Federal Employer Sanctions as Immigration Federalism

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INTRODUCTION

"For low-skilled workers in much of the world, U.S. admission policies make illegal immigration the most viable means of entering the country." Low average schooling, which disqualifies many potential
immigrants from employment-based visas, and long queues affecting family preference immigration from high-traffic countries, make the admission criteria outlined in the U.S. Immigration and Nationality Act (INA) prohibitive for most would-be immigrants to the United States.\(^2\) Perhaps due to this failure of immediate legal avenues, many immigrants enter the country illegally. Though many eventually gain legal status, in the meantime they live and work in the United States without documentation.\(^3\) "Illegal immigration thus accomplishes what legal immigration does not: It moves large numbers of low-skilled workers from a low-productivity to a high-productivity environment."\(^4\)

Recognizing that job opportunities are a significant motivating factor in the decision to come to the United States, President Reagan signed the Immigration Reform and Control Act (IRCA) in 1986, the "center-piece"\(^5\) of which was the country's first comprehensive federal employer sanctions law.\(^6\) "Conditioning U.S. jobs on proof of [work] authorization, so the logic went, would deter immigrants from coming to the United States for work reasons, encourage those that were here without meaningful job opportunities to return home, and over the long term reduce the rate of unauthorized migration."\(^7\) The Senate report for a version of the bill that became IRCA suggested that, while Third World development, closing the gap in wage disparity and working conditions, and the achievement of higher standards of living in sending countries were long-term goals that would help curb illegal immigration, the short-term cure was to eliminate the availability of the jobs that serve as a magnet.\(^8\) Prohibiting the hiring of unauthorized workers would be the most immediate way to cause meaningful change in the amount of unlawful migration to the United States.

More than twenty years later, IRCA's employer sanctions continue to influence discussions on comprehensive immigration reform, despite

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2. Id. at 14–15.
4. Id. at 15.
6. Kitty Calavita, Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime, 24 Law & Soc’y Rev. 1041, 1042 (1990). While this was the first comprehensive attempt at the federal level, some states had employer sanctions laws before IRCA. California’s, for example, was the subject of a preemption lawsuit discussed infra Part II.B.
overwhelming evidence that sanctions do not significantly reduce the number of unauthorized migrants in the workforce. Proponents of employer sanctions still view employer verification mechanisms as one of the most promising solutions to immigration enforcement because they are less dangerous than armed border enforcement and less expensive than detention and removal from the interior. In addition, given that no government agency charged with enforcing immigration law could, on its own, patrol the more than 7.5 million businesses across the nation to find and remove unauthorized workers, enlisting employers is a useful force multiplier. For those whose response to the failure of sanctions is to increase both the likelihood and the severity of employer sanctions, the hope is that ramping up enforcement will lead to a closing of the employment loophole, as IRCA originally intended.

While employer sanctions are an understandable first reaction to the job-magnet effect and an inexpensive means of multiplying the available

9. See Nat'l Council of La Raza, Talking Points (2007), available at http://nclr.forumone.com/files/44530_file_EEVS_Talking_Points.pdf; see also Roger Lowenstein, The Immigration Equation, N.Y. TIMES MAG., July 9, 2006 ("The sponsor of the House legislation, Representative James Sensenbrenner, a Republican from Wisconsin, says bluntly that illegals are bad for the U.S. economy. His bill would require employers to verify the status of their workers from a national database and levy significant penalties on violators.").

10. See Comprehensive Immigration Reform in 2009: Can We Do It and How?: Hearing Before the S. Judiciary Subcomm. on Immigration, Refugees and Border Security, 111th Cong. (2009) [hereinafter Meissner Testimony] (testimony by Doris Meissner, Senior Fellow, Migration Policy Institute); see also Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 STAN. L. REV. 809, 847 (2007) (asserting that unauthorized immigration allows for a population of low-skilled workers to enter the country and eventually gain legal status if they are not removed by ex-post, internal verification mechanisms that provide an opportunity for the government to gather more in-depth information than ex-ante border verification mechanisms might).

11. See Meissner Testimony, supra note 10.

12. Rep. Sensenbrenner said in 2006 that we need to "cut off the magnet of jobs for illegal immigrants. That means having realistic and enforceable employer sanctions. So hiring illegals because there is no enforcement ends up lowering the labor costs of the people who hire them, so much so that with low fines and very selective and spotty enforcement, people can get away with undercutting the competition that is only hiring citizens and legal immigrants with green cards. . . . [I]f we shut off the jobs by enforcing employer sanctions, many of the illegal immigrants will simply decide to go home because they cannot make money in the United States. And you will see an attrition." Danielle Knight, Immigration Debate: Q&A with Rep. James Sensenbrenner Jr., U.S. NEWS & WORLD REP., June 6, 2006, available at http://www.usnews.com/usnews/news/articles/060606/6immigrationa.htm.

13. See Pham, supra note 5, at 805 ("The biggest enforcement problem for employer sanctions is simply that they are rarely enforced."); see also Jeffrey Manns, Private Monitoring of Gatekeepers: The Case of Immigration Enforcement, 2006 U. ILL. L. REV. 887, 944 (suggesting that private monitoring of employers will "breathe new life into the gatekeeping duties of employers by providing them with credible threats that their compliance measures will be subject to ongoing oversight").
enforcers of immigration law, they have proven unworkable for employers as a result of the shortcomings of the existing verification mechanisms (vulnerability to document and identity fraud has proven inevitable with both the I-9 system and E-Verify) and have led to rampant violations of both civil rights laws and IRCA itself.

In response to employer sanctions' widely recognized failure and the growing number of unlawful migrants, the federal government has considered additional means of decentralizing (and thus expanding) immigration enforcement. President George W. Bush made a concerted effort to involve local authorities in immigration law enforcement. With encouragement from former Attorney General John Ashcroft, and perhaps as backlash to 9/11 or the flagging economy, some states and municipalities responded to rising anti-immigrant sentiment by passing local measures intended to augment enforcement of federal immigration law.

