textualism as Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997) ("By using legislative history as an authoritative source of legislative intent, the Court makes legislative self-delegation possible; Congress's own agents can go far in determining the details of statutory meaning simply by declaring their own conception of legislative intent. This practice is in significant tension with the Supreme Court's modern separation-of-powers case law, which establishes that legislative self-delegation poses a particularly acute danger to bicameralism and presentment and is unconstitutional per se."); see also Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 n.22 (1986) (observing that committee reports are "prepared by the unrepresentative members and their staffs").

42. For these scholars, "a search for legislative intent is futile" and it is dubious that "hundreds of legislators . . . share a coherent 'intent' on a matter not clearly resolved by the statute for which they voted." Manning, *supra* note 41, at 684–85 (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930)); see also Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762–63 (2010) ("[T]extualists take a 'realist' view of Congress, which translates to their rejection of the notion that a multimember legislative body can have a single, discernable 'intent'"); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1833–34 (1998) ("Legislative intent is a meaningless concept, because intentions cannot coherently be attributed to collective bodies. Even if the concept of legislative intent were coherent, legislative history is unreliable evidence of that intent.") (footnote omitted). But see Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 82 (2012) ("Even if one does not accept the recent philosophical work supporting group agency, one should at least accept that, however fictional, the concept of group agency exists in the law.").

The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind as possible reductions of a given determinate, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these [legislators], but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed.<sup>43</sup>

Similarly, some scholars and judges argue that using legislative history is futile because we cannot infer “intent” from legislators’ acquiescence to specific language in a statute.<sup>44</sup> They point out that there are many reasons why legislators may acquiesce to a bill. For instance, some “legislative outcomes” occur because of “seemingly arbitrary (or at least non substantive) factors, such as the sequence of alternatives presented (agenda manipulation) and the practice of strategic voting (logrolling).”<sup>45</sup> Public choice theorists often view a legislator’s acquiescence to statutory language as an indicator of the power of interest groups and the “bargains struck among those groups.”<sup>46</sup> In this way, public choice theorists see “actual statutory language” as “the dearest legislative commodity” rather than an indicator of legislators’ intents about how to interpret specific language in a statute.<sup>47</sup>

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43. Radin, *supra* note 42, cited in Manning, *supra* note 41, at 684 n.46; see also Nourse, *supra* note 42, at 80 (describing Professor Radin’s view that there is “no such thing as ‘legislative intent’” is a “classic ‘realist’ claim”).

44. Along the same lines as the “futility argument,” it is difficult to divine the intent of legislators when they vote for a bill because many legislators are not aware of much of what is said about a piece of legislation before they vote for it. As Professor Manning has stated, “courts simply do not know whether most legislators (much less presidents) have read, or are even aware of, the pre-enactment interpretations contained in the legislative history.” Manning, *supra* note 41, at 686. Consequently, according to this rationale, it is an analytical stretch to conclude that legislative history can tell us something about what a party intended when he or she voted for or signed a bill.

45. Manning, *supra* note 41, at 685 (footnote omitted); see also *id.* at 686 (“If legislative outcomes turn on procedural maneuvers and strategic behavior, judges cannot reconstruct what a legislature would have ‘intended’ to achieve if it had explicitly settled a point that was not clearly resolved in the statutory text (the only text that a requisite majority of legislators voted to enact).”).

46. *Id.* at 687; see also Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) (“Committee membership rarely represents a cross-section of the legislature. Instead, legislators tend to self-select into those committees in which their supporters have the greatest stakes.”).

47. Manning, *supra* note 41, at 687–88; see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1442–43 (2003) (“Legislative communication is, in part, an exercise in spin control. . . . Because legislators know that courts often turn to legislative indicia to resolve ambiguities in the legislation, legislators have an incentive to influence—and even manipulate—the record to serve their ends rather than those of others. Legislators’

These futility arguments about the use of legislative history provide helpful insight into how to frame legislative history inquiries but should not compel us to abandon the practice all together. They illuminate why it is imperative to move away from inquiries into the thought processes and true motivations of legislators when we are trying to interpret statutory meaning within the parameters of the U.S. legal system. Without intending to do so, judges and scholars who engage in futility arguments direct us to frame inquiries into legislative history as searching for purposes that are attached to the legislation and are not evident from the statutory text itself. As Justice Breyer has stated, the “personal motives” of legislators “do not change the purpose of the bill’s language.”<sup>48</sup> 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.

While this analytical shift to stated purposes may still have some drawbacks,<sup>49</sup> we still need to develop a forensic approach to legislative history because the use of legislative history—as well as inquiry

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propensities to manipulate and manufacture legislative histories confound efforts to recover accurate indicia of legislative intent.”) (footnotes omitted). For judicial critiques along these lines, see, for example, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 570 (2005) (suggesting that some legislative language is the product of manipulative legislators, staffers, and lobbyists). *But see* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 53 (2007) (“There are constraints, however, on legislative actors behaving in such a manner—notably, certain incentives within the legislative process that operate to encourage accuracy and probity, especially by committee leaders (who tend to function as bill managers) and their staffs. In the short-term, members know they must rely on colleagues’ representations at the committee stage as to what a bill means, because Congress operates heavily through its committees and members depend upon the accuracy of committee-based information in moving the legislative agenda. More generally, members as repeat players in the legislative process typically aspire in the long-term to a positive relationship with their colleagues and with the institution.” (footnote omitted)).

48. Breyer, *supra* note 40, at 865–66. However, legislative history is still a “tool” that courts can use “as part of their overarching interpretive task of producing a coherent and relatively consistent body of statutory law, even were the ‘rational member of Congress’ a pure fiction, made up out of whole cloth.” *Id.* at 867.

49. Nourse, *supra* note 42, at 134–52; Rodriguez & Weingast, *supra* note 47, at 1432–33 (“The basic democratic principle of majority rule, established in Article I of the U.S. Constitution, ensures that legislators must create a coalition at least as large as a majority of the legislators in each house in order to enact legislation. The process of legislation, then, is shaped by the decisions made by legislators to form and maintain coalitions within the institutional structure of the legislature and within the structure of those nonlegislative institutions (the presidency, the judiciary, and the bureaucracy) upon which legislators rely to facilitate their legislative aims.”) (footnotes omitted).

into what it can contribute to legal analyses—continues, despite these judicial and scholarly calls for its abandonment. As Professor Victoria Nourse’s influential recent work on legislative history contends, we need to push for empirical rigor in this area because “[l]egislative history’s fires still burn, despite repeated attempts to extinguish them. . . . [T]he question is how [legislative history] is best used.”<sup>50</sup> This Article, and its proposed forensic approach to legislative history, takes a significant step in this direction. A more empirically-grounded approach to the study of legislative history can ameliorate many of the concerns raised by the critics of legislative history. At the very least, the introduction of a new source of authority may alter the terms of a sometimes intractable debate and provide additional context to help interpret ambiguous statutory language.

*B. What Are the Elements of the Proposed Forensic Approach to Legislative History?*

As an initial matter, interpreters should make sure there is a true ambiguity which statutory language cannot resolve on its own. Some critics claim that judges and scholars turn too quickly to legislative history when they should just rely on the statutory text.<sup>51</sup> The proposed forensic approach to legislative history fully acknowledges that the legislation’s text, case law precedent, and canons of construction are the primary means to interpret statutory text. Nonetheless, when there is a true ambiguity, legislative history can provide additional context. As Hart and Sacks have said, legislative history is helpful when the other tools “leave[ ] you in doubt about the choice between” two interpretations.<sup>52</sup> Thus, interpreters should turn to a review of the legislative history in order to “understand the context and purpose of a statute” when there are two reasonable views of the statute’s meaning that the plain language of the statute cannot resolve on its own.<sup>53</sup> It is in such a circumstance that social scientists might call for a more sys-

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50. Nourse, *supra* note 42, at 72. Justice Breyer has stated that criticisms of legislative history “call, not for abandonment of the practice, but at most for its careful use.” Breyer, *supra* note 40, at 847.

51. See James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901–02 (2011) (discussing Justice Scalia’s criticism of the use of legislative history to bolster a textualist resolution of statutory meaning as “wasteful research”).

52. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1232 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

53. Breyer, *supra* note 40, at 848.

tematic empirical approach—or a forensic approach—to legislative history.<sup>54</sup>

The forensic approach to legislative history draws from social scientific insights and legal scholarship to propose a way to discipline and standardize reviews of the legislative record. As described above, one of the central critiques of how legislative history has been used is that judges and scholars just “pick and choose” from the legislative history because there is no uniform approach to legislative history.<sup>55</sup> The proposed approach ensures a “warts-and-all” view of legislative history that enables courts, scholars, advocates, and commentators (collectively referred to here as “interpreters”) to weigh the relative strength of various interpretations of statutory meaning.

To be able to assess with more empirical vigor the degree to which the legislative history supports one interpretation of the statutory language more than another, interpreters should take a number of steps that follow basic social scientific principles. Such an approach entails specifying opposing views and constructing a coding scheme that guides interpreters to define and systematically review the sample of relevant legislative history materials that are associated with a given piece of legislation.<sup>56</sup> Specifically, as the Article will describe in detail below, the proposed approach encourages interpreters to: (1) specify opposing “hypotheses” (interpretations) which includes identifying key variables of interest; (2) account for hierarchies of authority; and (3) systematically review the entire body of relevant legislative history to “test” opposing hypotheses.

### 1. *Specifying Opposing Hypotheses*

Interpreters should specify the opposing interpretations as much as possible and derive hypotheses from these competing interpretations. The interpreter must then specify the parameters for statements that would constitute evidence in support of one interpretation of legislative history versus those that would constitute evidence in support of another. The process of specification into measurable factors is analogous to social scientific processes of operationalizing variables.<sup>57</sup>

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54. See, e.g., CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 154–55 (2002) (discussing the systematic organization of the book around “basic questions about legislative history and statutory interpretation”).

55. See, e.g., Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351, 371–72 (2010).

56. See NEUMAN, *supra* note 6, at 95–100, 115–32, 147–51, 239–45.

57. See generally *id.* at 115–32, 241–49.

Having done so, the interpreter can then identify the specific types of content within the entire legislative record that should be considered in adjudicating between contending interpretations. This also enables the interpreter to establish the universe of specific content to be categorized according to different viewpoints. This step helps to ameliorate the tendency for interpreters to overlook aspects of the legislative history that support the opposing viewpoint. It also helps to define the universe of relevant legislative history materials (the sample).

## 2. *Accounting for Hierarchies of Authority*

When constructing a coding scheme that guides a review of legislative history and identifies which legislative history sources are most useful, interpreters should also be attuned to potential hierarchies. Any coding scheme must acknowledge that “not all legislative history is created equal.”<sup>58</sup> Some critics of legislative history argue that many judges, scholars, and critics do not respect the hierarchy of authority among various legislative history materials.<sup>59</sup> In other words, they look at all elements of legislative history equally and do not acknowledge that some time frames, some documents, and some speakers may have more interpretive weight than others.<sup>60</sup> Because they are primarily driven by the motive to find what helps their view, and to overlook counter views, they select what they like and ignore the rest.<sup>61</sup> Moreover, as Professor Nourse has demonstrated, sometimes interpreters misuse the materials simply because they do not understand congressional rules or “how legislation is actually created.”<sup>62</sup> Thus, the coding scheme should allow interpreters to view the material from a variety of viewpoints. Specifically, it should allow interpreters (if they so desire) to consider the timing, the type of legislative history document, and the identity of the speaker associated with each relevant statement.

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58. Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 973 (2007) (“[S]ome aspects of legislative history are trustworthy indicia of legislative meaning and others are not. Thus, the task for judges is to determine which aspects of legislative history are trustworthy and to rely only upon those sources when decoding statutory meaning.”).

59. See, e.g., Nourse, *supra* note 42, at 73.

60. See *id.* at 74–75.

61. See Roessler, *supra* note 5, at 108.

62. Nourse, *supra* note 42, at 75.

*a. Timing*

By dating all of the codes, interpreters will be able to separate out the more recent materials from the older materials. The recent materials may be more relevant to some analyses if they relate more closely to the final wording of the bill.<sup>63</sup> It is important, for instance, to know when the interpreter is coding material in an earlier committee report that is referring solely to text that was later altered or omitted.<sup>64</sup> Nonetheless, sometimes earlier legislative materials can be more relevant than later ones.<sup>65</sup> Professor Nourse's empirical approach to legislative history helpfully directs the inquiry toward "the last relevant decision."<sup>66</sup> For Professor Nourse, "[t]he best legislative history is the last, most specific decision related to the interpretive question prior to the textual decision."<sup>67</sup> In other cases, earlier materials may be relevant when the question does not relate to a precise "textual decision" to alter language but instead has to do with the broader context or underlying policies of the legislation.<sup>68</sup> This longer historical view will allow interpreters to see, among other things, what kinds of sentiments and policy threads are consistent across time, despite variations in the bill's wording.

*b. Type of Document*

Along with the timing, interpreters should code the type of legislative history document that is reviewed (report, debate, hearing). Reports<sup>69</sup> and debates<sup>70</sup> are widely viewed as more authoritative than

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63. *Id.* at 73 (arguing that earlier reports will be less reliable than later reports when the latter is discussing a "much-altered" piece of legislation).

64. Early legislative history can be seen as less reliable because it "does not reflect many of the deals agreed upon to ensure passage of the bill." Blackman, *supra* note 55, at 370.

65. *Id.* ("Other legislative history may also be unreliable because it was created later in the process according to a specific agenda and lacks much of the record devised while the bill was actually being deliberated."); see also Nourse, *supra* note 42, at 110 ("[T]here may be cases where the most *specific* legislative history on the issue appears earlier rather than later in the process, as, for example, when a committee report speaks directly to the question being litigated.").

66. Nourse, *supra* note 42, at 76.

67. Nourse, *supra* note 42, at 110; see also *id.* at 101 ("The important point is that a one-and-a-half page segment of the conference report's joint explanation is the relevant legislative history. One need not wade knee-deep in the thirteen-year history of the Federal Rules of Evidence.") (footnotes omitted).