While local and state attempts at direct immigration enforcement are likely expressly or impliedly preempted by IRCA, INA § 287(g) offers another avenue for delegation of immigration authority. A result of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, INA § 287(g) authorizes the Secretary of Homeland Security

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17. Nchimunya D. Ndulo, Note, State Employer Sanctions Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited, 18 CORNELL J. L. & PUB. POL'Y 849, 851 (2009) ("Then-United States Attorney General John Ashcroft and other Department of Justice officials encouraged local governments to enforce immigration laws as part of their anti-terrorism mission. Additionally, following the events of September 11th, Congress drafted legislation such as the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which would have financially rewarded local governments willing to enforce immigration laws. Although the CLEAR Act did not pass, some of its core provisions continue to resurface in legislation pending in Congress.").
18. Border policies and interior enforcement—seen as an extension of border laws—serve to reinforce physical borders, preserve resources for those with lawful status, and send a symbolic message about U.S. immigration policy, whether or not such mechanisms are actually effective or consistently implemented. See Huyen Pham, When Immigration Borders Move, 61 FLA. L. REV. 1115, 1115 (2009). In the current economic climate, resources are ever more jealously guarded, and the push to reserve benefits, especially employment opportunities, for those who are lawfully present has increasing political appeal. Id. at 1147.
19. See infra Part II for examples of attempts at local immigration enforcement.
to enter into Memoranda of Agreement with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions as long as they receive proper training and supervision by U.S. Immigration and Customs Enforcement (ICE) officers. Without such training and limited, delegated authority, local officers could not identify, process, or detain unlawful migrants because that kind of direct immigration enforcement is an exclusively federal power. Thus, § 287(g) has been used as a means of expanding federal immigration enforcement power by way of limited agreements with states and localities.

Like subfederal enforcement and 287(g) agreements, IRCA's employer sanctions scheme results in a delegation and decentralization of immigration authority meant to increase the number of available immigration enforcers. Employers, however, more than other subfederal enforcement agents, face great difficulty in complying with anything beyond the letter of the law. Without any training to speak of, employers are expected to verify the authenticity of any one of twenty-seven identity and work eligibility documents. With so many fraudulent


22. See Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983). Preemption of state and local authority was the norm until the Office of Legal Counsel caused major confusion in the immigration enforcement debate in 2002 when it drafted an opinion asserting the “inherent power” states (as sovereign entities) have to enforce federal immigration law. Compare Memorandum From Assistant Attorney General Jay S. Bybee, Off. of Legal Counsel (Apr. 3, 2002) with Assistance by State and Local Police in Apprehending Illegal Aliens, Teresa Wynn Rosenburgh, Off. of Legal Counsel, Memorandum Opinion for the U.S. Attorney S. District of Cal. (Feb. 5, 1996), available at http://www.justice.gov/olc/immstopola.htm. Resolving this debate is beyond the scope of this Note, but see supra notes 137-139 and accompanying text for further discussion.

23. This Note takes as given that employers are actually immigration screeners and part of the enforcement of immigration law. This premise, however, has been the subject of some debate because employers do not detain or deport people. Eleanor Marie Lawrence Brown notes that employer sanctions encourage employers to screen aliens for work permits and penalize employers who fail to do so. Eleanor Marie Lawrence Brown, Outsourcing Immigration Compliance, 77 FORDHAM L. REV. 2475 (2009). Michael J. Wishnie also contends that employers are private enforcers, see Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails, 2007 U. CHI. LEGAL F. 193, 215, as do others, including Stephen Lee, see Lee, supra note 7, at 1110–19, and Huyen Pham, see Pham, supra note 5, at 784–85, though Pham debates whether employer screening is truly enforcement or just execution of government policy. Congressional hearings before the passage of IRCA suggested that employers did not even have to make judgments concerning the authenticity of the documentation, an interpretation that is reinforced by the good faith clause and the fact that the document need only “reasonably appear on its face to be genuine.” See Calavita, supra note 6, at 1058.

24. Calavita, supra note 6, at 1059 (“Compliance with the paperwork requirement had come to stand in for compliance with the real heart of the employer sanctions law—the ‘knowing hire’ provision.”).

documents available, employers must use their considerable discretion to separate valid documents from fraudulent documents. In addition, employers must wade through the complexity of the INA to determine whether the documents presented, if valid, prove work authorization. For example, some people are in the United States legally but are not work-authorized, such as certain student visa holders; others have recently adjusted status or are in the process of adjustment, both of which affect employment authorization in subtle ways that employers may not recognize or understand without training. Thus, even in seemingly straightforward situations, "in the absence of a counterfeit-proof identification card, 'employers would have to use their discretion in determining [worker] eligibility.'"

Because of the vast expansion of discretionary immigration authority through delegation to private employers untrained as immigration screeners, there is great potential for employer mistake and abuse, such that federal employer sanctions, especially if increased, raise issues similar to preempted subfederal enforcement. Local immigration enforcement has been preempted because of fear that a lack of uniformity in the application of federal immigration law would result in the creation of "a thousand borders" and could lead to increased discrimination. The use of more than 7.5 million private employers as immigration screeners should be questionable by the same logic. Though employer sanctions are not preempted by federal law (because, like 287(g) agreements, they explicitly form part of the federal immigration scheme in the INA), employers' inconsistent and unreliable determinations of immigration status, due to rampant fraudulent documents, lack of training, and complex immigration regulations, lead to the same problematic results of decentralized, subfederal enforcement.

This Note explores the ways in which the failings of the current system of employer sanctions should render employer sanctions invalid for the same reasons that underlie preemption of state and local immigration enforcement laws. Because sanctions are intended to have a direct impact on immigration and require individual, private employers to enforce immigration law (without training!) as screeners of employees' eligibility and immigration status, IRCA's employer sanctions scheme results in an uneven and inconsistent application of what is meant to be a comprehensive federal scheme of immigration law. Moreover, if proposals to ramp up employer sanctions are successful, the potential for workplace discrimination will increase because employers, having access to only inadequate

27. Pham, supra note 18, at 995.
28. See discussion Part III.B.1 infra.
means of verifying work authorization, will face dueling liabilities under antidiscrimination and immigration law.

Part I explores the use of employers as immigration enforcers in the context of currently available—and inadequate—mechanisms used to verify employment eligibility. Part II outlines the values underlying federal preemption of local immigration enforcement and the limited exception allowed under a 287(g) agreement. Part III then makes explicit the parallel failings of subfederal and private-employer enforcement, such as lack of uniformity in the application of federal immigration law and potential increases in discrimination.

The Note suggests that while the perceived need to broaden federal enforcement through delegation of power indicates a need for comprehensive immigration reform, calls to heighten employer sanctions are misplaced because federal employer sanctions suffer from the same problems underlying preemption of subfederal immigration enforcement. Ultimately, however, the Note concludes that, despite their failings and despite the problems paralleled in subfederal enforcement contexts, employer sanctions will likely remain in force because the federal government is unable to exclusively manage immigration enforcement and cannot afford the loss of what is ultimately a largely symbolic statement in opposition to unlawful migration.30

I. IRCA's Employer Sanctions: From Punishment to Decentralization of Power

While IRCA's employer sanctions are not preempted by federal law (they are federal law), their implementation, especially under a regime of heightened enforcement as called for repeatedly in Congress, raises identical normative issues underlying subfederal immigration enforcement. This section discusses IRCA's employer sanctions and demonstrates that they have failed in their stated goals: rather than forming a program that punishes errant employers, the "sanctions" have become a delegation of federal immigration enforcement authority to private employers.

A. A Brief History of IRCA's Employer Sanctions

In 1986, § 274 of the Immigration and Nationality Act (INA) made it illegal for employers to "hire, or to recruit or refer for a fee . . . [or] to continue to employ" unauthorized workers "knowing" that those workers

30. A key goal of IRCA's drafters was sending a message that employment of unauthorized workers would no longer be tolerated, "regardless of whether it was financially, technically or politically possible to enforce [employer sanctions] rigorously in the short run." MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES 39 (1990).
were unauthorized. Previous immigration legislation, such as the McCarran-Walter Act of 1952, which made it illegal to “harbor, transport, or conceal illegal entrants,” included an amendment, called the Texas Proviso, that expressly excluded employment from the “harboring” category. Under the Proviso, “[w]hether or not ‘knowing’ employment of undocumented workers would constitute harboring remained ambiguous despite congressional discussion. Nonetheless, the Proviso was interpreted by the INS [and employers] as carte blanche to employ undocumented workers.” Thus, while not the first piece of federal immigration legislation regarding employment, IRCA’s employer sanctions provision effectively ended the “long-standing laissez-faire policy” toward the employment of undocumented workers. Or so it seemed.

While cracking down on illegal employment—so as to deter unlawful migration—was the underlying purpose of IRCA’s employer sanctions, critics claim that, in implementation, IRCA’s sanctions did little to change the landscape. “A historical analysis of U.S. immigration laws since the late nineteenth century reveals that these laws were often hapless attempts to resolve conflicts derived from a fundamental contradiction between the economic utility of immigrants versus political demands to restrict this source of cheap labor.” From their inception, IRCA’s employer sanctions were no different. Though the language and legislative history of employer sanctions suggest that they were intended to have a true deterrent effect on unlawful hiring, their implementation indicates that the sanctions were not meant to pose a real threat to employers. INS guidelines “stressed cooperation” over “harassment and

33. Id.
34. Id.
35. Calavita, supra note 6, at 1042.
36. Former Homeland Security Secretary Michael Chertoff reiterated this underlying explanation for an employer sanctions regime in August 2007: “We all know that a critical part of immigration enforcement is effective interior and worksite enforcement. The reason for that is because the magnet that brings most economic migrants into this country is work. And if we have worksite enforcement directed at illegal employment, we strike at that magnet.” Dep’t of Homeland Security Secretary Michael Chertoff & Dep’t of Commerce Secretary Carlos Gutierrez, Remarks at a Press Conference on Border Security and Administrative Immigration Reforms (Aug. 10, 2007), available at http://www.dhs.gov/xnews/releases/pr_1186781502047.shtm.
37. Calavita, supra note 6, at 1045.
38. See id. at 1065 (asserting that the “lawmaking process itself . . . ensured that employer violations would entail very little risk”); Lee, supra note 7, at 1126–27 (“IRCA’s design and history suggests (sic) that Congress intended to deter unauthorized immigration by targeting employers. IRCA’s implementation history, however, demonstrates that from the very beginning the then-INS demonstrated a willingness to work
heavy-handed enforcement." IRCA's good faith compliance standard merely requires that employers check the document to see if it "reasonably appears on its face to be genuine" and relates to the person presenting it. This standard, coupled with the three days' warning given to employers before their records are investigated, makes prosecuting employers for "knowingly" hiring unauthorized workers very difficult and results in compliance with only the letter of the law. Indeed, when Kitty Calavita asked upper-level INS officials how leniently they would interpret "appears on its face to be genuine," one official said "the employer should be suspicious if there is 'five tons of white-out' on a worker's document ... [or] if the identification showed the photo of a gorilla." These lax standards led David Martin to call the document verification process "empty ceremony."