68. *Id.* at 90 ("[This theory] does not . . . look to legislative history to find vague purposes, but looks for Congress's textual decisions in the actual rule-based history of the statute.").

69. See, e.g., Brudney, *supra* note 47, at 40–42 (arguing that the Supreme Court relies on committee reports because the reports "shed [ ] light on the meaning or implications of inclusive text[,] "reflect [the] level of consideration" of committee mem-

hearings. Committee reports, for instance, are widely acknowledged as “an authoritative context for choosing among alternative meanings of the text”<sup>71</sup> and as the views of an influential group of “advocates for the bill.”<sup>72</sup> Hearings may be relevant in certain circumstances, but generally carry less interpretive weight when compared to reports and debates.<sup>73</sup>

Professor Nourse and others have questioned this hierarchy of authority, arguing, according to the rationale mentioned above, that the most relevant documents are the ones that most specifically address the issue at hand.<sup>74</sup> If something is covered specifically in the hearings, but not in reports or debates, the hearings may become the most relevant source in the legislative history. The coding scheme will allow each interpreter to decide how much weight to accord to the document type.

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bers, and are “highly accessible due to a format that is orderly and understandable to other members, to the courts, and to the broader legal community[.]” and committee members develop a level of expertise over subject areas within their “ongoing jurisdictional ambit.”); George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43 (explaining that committee reports are well regarded because “they represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.”) (internal quotation marks omitted); William D. Popkin, *Symposium on Statutory Interpretation: Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 317 (1990) (“Committee reports are therefore properly treated as the most reliable type of legislative history.” (footnote omitted)). Some, however, argue that reliance on reports is “undemocratic.” See, e.g., *Exxon Mobil Corp. v. Alapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–50 (2002); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008); *Wyeth v. Levine*, 129 S. Ct. 1187, 1206–07 (2009) (Thomas, J., concurring); *Mod-Con Freight Systems, Inc. v. Michigan Public Service Comm’n*, 545 U.S. 440, 468 (2005) (Kennedy, J., dissenting).

70. See, e.g., Costello, *supra* note 69, at 70–71 (1990) (discussing when debates are useful to clarify the statute or to get background information).

71. William Eskridge, *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 374–75 (1990); see also Richard A. Danner, *Justice Jackson’s Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT’L L. 151, 164 (2003) (reasoning that committee reports are generally considered more reliable than floor debates because they involve less “politicking”).

72. Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA’s Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2767–68 (2007).

73. Blackman, *supra* note 55, at 370 (“[L]egislative history may not be reliable because it reflects the views of outsiders to the bill who provided the public statements that give the bill a gloss favorable to their point of view, regardless of whether anyone else agrees with it.”).

74. See, e.g., Nourse, *supra* note 42, at 110.

c. *Speaker*

A third layer of coding should include the identity of the speaker for each statement. This can help interpreters who believe that the speaker's level of involvement in the drafting of the bill affects the statement's interpretative value. There is some disagreement on this issue as well. The most common view is that statements by bill sponsors, bill drafters, floor managers, and the chair of the subcommittee are more persuasive than statements by other legislators.<sup>75</sup> According to this view, "[s]tatements by Members not associated with sponsorship or committee consideration of a bill are accorded little weight."<sup>76</sup> For some, the identity of the speaker is most relevant when there were no hearings on a bill or language was added to the legislation on the House or Senate floor.<sup>77</sup> In these situations, the committee reports do not address the question at hand.

By contrast, however, the public choice critiques referenced above<sup>78</sup> suggest that the views of the median legislator are more persuasive because they are less likely to be acting on behalf of powerful interest groups.<sup>79</sup> Moreover, some argue that "statements of those who lost the debate" are not "authoritative statements of meaning."<sup>80</sup> This is especially important when the vote turned on the specifics of the disputed text. The coding scheme will allow interpreters to tease out these differences and see whether there are differences based on the weight of authority. They can run reports, for example, that group the output based on the speaker's level of involvement.

d. *Employing Comprehensive and Systematic Analyses*

Once the coding scheme is complete, interpreters should employ a comprehensive and systematic review of the relevant legislative history. This will avoid purely inductive or opportunistic inquiries. In other words, a forensic approach to legislative history moves the inquiry away from what some have referred to as "inevitable cherry-

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75. See, e.g., Costello, *supra* note 69, at 41; Danner, *supra* note 71, at 164.

76. Costello, *supra* note 69, at 41–42.

77. See *id.* at 50 (stating that when floor statements address issues not considered by committee reports, "views of Members closely associated with the legislation through either sponsorship or committee review can be helpful"); Lori L. Outz, *A Principled Use of Congressional Floor Speeches in Statutory Interpretation*, 28 COLUM. J.L. & SOC. PROBS. 297, 317–18 (1995).

78. See *supra* text accompanying notes 45–47.

79. See Manning, *supra* note 41, at 688 n.67.

80. Nourse, *supra* note 42, at 73.

picking.”<sup>81</sup> It does so by highlighting how widespread (or not) support is for a particular view or counterview about statutory meaning. Interpreters should code all potentially relevant legislative materials and input the codes into a format that can allow the interpreter to run reports.

While there are a number of tools interpreters can use to input and analyze the data, this Article’s analysis benefited from software that is very useful in this area, but rarely considered by law-trained interpreters. ATLAS.ti, a qualitative data analysis and research software, can facilitate comprehensive and systematic reviews of legislative history. The software allows interpreters to upload all legislative history materials onto the same database. As interpreters conduct their review of all of the materials, they can highlight text that should be included in the sample of statements relevant to adjudicating between the hypotheses and then assign codes to each statement indicating which view the statement supported. They can also evaluate the relative weight the statement should be accorded depending on the date of the bill and the level of the speaker’s involvement in the development of the proposed bill. That is, they can code the speaker for whether the speaker was the bill’s author, whether the speaker was on the committee that considered the legislation, whether the speaker was a “median legislator,” and other designations that may be relevant to the interpreter’s analysis.

Another benefit of ATLAS.ti is that it permits interpreters to run a variety of reports that can convert a qualitative review of the written material into quantitative output. ATLAS.ti, for instance, can produce a report of all statements that support one view or another. Such a report enables the interpreter to review, in summary form, supportive statements and to examine similarities between or nuances within those statements. Because the system associates the numbers with specific quotes and codes, it is attuned to the nuances of content, which is very necessary in law-and-policy analyses. At the same time, it has the

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81. Roessler, *supra* note 5, at 108; *see also* Blackman, *supra* note 55, at 371–72 (claiming that judicial cherry-picking is exacerbated by there being no widely accepted approach to using legislative history); Edward Heath, *How Federal Judges Use Legislative History*, 25 J. LEGIS. 95, 101 (1999) (“A willful judge, dissatisfied with the outcome the statute patently produces, could plumb the legislative history in search of excerpts of commentary to confirm an alternative reading which produces a result he prefers.”); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1661–63 (2010) (“[G]iven the vast quantity and range of legislative history materials from which to choose, it is all too tempting for a judge to take only what is convenient—namely, that which helps to achieve the desired result—and to ignore the rest.”) (footnote omitted).

added value of simultaneously providing a more quantitative review of the content. In other words, it gives interpreters numbers and frequencies that can shed new light on the wider context surrounding disputes over ambiguous statutory text.