In the more than twenty years since their implementation, sanctions have proven to be a largely empty threat due to the ease of basic administrative compliance and the difficulty INS/ICE has in proving "knowing" hiring in all but the most egregious cases. In the years following 9/11, employer sanctions have become even less likely due to INS/ICE's low prioritization of workplace enforcement, with far more resources dedicated to criminal aliens and threats to national security. Between fiscal years

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42. Calavita, supra note 6, at 1059 (suggesting that "compliance with the paperwork requirement had come to stand in for compliance with the real heart of the employer sanctions law—the 'knowing hire' provision").
43. Lee, supra note 7, at 1106.
44. Calavita, supra note 6, at 1063.
45. David A. Martin, Eight Myths About Immigration Enforcement, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 546 (2007). But see Cox & Posner, supra note 10 (discussing the first-order, ex ante port-of-entry exclusion mechanisms versus the second-order, ex post internal deportation systems and suggesting that internal verification mechanisms are not necessarily mere symbolism because the government might prefer ex post screening since it provides an opportunity to gather more in-depth information).
46. Agency priorities have shifted over time, with the INS focusing resources on criminal aliens in the 1990s through today and a shift toward "counter-terrorism" efforts following September 11, 2001. See Wishnie, supra note 23, at 209–10; see also GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT
1999 and 2003, the percentage of ICE agents’ time designated to worksite enforcement dropped from approximately 9 percent (the equivalent of 240 full-time employees) to approximately 4 percent (ninety full-time equivalents). 7 The number of employer sanctions fines issued by INS and the Department of Homeland Security (DHS) similarly declined in the same period, from 417 notices of intent to fine in 1999 to 105 by 2001 and to just three by 2004. 49 Though sanctions actions increased briefly in 2007, 50 even when sanctions were applied, they were often negotiated

47. GAO, WEAKNESSES HINDER, supra note 46, at 14.

48. In 2003, the INS was replaced with two agencies—U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE), which handle all investigative and enforcement functions—consolidated under the newly created Department of Homeland Security (DHS).

49. Lee, supra note 7, at 1119. During the same period, apprehensions at the worksite were similarly down, from 2,849 in 1999 to 685 in 2004. 2001 INS Stat. Y.B. tbl.61; Fact Sheet: Worksite Enforcement, U.S. Immigration & Customs Enforcement (Apr. 30, 2009), http://www.ice.gov/news/library/factsheets/worksite.htm. This decline in enforcement may be explained by Karl Manheim’s suggestion that “[e]ven when the law plainly prohibits [unlawful immigrants’] employment, enforcement is often lax because of powerful forces within the economy which benefit from their presence in the labor market ‘as a source of cheap labor.’ In other words, lax enforcement of immigration laws may be a conscious decision by the federal government, rather than the result of neglect or incompetence.” Karl Manheim, State Immigration Laws and Federal Supremacy, 22 Hastings Const. L.Q. 939, 1002 (1995).

50. From 2005 to 2007, worksite apprehensions increased from 1,116 to 4,077. Fact Sheet: Worksite Enforcement, U.S. Immigration & Customs Enforcement (Apr. 30, 2009), http://www.ice.gov/news/library/factsheets/worksite.htm. Though the number of apprehensions of unauthorized workers increased in this period, it still represents only a tiny fraction of the millions of undocumented workers. ICE, the federal agency responsible for investigating illegal hiring, increased enforcement of the employer sanctions law in 2007, leading to a dozen major busts. ICE officials focused on criminal claims against company officials, rather than just civil penalties, which some employers had come to see as the cost of doing business. A first civil offense, for example, resulted in fines of $275 to $2,200 for each unauthorized employee. Criminal penalties, on the other hand, soared as high as $3,000 and up to six months in prison for each illegal hiring. See Jacques Billeaud, Legislatures Look at Employer Sanctions, Associated Press, Mar. 21, 2007, available at http://www.thefreelibrary.com/Legislatures+Look+at+Employer+Sanctions-a01611308259.
down to a level low enough to be justified as an acceptable business expense.\footnote{51}

Available evidence indicates that the employer sanctions program has not succeeded in one of the main goals of private enforcement: weakening the ‘pull’ factor of unlawful migration.\footnote{52} Rather than decrease, the numbers have increased dramatically since IRCA’s passage.\footnote{54} "For much of the past decade, more than 1 million immigrants have entered the United States legally, and about another half a million have settled illegally."\footnote{56} In March 2005, after almost twenty years of employer sanctions, there were over 7.2 million unauthorized workers in the civilian workforce (about 5 percent of the total workforce and much larger percentages in certain industries).\footnote{56} By March 2008, the estimate had grown to over 8.3 million undocumented workers in the United States labor force.\footnote{57} At the same time, however, government Census data and estimates from the Pew Hispanic Center indicated that, for the first time since 2005, the number of undocumented immigrants had either declined slightly or, at the very least, grown more slowly from 2005 to 2008 than it had in the previous decade.\footnote{58} Those in favor of tough immigration laws attribute the slowing growth of the undocumented population to

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\footnote{51}{See Pham, supra note 5, at 815 ("Because of the costs required to defend the fines in administrative proceedings, INS (and now ICE) often negotiate with employers to substantially lower the amounts of these fines. . . . The substantially lower amount of fines ordered and collected led some ICE officials to complain that the fines do not provide any meaningful deterrent."); Calavita, supra note 6, at 1054 ("[G]iven the size of potential fines, violations were an acceptable risk. According to the general manager of a restaurant, ‘the fines are a reprimand, not a serious threat.’"). Though Calavita wrote almost twenty years ago, the fact that the likelihood of employer sanctions has been on the decline, see supra notes 48–49 and accompanying text, suggests that what was never considered a serious threat has become even less so.}
\footnote{52}{For a discussion of the goals of private enforcement, see Pham, supra note 5, at 800–01.}
\footnote{53}{Though this “failure” of employer sanctions is not the focus of this Note, it is worth mentioning. Some have suggested that these numbers are misleading because there is no way to know if illegal immigration might have increased more or at a more rapid rate in the absence of employer sanctions. See Stephen H. Legomsky, Employer Sanctions: Past and Future, in The Debate in the United States Over Immigration 171, 177–78 (Peter Duignan & L.H. Gann eds., 1998).}
\footnote{55}{Meissner Testimony, supra note 10.}
\footnote{56}{ANDORRA BRUNO, CONG. RESEARCH SERV., RL 33973, Unauthorized Employment in the United States: Issues and Options 1–2 (2007).}
\footnote{58}{Pham, supra note 18, at 1126–27.}
\end{footnotes}
increased enforcement under the Bush Administration, while others argue that the nation’s flagging economy and widespread unemployment are behind the decline.\(^{59}\) A middle ground perspective suggests that increased interior enforcement may result in the diversion of undocumented populations to other regions, rather than affecting return migration.\(^{60}\)

Despite the slight decline in numbers, there is no question that unlawful migration has continued since the passage of employer sanctions. As of January 2009, there were an estimated eleven million unauthorized immigrants living in the United States.\(^{61}\) This contemporary data may have been foreshadowed by Kitty Calavita’s 1990 study (four years after IRCA’s passage), which found that, in industries that had traditionally been immigrant-dependent, nearly half of hiring managers interviewed at southern California companies suspected that they had hired unauthorized workers, and more than 10 percent admitted to knowingly hiring undocumented employees.\(^{62}\) More importantly, several employers indicated that they had no intention of abandoning the practice of unlawful hiring because competition required it, and because the usually empty threat of sanctions constituted merely an additional, acceptable cost of business.

Under IRCA’s employer sanctions scheme, then, employers who hire outside the law gain a competitive advantage over those who follow the law.\(^{64}\) Ironically, instead of punishing or sanctioning employers, IRCA has proven effective as “de facto immunity . . . to negotiate low wages, . . . competition.”\(^{65}\)

\(^{59}\) Id. at 1127 (pointing to the Center for Immigration Studies as the pro-enforcement example and the Immigration Policy Center as a group in favor of liberalizing immigration laws).

\(^{60}\) Id. at 1129 (citing the Migration Policy Institute’s theory of the cause of decreasing numbers of immigrants).


\(^{62}\) Calavita, supra note 6, at 1050–51.

\(^{63}\) Id. at 1053–55.

\(^{64}\) See id. at 1054 (quoting a garment shop owner as feeling competitive pressure to violate immigration law with respect to the hiring of unauthorized workers: “When you have someone who’s bidding against you and using illegals and paying them under the table, it’s not really right.” Another employer indicated plainly that “there’s a lot of pressure right here not to comply.” Indeed, 57 percent of the employers Calavita interviewed thought that their competitors used undocumented workers.). Employers have also expressed concern that participating in programs like E-Verify could place them at a competitive disadvantage compared to nonparticipating competitors in a tight labor market. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 2 (1999) [hereinafter GAO, SIGNIFICANT OBSTACLES], available at http://www.gao.gov/archive/1999/gg99033.pdf.
disregard workplace protections, and otherwise suppress worker dissent[,] ... maximizing profit over the interests of advancing the goals of our nation's immigration and labor and employment laws. 65

Though initially conceptualized as a means of threatening liability to employers who hire unauthorized workers, employer sanctions have ultimately served largely as a force multiplier to enhance (at least the illusion of) interior immigration law enforcement against undocumented employees. 66 The very need to expand federal forces through the use of employers suggests that employer liability is an empty threat because DHS lacks sufficient personnel/resources to truly follow through to any great degree on employer sanctions. 67 The following section outlines this shift from employers as targets to employers as delegates of federal immigration authority.

65. Lee, supra note 7, at 1107. Another goal of employer sanctions is presumably to punish those who benefit from unlawful hiring and to create incentives to enter legally since unlawful entry will not result in employment opportunities. Indeed, employees rather than employers have become the focus of the employer sanctions system. Of course, some would argue that those who gain livelihood to which they are not legally entitled should face some punishment, especially when others who go through legal channels are not able to find legitimate employment opportunities. While employees unlawfully seeking work are also skirting immigration law, the focus almost exclusively on employees rather than employers has had the unfortunate effect of undermining workers' rights more broadly because employers, not fearing liability for themselves, use the threat of DHS reporting to subdue employee complaints about workplace conditions. Id.

66. Some sort of force multiplier is required because the cost of identifying all those who might contribute to American workplaces and eventually become citizens "render[s] impractical any policy that relies only on Congress, [federal] agencies, and other public entities." Id. at 1115.

67. DHS employs 31,500 immigration officials (split between ICE and USCIS), compared to millions of employers nationwide, including over 1.1 million in construction and manufacturing/production alone. Id. at 1105–06. Tellingly, in Calavita's 1990 study of employers' responses to IRCA sanctions, 32 percent of employers were "convinced that the INS [did] not have the ability to enforce the law. A number of employers cited the lack of INS resources, reasoning, as one restaurant manager did, 'It's going to be a nightmare for them [the INS]. I suspect that they will probably spotcheck . . . . There are just too many companies that use undocumented workers.'" Calavita, supra note 6, at 1053. However, the limited availability of DHS employees does not have to doom federal enforcement. The Internal Revenue Service (IRS), for example, has similarly limited enforcement capabilities but has still been successful in securing high levels of voluntary compliance with tax laws. See Andrew Parker, Collecting What America Owses, FIN. TIMES (London), Feb. 27, 2005, at 12 (quoting Mark Everson, head of the IRS: "What we cannot afford is to let our tax laws be viewed in the same way as our immigration or drug laws are, where too large a segment of the populace says: 'Those laws are not what we respect.'")
In 1986, IRCA’s implementation of employer sanctions “expanded the private sector’s role in enforcement. Since then, the federal government has required employers to verify identity and work authorization, but they can choose to comply with varying diligence and punctiliousness.” IRCA’s employer sanctions scheme both empowers and requires employers to become private immigration screeners, even de facto agents of the INS (now part of the DHS) “expected to judge whether the documents presented [as proof of work authorization] are obviously counterfeit or fraudulent.” IRCA requires employers to screen workers and verify their immigration status. “Thus, along with port-of-entry inspectors, international carriers, asylum officers, and an increasing number of state and local law enforcement officers, employers assist DHS in a screening capacity by identifying those immigrants who, in their judgment, ought to be reported to DHS officials for removal.” Employers, then, rather than being the target of sanctions, become “agents of the State,” allowing DHS to work with (instead of against) employers to examine documents, consult federal databases, and otherwise verify prospective employees’ immigration statuses.