This aspect of the forensic approach to legislative history can help bring structure to the unstructured and heterogeneous world of legislative history materials and can uncover hidden meanings in the materials. It can also help identify whether a particular sentiment is associated only with one person, a few people, or to a larger group of legislators.<sup>82</sup> Developing a comprehensive and systematic review of the legislative history that takes into consideration all voices on a particular aspect of legislation will help to ameliorate cherry-picking concerns as well as concerns that the legislative history has been peppered with language on behalf of powerful interest groups. Similarly, because the coding will cover all views and counterviews that relate to a specific question, it allows interpreters to look for and test alternative interpretations of the same statutory text.<sup>83</sup>

### III.

#### APPLICATION OF THE PROPOSED APPROACH

As a result of IRCA's textual ambiguity about how it affects unauthorized workers' workplace protections, courts have divided on this issue. The IRCA harmony courts conclude that providing unauthorized workers with the full panoply of subfederal workplace protections supports IRCA's goal to reduce unauthorized immigration.<sup>84</sup> By contrast, the IRCA conflict courts identify a tension between federal

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82. This responds to a common critique, for instance, that floor statements are susceptible to cherry-picking. Since there are a number of statements, interpreters can pluck out statements that support their view and ignore others. Counting the number of statements to weigh in favor of or against a particular interpretation can ameliorate this problem. See Outzs, *supra* note 77, at 317 ("The lesser value placed upon floor statements may be due to the fact that they are particularly susceptible to a range of criticisms made of all legislative history. The extensive pool of floor statements from which assertions can be drawn as to a particular interpretation of a statute offers innumerable opportunities for misuse.") (footnote omitted); Roether, *supra* note 72, at 2768-69 ("[T]he Court is generally wary of relying on the opinion of a single legislator as an authoritative statement of congressional intent. Since statements uttered in congressional debate often conflict, and only represent the view of a single, perhaps uninformed, legislator on an isolated issue, relying on a floor statement poses a great risk of producing an inaccurate indication of true congressional intent.") (footnotes omitted).

83. See NEUMAN, *supra* note 6, at 95-100.

84. See cases cited *supra* note 33.

immigration law and some aspects of subfederal workplace protections.<sup>85</sup>

A detailed review of these cases further specified that there are essentially two types of underlying disagreements about IRCA that can explain the differences in outcomes. These include opposing interpretations regarding (1) the relative centrality of labor concerns in IRCA and (2) the intended relationship between workplace protections and the incentives of employers and immigrants. Along with framing the opposing hypotheses and key variables, these two debates helped identify the relevant sample of legislative history materials. The subsections below describe the opposing hypotheses on each of the two central debates, the universe of relevant legislative history documents (the sample) and the findings.

#### A. *Opposing Hypotheses on Centrality of Labor Concerns*

The IRCA harmony and IRCA conflict courts disagree about the role that labor concerns played in justifying the need for IRCA and, as a result, have opposing views about whether to uphold or limit workplace protections for unauthorized immigrants.<sup>86</sup> The coding scheme defined the “labor concerns” variable as including any stated concern about wages, working conditions (including conditions deemed so unfair as to be considered exploitation), and/or employment opportunities. The two opposing hypotheses about the centrality of labor concerns can be summarized as follows.

If the IRCA harmony courts have the more accurate interpretation of the statute, the legislative history analysis would support the view that one of IRCA’s main purposes was to address labor concerns.<sup>87</sup> This is the case because the IRCA harmony cases acknowledge, at least implicitly, that the provision of workplace protections—such as protections related to the payment of wages and working conditions—to unauthorized employees is consistent with IRCA’s main

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85. See cases cited *supra* note 31.

86. Compare *infra* note 87, with *infra* note 88.

87. See, e.g., *Asylum Co. v. D.C. Dep’t of Emp’t Servs.*, 10 A.3d 619, 628 (D.C. 2010) (“Interpreting the Act to exclude undocumented aliens, thereby permitting employers to avoid payments of benefits to such workers, could undermine the goal of encouraging employers to foster a workplace that is safe for all workers.”); *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 755–56 (Ky. 2011) (failing to provide subfederal protections “leav[es] the burden of caring for injured workers and their dependents to the residents of the [state].”); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005) (“[W]ithout the protection of the statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers.”).

purposes. If labor concerns were central, Congress could not have meant to curtail workplace protections. By contrast, if the IRCA conflict courts represent the superior interpretation of the statute, we would expect very few mentions of labor concerns as a justification for IRCA. Instead, we would see other non-labor-related concerns in statements about the bill's purposes. If these courts had viewed labor concerns as one of IRCA's main purposes, they probably would not have curtailed workplace protections of unauthorized workers in order to avoid a conflict with IRCA.<sup>88</sup>

To determine the relative weight of labor concerns, the coding team coded all justifications of the bill in the sample of the legislative record for whether the justification cited labor concerns. This means that the analysis includes any type of justification for the bill, even those that did not relate to labor concerns in any way. The U.S. labor and employment law scheme provides a rationale to code any discussion of labor concerns in the legislative history of IRCA, regardless of the immigration status of the workers mentioned. This is the case because the U.S. scheme acknowledges the interconnections between the treatment of subclasses of workers (here, the unauthorized) and the wages and working conditions of other classes of workers (here, the authorized).

However, the prominence of labor concerns in IRCA's legislative history, alone, may not be entirely conclusive for some interpreters. For them, it could simply mean that Congress's purpose to address labor problems related to concern for authorized workers and had nothing to do with workplace law protections for unauthorized workers. Alternatively, it could mean that legislators actively wanted to make sure unauthorized workers did not have full access to workplace protections. Thus, the coding team coded each justification of the bill that mentioned a labor concern for whether it explicitly mentioned a concern for unauthorized workers, authorized workers, or workers in general (without a reference to their immigration status). It also coded each justification of the bill that mentioned labor concerns for whether the concerns for unauthorized workers were explicitly connected to concerns for authorized workers.

This subcoding of all justifications of the bill that mentioned labor concerns helps to further establish whether the IRCA harmony courts have the more accurate view of IRCA's purposes. If one of

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88. See Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 400 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

IRCA's main purposes was, in fact, to protect unauthorized workers in particular, this would support the IRCA harmony courts' interpretation that IRCA intended to retain the workplace protections of unauthorized workers. If labor concerns did not relate to protection of unauthorized workers in a significant way, this would support the IRCA conflict courts' view that providing such protections to this group would be in conflict with legislative purposes.

*B. Opposing Hypotheses on the Relationship Between Workplace Regulation and Incentives*

The IRCA harmony courts and IRCA conflict courts also disagree about legislative purposes with respect to how the workplace protections of unauthorized immigrants should affect the incentives of unauthorized workers and/or employers. The coding scheme defined the "workplace protections" variable as including references to any legal protection at the federal or subfederal level that has to do with wages, hours, employment discrimination, health and safety, or collective organizing at the workplace. The two opposing hypotheses about the relationship between workplace protections and incentives can be summarized as follows.