While other interior enforcement involves more direct authority to exclude on the basis of immigration status (such as 287(g) agreements and federal enforcement that does not take place at the border), private employers are expected to review immigration-related documents, use their discretion in making determinations about the authenticity of those documents and the applicant’s work authorization, and then dole out essential

69. See, e.g., Wishnie, supra note 23, at 215 (“IRCA has made private employers the instrument of immigration enforcement.”). Stephen Lee outlines in detail how IRCA’s employer sanctions lead to the use of employers as immigration screeners, just as in airline sanction laws, where “Congress has imposed a set of obligations onto a private entity, which is charged with the duty of carrying out a service traditionally carried out by a public entity.” Lee, supra note 7, at 1114 n.32. This delegation of screening responsibilities “provides a cost-effective way to winnow down the universe of potential immigrants to a manageable size” considering that DHS itself only employs approximately 31,500 immigration screeners, compared to the millions of employers whose services could be added to the forces. Id. at 1116.
71. GAO, SIGNIFICANT OBSTACLES, supra note 64, at 4.
72. Lee, supra note 7, at 1105.
73. Id. at 1108.
benefits on the basis of that decision. Using their delegated, discretionary authority, employers "shape the conditions under which unauthorized immigrants remain in the United States and define the conditions triggering DHS detention and removal." Though interior enforcement designed to deny benefits on the basis of unlawful immigration status does not deny physical access to the country and does not necessarily result in deportation, exclusion from essential benefits, such as employment, is effectively as exclusionary as physical denial of entry at the border. Indeed, Huyen Pham has called employer enforcement the "most significant" private enforcement of immigration law.

Employers perform their role as immigration screeners through compliance with required employer work status verification systems such as the I-9 process and use of the federal electronic database, E-Verify. To provide meaningful compliance, employers must pay detailed attention to a complex variety of immigration status or work authorization documents. As a result, work-status verification cannot be seen as self-enforcing but rather requires significant employer discretion in its application. Unfortunately for employers (and those hoping that

74. See Pham, supra note 18, at 1123–24 (discussing the distinction between direct immigration enforcement and what she calls "moving borders" interior enforcement, of which employer sanctions are an example).

75. Lee, supra note 7, at 1109. See also Cox & Posner, supra note 10 at 847 (suggesting that ex-post, internal verification mechanisms provide an opportunity for the government to gather more in-depth information than ex-ante border verification mechanisms might).

76. Pham, supra note 18, at 1120. Pham acknowledges that someone who is merely denied a single benefit due to unlawful status may be better off than someone who is placed directly into deportation proceedings or denied entry at the border, but Pham also emphasizes that the importance of the denied benefit, especially if coupled with the denial of other essential benefits (medical care and housing, for example), can make the inaccessibility of such benefits tantamount to exclusion at the border. Id. at 1125. Indeed, for proponents of such policies, the goal is to make continued unlawful presence so difficult that it results in "self-deportation." Id. at 1144–45. While it is unclear exactly how effective such mechanisms are at encouraging self-deportation, there is some evidence, particularly in the context of state and local enforcement laws, that these policies cause widespread flight of immigrants. Id. at 1126. As the legislative findings of the recent Arizona law, S.B. 1070, indicate, causing flight is precisely the point. See S.B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010), available at http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf ("The legislature declares that the intent of this act is to make attenion through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.").

77. Pham, supra note 18, at 1118. The significance of employers as screeners is interesting in light of statements made by Senator Simpson at the time IRCA was debated: "the Federal law relative to the knowing hiring of illegal aliens will not require employers to make judgments concerning the authenticity of documentation." Calavita, supra note 6, at 1058.

78. Motomura, supra note 68, at 2047–48 (underscoring the fact that immigration law is complex and does not lend itself to self-enforcement because, for example, even
sanctions might deter unlawful hiring), the available mechanisms for document verification and the utter lack of employer training hinder meaningful enforcement. Instead, the "primary impact of the poorly designed and minimally enforced employer sanctions was to create a booming business in fraudulent documents."\textsuperscript{79} Especially in the context of significant employer discretion, the shortcomings of the available mechanisms (discussed in the following subsections), make the prospect of heightened federal employer sanctions problematic for the same reasons that subfederal regulations are typically preempted by federal law.

1. The I-9 Process

A commonly-used worker verification mechanism is the I-9 process. As a result of the complexity of immigration law and employers' utter lack of formal training in document verification, employers completing I-9 paperwork face a difficult task in trying to recognize valid work authorization.\textsuperscript{80} Employers can verify work authorization and identity by reference to any of twenty-seven documents,\textsuperscript{81} many of which are widely available in fraudulent forms.\textsuperscript{82} While allowing a variety of documents to prove eligibility ensures that a large portion of the population is able to people who have entered illegally can legally avoid deportation and regularize status through a grant of asylum or through employment or family relationships).

\textsuperscript{79} PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 86 (2000).

\textsuperscript{80} Employers are typically only provided verification training upon a finding of egregious violation of employer sanctions law, but as of 2007, ICE launched the ICE Mutual Agreement Between Government and Employers (IMAGE), a voluntary program that provides education and training on hiring procedures, fraudulent document detection, use of E-Verify, and anti-discrimination requirements. See IMAGE, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, https://www.ice.gov/image/ (last visited Oct. 25, 2010). Because employer sanctions are generally unenforced, it is unlikely that many employers have received training in document verification unless they have volunteered for it.

\textsuperscript{81} GAO, CHALLENGES EXIST, supra note 15, at 6. For a list of the eligible documents, see HANDBOOK FOR EMPLOYERS 43–44 (2009), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf.

\textsuperscript{82} See U.S. SENTENCING COMM'N, ECONOMIC CRIMES POLICY TEAM, IDENTITY THEFT FINAL REPORT 10–13 (1999) (citing the example of wide exploitation of social security numbers and drivers' licenses as "breeder" documents to secure other legal forms of identification). 78,000 fraudulent documents were used to obtain employment for about 50,000 unauthorized workers in investigations INS completed from 1996 to 1998. GAO, SIGNIFICANT OBSTACLES, supra note 64, at 10. A January 1997 Justice Office of Inspector General audit report indicated that INS had confiscated 300,000 counterfeit documents in thirty fraud cases across five INS district offices. Id. Nearly all of the counterfeit documents were confiscated in Los Angeles. Id. In November 1998, INS seized more than two million counterfeit documents in Los Angeles, including permanent resident cards, Social Security cards, and drivers’ licenses from various states, all of which were headed for distribution points through the country. Id.
demonstrate work authorization, the number of documents and the variety of forms those documents can take leads to confusion among employers. Even the Handbook for Employers, produced by USCIS, contains only a few examples of valid documents, despite the existence of several valid circulating versions of each of the twenty-seven acceptable forms of identification. It is problematic that the Handbook offers such incomplete guidance to employers faced with a multitude of possible documents in need of verification, but it is not clear that a more comprehensive guide (if it were even feasible to provide and keep constantly up-to-date) would solve the problem. Additional examples and guidance could serve only to further complicate an already-complex process by adding to the time and expertise required to master the Handbook and determine the universe of acceptable documentation.

If the sheer number and variety of eligible documents were not enough to confuse the process, the documents allowed for verification of identity and work authorization include “identification documents that are either easily counterfeited, easy to obtain, or faceless and fungible, such as social security cards.” Because fraudulent documentation is so easily acquired, “[the I-9 system] makes the verification process a ‘don’t ask, don’t tell’ policy from the standpoint of employers.” Through the use of fraudulent documents, unauthorized workers have been able to circumvent the employer verification system, making it difficult, if not impossible, for willing employers to comply with the law. Even the INS admitted that “the proliferation of inexpensive fraudulent documents makes it almost impossible for employers to ensure employment to only authorized workers.”

Adding to the confusion is the fact that work eligibility status itself is not always clear. Recent estimates suggest that approximately 1 to 1.5 million noncitizens in the United States live in a “twilight status,” still waiting for their paperwork to be processed after having satisfied the


84. See id. at 43 (2009) (“These pages are not, however, comprehensive because, in some cases, many variations of a particular document exist and new versions may be published subsequent to the publication date of this Handbook.”); see also Collins Foods Int’l Inc. v. U.S. INS, 948 F.2d 549 (9th Cir. 1991) (holding that the employer did not have constructive knowledge of employee’s unauthorized status due to failure to compare the employee’s fraudulent social security card with the example in the Handbook since the Handbook only contained one example among many legitimate social security cards in circulation at the time).


86. Manns, supra note 13, at 965 n.339.

87. Id. at 968 n.348.

88. GAO, Significant Obstacles, supra note 64, at 9–10.
requirements to become lawful permanent residents. These individuals are but one example of a group whose work status would be difficult to verify by referencing their current documents or government databases. Because "few, if any, private enforcers have received training in immigration law's complexities," they are "bound to make wrong enforcement decisions, either in good faith or with discriminatory intent to try to minimize legal liability." Indeed, recognizing the difficulty of determining worker eligibility from paper documents, some employers practice "defensive hiring," refusing to hire people who look like they might be unauthorized to work.

2. E-Verify: An Attempt to Salvage Work Authorization Verification

In an effort to respond to the difficulty employers face in verifying paper documents, Congress has explored the use of a national electronic database through a pilot program, initially called the Basic Pilot and subsequently dubbed "E-Verify." The program, now operational in all fifty states, is voluntary for most employers but reform proposals often suggest making it mandatory, and as of 2007, DHS requires all federal contractors and vendors use E-Verify. E-Verify will almost certainly form part of immigration reform proposals, taking the verification of
paper documents (the I-9 process) a step further by requiring that employers verify work authorization with the Social Security Administration (SSA) and/or DHS.

Employers using the E-Verify database enter the employees' information as presented on their work authorization documents and wait for verification electronically.\textsuperscript{96} Because a person who submits a false name or social security number would theoretically not match the SSA or DHS databases and would therefore not be confirmed as work-authorized when queried in the system, use of E-Verify is meant to remove the element of employer discretion and much of the risk of document fraud.\textsuperscript{97}

Unfortunately, the database has an alarming failure rate and has met with significant employer resistance. As of April 2008, while more than 61,000 employers (of 7.5 million\textsuperscript{98}) had registered for E-Verify, only about half were active users.\textsuperscript{99} In addition to resisting the need for updated equipment and the time to learn a new system, employers may be reluctant to use the system because of its questionable reliability.\textsuperscript{100} "[The E-Verify] database errors are surprisingly widespread ... They exist on a scale that would affect hundreds of thousands and perhaps millions of workers in a universal system."\textsuperscript{101} Indeed, a "2007 report to the [DHS] found that 'the database used for verification [was] still not sufficiently up to date to meet the IIRIRA requirement for accurate verification.'"\textsuperscript{102} Seven percent of queries return an initial, tentative non-confirmation with the SSA, while about 1 percent result in DHS tentative non-confirmations.\textsuperscript{103}