If IRCA conflict courts have the more accurate view of IRCA's purposes, we would expect any discussions of workplace protections to relate more to immigrant incentives than to employer incentives. That is, we would expect any discussion about the relationship between workplace protections and incentives to be more focused on the quality of jobs immigrants might encounter. In other words, according to this view, the availability of workplace protections may shape immigrant calculus to migrate without authorization. According to the IRCA conflict cases, providing certain workplace protections to unauthorized workers would encourage future unauthorized immigration and therefore would be in conflict with federal immigration policy goals.<sup>89</sup>

In making this argument, either explicitly or implicitly, many of these IRCA conflict courts assume that employers' full compliance with existing workplace standards is not a priority in the immigration policy context. In other words, they assume that Congress's purpose was to prioritize *disincentivizing* potential immigrants from unautho-

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89. See, e.g., *Xinic v. Quick*, No. 2004-226030, 2005 WL 3789231, at \*1 (Va. Cir. Ct. Nov. 14, 2005) (stating that the provision of subfederal workplace law remedy to an unauthorized employee "not only trivializes the immigration laws, it also condones and encourages future violations.") (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002)).

rized migration through a reduction in their workplace protections over *disincentivizing* employers from preferring unauthorized immigrants through a requirement that they provide unauthorized workers with full workplace protections.<sup>90</sup>

By contrast, if IRCA harmony courts have the superior view, we would expect IRCA's record to include more discussion about the relationship between workplace protections and the incentives of employers to employ unauthorized immigrants. This is the case because IRCA harmony courts surmise that workplace protections for unauthorized workers would ensure that they would not represent a cheaper, more vulnerable source of labor that is attractive to employers.<sup>91</sup> IRCA harmony courts anticipate that if employers are forced to respect workplace protections for all workers, they will be less likely to employ unauthorized workers and thereby reduce unauthorized immigration. As one court put it, "[a]llowing employers to hire undocu-

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90. *See, e.g.,* *Morejon v. Terry Hinge & Hardware*, No. B162878, 2003 Cal. App. Unpub. LEXIS 10394, at \*30 (Cal. Ct. App. Nov. 4, 2003) (concluding, in a wrongful termination case, that public policy "dictates [that undocumented employees] may not recover for wrongful termination, notwithstanding any differences in knowledge between their respective employers regarding their work eligibility. The presentation of fraudulent documents to an employer attacks IRCA's verification system, regardless of whether the employer is ignorant or knowledgeable of their falsity. If the employer is ignorant, the employer is duped into submitting a misleading I-9 form; if not, the unscrupulous employer is invited to violate IRCA with impunity because the documents support a defense that the employer acted in good faith."); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 512, 520–21 (Mich. Ct. App. 2003) (concluding that employee's IRCA violation required reduction of weekly wage-loss benefits remedy); *Xinic*, 2005 WL 3789231, at \*1 (stating that providing workers' compensation remedies to an undocumented employee may be in conflict with IRCA because it "not only trivializes the immigration laws, it also condones and encourages future violations") (citing *Hoffman*, 535 U.S. at 150); *Crespo v. Evergo Corp.*, 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004) (concluding, in a pregnancy discrimination case, that IRCA "precludes both economic and non-economic damages [that the plaintiff] claims resulted from the termination of that employment" because of the "illegality of plaintiff's employment").

91. *See, e.g.,* *Dowling v. Slotnick*, 712 A.2d 396, 404 (Conn. 1998); *Asylum Co.*, 10 A.3d at 628; *Cont'l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 630–31 (Ga. Ct. App. 2004); *Abel Verdon Constr.*, 348 S.W.3d at 755–56; *Design Kitchen & Baths*, 882 A.2d at 826; *Correa v. Weymouth Farms, Inc.*, 664 N.W.2d 324, 328 (Minn. 2003); *Amoah v. Mallah Mgmt., LLC*, 866 N.Y.S.2d 797, 800 (App. Div. 2008); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 66 (App. Div. 2005); *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23, 27–28 (Ct. App. 2005); *Garcia v. Pasquareto*, 812 N.Y.S.2d 216, 217 (App. Div. 2004) ("If employers know that they will . . . be required to pay [unauthorized workers] at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance."); *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 392–93 (Sup. Ct. 2007) ("IRCA and New York Labor Law Article 8 share the same goals"—namely removing "incentives left for an employer to hire an undocumented alien in the first instance.").

mented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration.”<sup>92</sup> In line with the rationale of these cases, IRCA harmony courts assume that one of Congress’s main concerns with workplace protections had to do more with how to affect employers’ behavior rather than immigrants’ behavior.<sup>93</sup>

These courts are faced with what they sometimes perceive as an either-or choice: to *disincentivize* employers (from preferring unauthorized immigrant workers over authorized workers by ensuring that unauthorized workers have the same workplace protections as authorized workers) or to *disincentivize* immigrants (from immigrating without authorization by limiting their workplace protections in the United States). Since the U.S. Supreme Court decided *Hoffman* in 2002, litigants have increasingly asked courts to make conclusions about Congress’s purpose in this regard. A federal district court in California captured the nature of this increasingly common “either-or” dilemma well:

Every remedy extended to undocumented workers . . . provides a marginal incentive for those workers to come to the United States. It is just as true, however, that every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers. The economic incentives are in tension. Given this tension, the courts must attempt to sensibly balance competing considerations.<sup>94</sup>

Thus, the IRCA harmony and IRCA conflict courts differ in their views of the relationship between workplace protections and the incentives of the parties—employers and immigrants—involved in unauthorized immigrant employment. As a result, they disagree about whether to uphold or limit workplace protections for unauthorized immigrants when faced with a question about IRCA’s effects on sub-federal workplace protections. The coding scheme represents these

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92. *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 77 (Cal. Ct. App. 2007).

93. *See, e.g., Dowling*, 712 A.2d at 404 (“Potential eligibility for workers’ compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally.”); *Asylum Co.*, 10 A.3d at 633 (“[I]t [is] unlikely that the availability of workers’ compensation benefits in the event of a debilitating work injury in the United States would significantly affect an alien worker’s decision about whether to enter the country in response to the already ‘magnetic’ force of the job market [that IRCA seeks to reduce.]”); *Amoah*, 866 N.Y.S.2d at 800 (“[I]t is unlikely that denying wage-replacement benefits to injured unauthorized workers will deter illegal aliens from violating IRCA in order to obtain employment in the first place.”).

94. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005) (quoting *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002)).

opposing views by identifying all statements that dealt with the incentives of either employers or immigrants in relationship to workplace protections. This allows interpreters to evaluate the degree to which statements that link workplace protections to incentives are directed more towards immigrants or more towards employers.

### C. *The Sample*

The coding team defined the sample of the legislative history as including those aspects of the legislative history that are widely seen as having higher authority: reports and debates.<sup>95</sup> Since the two disagreements about the statute relate to the underlying policies and purposes of the legislation—rather than a specific word, or set of words, within the statute—there was no need to deviate from this hierarchy. Moreover, because there was no identifiable “textual decision” during the legislative process, the coding team could not define the relevant elements of the record by conducting a key word search. Rather, it required a systematic review of the entire text included in the sample of legislative history.

The coding team defined any element of the record as “relevant” if it talked about a justification for the proposed legislation and/or workplace-law related matters in any way. It reviewed all fifteen IRCA reports, spanning from 1972 through 1986, and determined that thirteen of these reports were relevant and should be coded. The coding team also reviewed every debate about IRCA between 1972 and 1986 and found that there were relevant debates in seven of those years that should be coded. A review of the hearings and secondary literature on IRCA’s legislative history did not yield a compelling reason to code that voluminous body of documents.<sup>96</sup>

For the debates, the coding team coded each person for whether any of the statements he or she made on a given day were relevant. Given that the debates record a back and forth exchange, participants in the debate often reiterated their points over the course of a day. If every statement were coded individually, this could mean that particularly vociferous debate participants would be accorded undue weight. The coding team thus took a conservative approach to enumerating statements made in favor of each hypothesis by only coding for

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95. *See supra* notes 69–70.

96. The coding team read or scanned every hearing. Our review of these documents did not identify anything inconsistent with the trends we identified in the reports and debates. Moreover, because there is no earlier textual decision that relates to the statutory interpretation questions at issue here, there was no reason to hone in on particular hearings relating to a textual decision.

whether each person staked out a *position* regarding either of the key variables, regardless of how many times they may have reiterated this position on a particular day. Thus, the unit of analysis in the sample of debates is that of positions staked out on any given day. Because there is no relevant textual decision that was voted on during the legislative process, and the relevant issues relate to underlying policies, there was no reason to distinguish between legislators who voted for the legislation and legislators who voted against it.

#### D. *The Findings on Centrality of Labor Concerns*

The systematic review of IRCA's legislative history supports the IRCA harmony courts' view that labor concerns were a main tenet of IRCA's purposes more than it supports the IRCA conflict courts' opposing view. All thirteen of the relevant reports cite labor concerns as a main purpose of the proposed legislation.<sup>97</sup> Not surprisingly, the primary labor-related concern related to authorized workers. However, all but one of the reports specifically referenced concern for the plight of unauthorized workers as well.<sup>98</sup> In fact, all but two of the thirteen

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97. See 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. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NAT'L INTEREST NO. 8 (Joint Comm. Print 1981) (the final report and recommendations of the Select Commission on Immigration and Refugee Policy with supplemental views by commissioners); STAFF OF SELECT COMMISSION OF IMMIGRATION AND REFUGEE POLICY, 97TH CONG., SEMI-ANNUAL REPORT TO CONGRESS (Joint Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SELECT COMMISSION OF IMMIGRATION AND REFUGEE POLICY, 96TH CONG., 2D SESS., 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).

98. See, e.g., STAFF OF S. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NAT'L INTEREST NO. 8, at 42 (Joint Comm. Print 1981) ("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."); H.R. REP. No. 94-506, at 10 (1975) ("[T]he instant legislation will go a long way in eliminating the exploitation of illegal aliens and the other consequences that flow from their illegal status in the United States."); H.R. REP. No. 93-108, at 6 (1973) ("[E]mployers will continue to hire illegal aliens since such persons by virtue of their precarious status must work harder, longer, and often for less pay."); see also H.R. REP. No. 99-1000, at 25 (1986); H.R. REP. No. 99-682 pt. 1, at 49 (1986); S. REP. No. 99-132, at 16 (1985); H.R. REP. No. 98-115, pt. 1, at 17, 37 (1983); S. REP. No. 98-62, at 20 (1983); H.R. REP. No. 97-890, pt. 1, at 193 (1982); S. REP. No. 97-485, at 19 (1982); STAFF OF SELECT COMMISSION OF IMMIGRATION & REFUGEE POLICY, 97TH CONG., SEMI-ANNUAL REPORT TO CONGRESS, at 14 (Joint Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SE-

reports referred to the treatment of unauthorized immigrants in the workplace as reprehensible "exploitation."<sup>99</sup> Senate Reports from 1982, 1983, and 1985 concluded that one of IRCA's goals was to "eliminate the illegal subclass now present in our society."<sup>100</sup> According to these reports, the "weak bargaining position" associated with their unauthorized status "depress[es] U.S. wages and working conditions" and fosters their role as "a fearful and clearly exploitable group."<sup>101</sup>

Legislators more often than not linked the treatment of unauthorized workers with their concern for authorized workers. Nine of the thirteen reports made this explicit connection.<sup>102</sup> While the addenda to

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LECT COMMISSION OF IMMIGRATION & REFUGEE POLICY, 96TH CONG., 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, at 104 (Comm. Print 1980).

99. See H.R. REP. NO. 98-115, pt. 1, at 37 (1983) (noting "the exploitation of this vulnerable population in the workplace"); H.R. REP. NO. 97-890, pt. 1, at 193 (1982) ("An unscrupulous employer can exploit this vulnerability by threatening the alien with exposure to INS if s/he does not agree to the employer's conditions of employment. We strongly object to this situation, for it revives the specter of forced slavery and pardons the employer for illegal conduct."); STAFF OF S. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NAT'L INTEREST NO. 8, at 13 (Joint Comm. Print 1981) (referring to this group as "exploitable at the workplace" such that they are "depressing U.S. labor standards and wages"); CONG. RESEARCH SERV., STAFF OF SELECT COMMISSION OF IMMIGRATION & REFUGEE POLICY, 96TH CONG., 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES at 109 (Comm. Print 1980) ("Recent reports of wide scale exploitation of illegal migrants in the garment industry in New York and Los Angeles indicate, in addition to the exploitation of the workers themselves, that an undermining of U.S. labor standards may be a direct result of the workers' vulnerability because of their illegal status."); H.R. REP. NO. 94-506, at 7 (1975) ("[I]llegal aliens: take jobs which could be filled by American workers; depress the wages and impair the working conditions of American workers; reduce the effectiveness of employee organizations; compete most directly with unskilled and uneducated American citizens and constitute for employers a group highly susceptible to exploitation."); H.R. REP. NO. 93-108, at 8 (1973) ("[I]f an employee is known to be an illegal alien, he may then be subject to exploitation by an unscrupulous employer. Many such employers deny illegal aliens vacation and overtime pay. In addition, as a result of their illegal status, such aliens are often threatened with exposure by their employer if they complain about substandard wages and working conditions."); see also H.R. REP. NO. 99-682, at 49 (1986); H.R. REP. NO. 99-1000, at 25 (1986); S. REP. NO. 99-132, at 16 (1985); S. REP. NO. 98-62, at 20 (1983); S. REP. NO. 97-485, at 19 (1982).

100. S. REP. NO. 99-132, at 16 (1985); S. REP. NO. 98-62, at 20 (1983); S. REP. NO. 97-485, at 19 (1982).

101. S. REP. NO. 99-132, at 16 (1985); S. REP. NO. 98-62, at 20 (1983); S. REP. NO. 97-485, at 19 (1982).

102. S. REP. NO. 99-132, at 108 (1985) ("The chairman has already spoken on many occasions about the exploitable underclass of undocumented aliens in this country today. It is evident that these are people who are productive members of society but who are unable, for example, to seek redress for crimes, who are fearful of reporting job-related abuse and who have virtually nowhere to turn. They are forced to live a semiclandestine life.") (minority view); H.R. REP. NO. 98-115, pt. 1, at 167 (1983)

the reports (dissent, minority, additional, concurrence, supplemental) have less authority than the majority views represented in the main body of the report, they provide more support for IRCA harmony courts than for IRCA conflict courts.<sup>103</sup> Eight of eight addenda noted labor concerns as a main purpose of the proposed legislation.<sup>104</sup> Six of

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(stating that we should not overlook “the existence of a large underclass of illegal aliens”); S. REP. NO. 98-62, at 127 (1983) (“A large undocumented population contributes to the creation and perpetuation of an exploited subclass [of] society afraid to report crimes and illnesses which endanger the public health”) (additional view); H.R. REP. NO. 97-890, pt. 1, at 193 (1982) (“The cost to society of perpetuating an underclass of exploited citizens in [sic] incalculable. It is therefore in the best interests of this country to bring this large underclass of persons into the mainstream of our society and under the protection of our laws.”); S. REP. NO. 97-485, at 5 (1982) (“[O]nly a small fraction of [immigrants] are individually selected on the basis of labor market skills which have been determined to benefit the nation as a whole . . . . [As a result,] there have been generally adverse job impacts, especially on low income, low-skilled Americans, who are the most likely to face direct competition.”); STAFF OF S. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NATIONAL INTEREST NO. 8, at 400 (Joint Comm. Print 1981) (“The effect of the Commission’s proposals will be to drive the undocumented, particularly the Mexican undocumented immigrant, further Underground.”); CONG. RESEARCH SERV., STAFF OF SELECT COMMISSION OF IMMIGRATION & REFUGEE POLICY, 96TH CONG., 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, at 5 (Comm. Print 1980) (“Undocumented aliens are part of the underground economy, operating outside the control and protection of the law.”); H.R. REP. NO. 94-506, at 10 (1975) (“The illegal alien fearing detection and deportation is often subjected to intimidation, harassment, extortion, and blackmail by unscrupulous employers. In addition, such an employee by virtue of his status is in no position to report an employer who pays substandard wages, denies rightful benefits, and maintain [sic] poor working conditions”); H.R. REP. NO. 93-108, at 7 (1973) (“In light of this adverse impact of illegal alien workers on American citizens and permanent residents, we recognized the need for better sanctions to curb the problem”).

103. There were eight addenda attached to the thirteen reports (dissent, minority, additional, concurrence, supplemental). Eight of eight addenda cited labor concerns as a main purpose of the bill. Six of these eight addenda mentioned concern for unauthorized workers in particular. Four addenda linked the treatment of unauthorized workers and authorized workers.

104. H.R. REP. NO. 99-682, at 47–48 (1986) (minority); S. REP. NO. 99-132 (1985), at 104–05 (minority); S. REP. NO. 99-132 (1985), at 108 (minority); S. REP. NO. 98-62, at 127–28 (1983) (additional); S. REP. NO. 98-62, at 129 (1983) (minority); S. REP. NO. 98-62, at 134 (1983) (minority); H.R. REP. NO. 98-115, pt. 1, at 168 (1983) (additional); H.R. REP. NO. 98-115 Part 1, at 169 (1983) (additional); H.R. REP. NO. 98-115 Part 1, at 180 (1983) (dissent); H.R. REP. NO. 98-115 Part 4, at 70 (1983) (minority); H.R. REP. NO. 98-115 Part 4, at 74 (1983) (additional); S. REP. NO. 97-485, at 105 (1982) (additional); S. REP. NO. 97-485, at 112 (1982) (additional); S. REP. NO. 97-485, at 117 (1982) (additional); S. REP. NO. 97-485, at 119 (1982) (minority); H.R. REP. NO. 97-890 Part 1, at 191 (1982) (dissent); H.R. REP. NO. 97-890 Part 1, at 194 (1982) (dissent); H.R. REP. NO. 97-890 Part 1, at 215 (1982) (dissent); H.R. REP. NO. 97-890 Part 2, at 48 (1982) (minority); H.R. REP. NO. 94-506, at 31 (1975) (additional); H.R. REP. NO. 94-506, at 33 (1975) (supplemental); H.R. REP. NO. 94-506, at 37 (1975) (dissent); H.R. REP. NO. 93-108, at 25 (1973) (additional).

eight addenda specifically referenced unauthorized workers.<sup>105</sup> A minority opinion from the 1985 Senate Report, for instance, stated the following:

[I]t is wrong that the sanctions under current law fall solely on the undocumented aliens, not on employers who may be exploiting them. The Government needs stronger enforcement tools to deal with the serious problem of employers who engage in a pattern and practice of hiring and exploiting undocumented aliens.<sup>106</sup>

The coding of the debates similarly supports the IRCA harmony courts' view more than the IRCA conflict courts' view. As elaborated above, the unit of analysis is whether any legislator on a given day made a relevant statement (or position taken on any given day of debate). Table 1 presents the results of this analysis disaggregated by year of the debate. The final column of the table reveals that overall, ninety percent of legislator positions on any given day of debate regarding the main purposes of the bill mentioned labor concerns as central. In 1986, the year that the legislation was passed, the percentage of positions citing labor concerns as central was lower than in any other year. Nonetheless, it is still quite high at sixty-six percent. This table considers the total number of relevant legislator positions. If we isolated the positions of bill sponsors and bill introducers, we would see a similar trend. All of their positions, in all of the coded years, cite labor concerns as a main justification for the bill.<sup>107</sup>

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105. S. REP. NO. 99-132, at 107-08 (1985) (minority); S. REP. NO. 98-62, at 127-28 (1983) (additional); S. REP. NO. 98-62, at 129 (1983) (minority); S. REP. NO. 98-62, at 134 (1983) (minority); H.R. REP. NO. 98-115, pt. 1, at 168 (1983) (additional); H.R. REP. NO. 97-890, pt. 1, at 192 (1982) (dissent); H.R. REP. NO. 97-890, pt. 1, at 194-95 (1982) (dissent); S. REP. NO. 97-485, at 112-13 (1982) (additional); S. REP. NO. 97-485, at 117 (1982) (additional); S. REP. NO. 97-485, at 119 (1982) (minority); H.R. REP. NO. 94-506, at 37 (1975) (dissent).

106. S. REP. NO. 99-132, at 104 (1985) (minority); *see also* H.R. REP. NO. 94-506, at 41 (1975) ("[E]mployers can take unfair advantage of [unauthorized] persons with impunity.") (dissent).

107. 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).

TABLE 1: THE RELATIVE CENTRALITY OF LABOR CONCERNS IN DEBATE POSITIONS ABOUT BILL'S PURPOSES

Year	1972	1973	1982	1983	1984	1985	1986	Overall
% that mention labor concerns as central	86	100	86	100	100	94	66	90
% that do not mention labor concerns as central	14	0	14	0	0	6	34	10
Number of positions per debate day	21	11	57	25	93	35	93	335

This evidence that labor concerns were indeed a central tenet of the legislation supports the IRCA harmony courts' interpretation and undermines the IRCA conflict courts' view that Congress's purpose was to reduce the workplace law protections of unauthorized immigrants. This becomes even clearer if we look at the debates coding related to statements about concern for unauthorized workers' working conditions. Table 2 represents the findings produced by the sub-coding of all positions staked out that included viewing labor concerns as central to justifying the bill. It demonstrates that a significant proportion of legislator positions included concerns for unauthorized workers. In 1972, fifty-five percent of positions taken on any given day of debate included an explicit concern for unauthorized immigrants. In 1986, this percentage was even higher. That year, seventy-two percent of the positions echoed this sentiment. Similar to the trend above, each position of bill sponsors and bill introducers included labor concerns about unauthorized workers in particular as a main justification for the bill.<sup>108</sup>

108. 132 CONG. REC. 25,752, 30,038, 30,157, 30,181, 31,632, 32,248, 33,230 (1986); 131 CONG. REC. 23,317, 23,534, 23,719, 23,814-15, 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. 14,185 (1973); 118 CONG. REC. 30,154 (1972).

TABLE 2: THE RELATIVE CONCERN FOR UNAUTHORIZED WORKERS IN DEBATE POSITIONS ABOUT LABOR CONCERNS

Year	1972	1973	1982	1983	1984	1985	1986	Overall
% that mention concern for unauthorized workers	55	83	86	75	100	78	72	78
% that do not mention concern for unauthorized workers	45	17	14	25	0	22	28	22
Number of positions per debate day	11	18	29	8	45	32	61	204

Finally, coding the debates further confirms that a significant proportion of legislators made an explicit connection between the treatment of unauthorized and authorized workers. About fifty percent of the relevant statements in 1985<sup>109</sup> and 1986<sup>110</sup> made this explicit connection. In 1972, twenty-four percent made this connection and in 1973, thirty-six percent made this connection. In sum, the findings provide overwhelming support for the IRCA harmony courts' rationale that labor concerns in general, and labor concerns about unauthorized workers in particular, were a central justification for the legislation.

*E. The Findings on the Relationship Between Workplace Protections and Incentives*

The systematic review of IRCA's legislative history supports the IRCA harmony courts' view that full workplace protections for unauthorized workers would disincentivize employers from hiring unauthorized employees more than the IRCA conflict courts' opposing view. When workplace protections were mentioned, they were most often mentioned in connection with reducing employer incentives to prefer unauthorized immigrant employees over authorized employees. Eight of the thirteen reports considered the relationship between incentives and workplace protections for unauthorized workers. All eight confirmed the IRCA harmony courts' theory that workplace protections for unauthorized immigrants dissuade employers from hiring this

109. Sixteen out of thirty-two relevant statements made this explicit connection.

110. Twenty-seven out of sixty-one relevant statements made this explicit connection.

workforce.<sup>111</sup> No report confirmed the IRCA conflict courts' view that providing the full panoply of workplace protections to unauthorized workers would increase incentives for immigrants to violate immigration laws.

The final conference report on the legislation in 1986, which many would argue carries with it the most authoritative weight, illustrates support for the IRCA harmony courts' rationale. Announcing additional funding for the Department of Labor, the report expressed that the goal of heightened wage and hour enforcement on behalf of unauthorized workers was to "deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."<sup>112</sup> A 1986 House Report, which is often cited in post-*Hoffman* cases, is the most explicit statement on Congressional intent in this area. It states:

[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.<sup>113</sup>

While the *Hoffman* Court found this one report from one house of Congress to be a "slender reed" of legislative intent, it carries more persuasive weight when we see it in the context of a long line of reports that echo this sentiment. The 1983 House Report, for instance, included the same exact statement.<sup>114</sup> Similarly, the 1982 Senate Report proposed "increased enforcement of wage and working standards legislation" on behalf of unauthorized immigrants as the kind of "im-

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111. 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. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NAT'L INTEREST No. 8, at 344 (Joint Comm. Print 1981); CONG. RESEARCH SERV., STAFF OF SELECT COMMISSION OF IMMIGRATION & REFUGEE POLICY, 96TH CONG., 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, at 134 (Comm. Print 1980).

112. H.R. REP. No. 99-1000, at 25 (1986).

113. H.R. REP. No. 99-682, pt. 2, at 8-9 (1986).

114. H.R. REP. No. 98-115, pt. 4, at 17 (1983).

mediate action” that was necessary to curb unauthorized immigration.<sup>115</sup>

A 1981 report similarly made the explicit connection between providing workplace protections for unauthorized workers and employer incentives. It stated that heightened enforcement of federal occupational safety and health, wage and hour, social security, unemployment insurance, and employment discrimination protections on behalf of unauthorized immigrants “will reduce the incentive for employers to hire undocumented workers.”<sup>116</sup> Only three of the addenda of the debates referenced the relationship between workplace protections and incentives to discriminate against undocumented workers.<sup>117</sup> All three, however, supported the IRCA harmony view.

It appears that this issue was not specifically debated even though it was consistently covered in House, Senate, and conference reports. The coding of the debates yielded only two relevant statements about the relationship between incentives and workplace protections for unauthorized workers. These two statements, both from 1985, provide modest additional support for the IRCA harmony courts’ view. They simply report on the proposal, which ultimately became law, to provide more funding to the Department of Labor’s Wage and Hour division. One of these statements, made by a bill sponsor, echoed the 1986 conference report statement that the reason for enhanced wage and hour law enforcement was to “deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.”<sup>118</sup>

#### CONCLUSION

The Article commenced with the question of whether federal immigration law affects the subfederal workplace protections available to unauthorized workers. To date, court battles and scholarship on this issue have led to a virtual stalemate and often focus exclusively on normative policy arguments. While this study certainly acknowledges that there are drawbacks and limitations to the use of legislative history, it draws from methods typically employed by social scientists to add rigor to legal analyses of legislative history. The application of a

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115. S. REP. NO. 97-485, at 23–24 (1982).

116. STAFF OF S. & H.R. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY & NAT’L INTEREST NO. 8, at 357 (Joint Comm. Print 1981).

117. S. REP. NO. 98-62, at 133 (1983) (minority); S. REP. NO. 97-485, at 119 (1982) (minority); H.R. REP. NO. 97-890, pt. 1, at 194 (1982) (dissent).

118. 131 CONG. REC. 23,318 (1985); 131 CONG. REC. 23,300 (1985).

forensic approach to fifteen years of IRCA's legislative history provides a fresh, and more empirically rigorous, perspective on the relationship between immigration policy and subfederal workplace protections relating to unauthorized workers.

Specifically, the analysis shows that reducing unauthorized workers' subfederal workplace protections was not one of the purposes of the legislation. If anything, IRCA's legislative history demonstrates a congressional purpose to uphold unauthorized workers' workplace protections as a means to deter employers from seeking out unauthorized workers. To do otherwise would simultaneously work against both the immigration and workplace law regulatory regimes and would unconstitutionally step on the historic powers of subfederal governments to protect the working conditions of workers that labor within their territories. By developing a forensic framework for the study of legislative history, the Article also implores scholars and courts to focus less on bashing legislative history. It instead encourages them to develop empirical responses to these common critiques that can revive legislative history as a more reliable interpretive tool in law and policy analyses.