Most of the errors in response to SSA queries are due to changes in employees' citizenship status or other information, such as name changes, that have not been updated in SSA's records.\textsuperscript{104} When aliens naturalize,
their citizenship is recorded in DHS databases but is not updated in the SSA database. As a result, when their status is queried in SSA through E-Verify, a tentative non-confirmation is returned. Due to changes in 2008, these tentative SSA non-confirmations are immediately sent to DHS to be checked against their database. If DHS confirms authorization, E-Verify confirms the person as work authorized. Because of the lag in updating agency records for naturalized citizens, however, "these false negatives disproportionately affect persons born outside of the United States": "[the] error rate [is] approximately ten percent for naturalized citizens, and ... foreign-born individuals who are eligible to work in the United States [are] thirty times [more] likely to receive an erroneous tentative nonconfirmation [than] U.S.-born employees." As a result, "our overall employment verification system becomes a de facto source of employment discrimination."

In addition to raising questions of discrimination, E-Verify fails to rectify the identity fraud issues inherent in the I-9 system. As with the I-9 process, "E-Verify is vulnerable to identity fraud or the use by unauthorized immigrants of identity data belonging to other work-authorized individuals." If an unauthorized worker provides someone else's valid documentation, the program would find the person to be work authorized. Even if the document itself is counterfeit, if it contains valid information and appears reasonably genuine, E-Verify (like the I-9 process) would likely verify the employee's work status. Consequently, even if used

105. See id.
107. See id.
108. Rosenblum Testimony, supra note 91, at 58.
109. See Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 753 (10th Cir. 2010) (citing Westat, Findings of the Web Basic Pilot Evaluation xxv (2007)).
110. Rosenblum Testimony, supra note 91, at 58. See also Andorra Bruno, Cong. Research Serv., Unauthorized Employment in the United States: Issues and Options 5 (2007) (noting that tentative non-confirmations were frequently returned for foreign-born work-authorized employees, resulting in "unintentional discrimination against foreign-born employees").
111. Meissner Testimony, supra note 10, at 11. In 2007, E-Verify added a photo tool, meant to help curb identity fraud by allowing employers to examine an exact duplicate of the employment authorization document presented to determine if it has been doctored or if the person presenting it has substituted a new photograph on an original document. See Dep't of Homeland Security Secretary Michael Chertoff & Dep't of Commerce Secretary Carlos Gutierrez, Remarks at a Press Conference on Border Security and Administrative Immigration Reformus (Aug. 10, 2007), available at http://www.dhs.gov/xnews/releases/pr_1186781502047.shtm. Of course, this only helps if the document presented contains a photograph.
112. GAO, Weaknesses Hinder, supra note 46, at 11.
by a majority of employers, the database would not solve the significant problem of "false positives," people who appear to be work-authorized but are not. In addition, it would "continu[e] to wrongly non-confirm too many U.S. citizens and legal immigrants, a problem of 'false negatives' which is costly to American businesses and workers."113

The significant shortcomings of both the I-9 process and E-Verify have played a role in IRCA's employer sanctions' inability to effectively prohibit unauthorized employment. Rather than discourage unlawful migration by decreasing the job magnet, the failed implementation of employer sanctions has increased workplace discrimination, eroded wages and working conditions for U.S. workers, and undermined "public safety and homeland security by driving millions of undocumented immigrants and their families into the shadows of civic life."114 Moreover, "[g]iven that sanctions are rarely enforced, result in only small fines when they are enforced, and are structured in ways designed to undermine aggressive enforcement, it is hard to believe that the sanctions send any serious border control message."115 Even in reaffirming the importance of combating the job magnet underlying much of illegal migration, the U.S. Commission on Immigration Reform (mandated by the Immigration Act of 1990) stated in 1994 that "[t]he ineffectiveness of employer sanctions, prevalence of fraudulent documents, and continued high numbers of unauthorized workers . . . have challenged the credibility of current worksite enforcement efforts."116

Lukewarm enforcement sends the message that the United States is not serious enough about controlling illegal immigration "to dedicate the political and financial resources necessary to make employer sanctions effective."117 Jeffrey Manns suggests that "[t]he nominal enforcement of this law is likely worse than having no law at all, as it has fostered norms

113. Meissner Testimony, supra note 10, at 11-12. Even putting aside the issues of accuracy with the program, significant concerns remain regarding USCIS staff's ability to handle a huge influx of employers if the program becomes mandatory. As of 2006, USCIS only had thirty-eight immigration status checkers to complete any secondary verifications resulting from tentative non-confirmations. USCIS officials have "serious concerns about [USCIS's] ability to complete timely verifications if the number of [E-Verify] users greatly increased." GAO, WEAKNESSES HINDER, supra note 46, at 13. In addition, E-Verify may raise privacy concerns because anyone wanting access to the system could pose as an employer and gain access to employee information by signing a Memorandum of Understanding with the E-Verify program. Implementing controls to verify employer authenticity may require making information from other agencies, such as the IRS, available to USCIS, possibly raising additional privacy concerns.
115. Pham, supra note 5, at 818.
117. Pham, supra note 5, at 818.
of formalistic compliance with the law, but subversion of the law's substance.'

Though Manns responds by echoing congressional calls to heighten enforcement of employer sanctions (albeit through a fairly major rethinking of the program), this Note argues that the response should not be to blame lax enforcement and call for the enhancement of sanctions. Having been delegated limited powers, employers are effectively acting as immigration officers, much like subfederal immigration enforcement actors. Though the employer sanctions scheme cannot be preempted by federal law because it is federal law, the next section exposes the similarities between the problems of federal employer sanctions and subfederal immigration enforcement and suggests that calls to increase employer sanctions can only exacerbate the issues created by immigration federalism: a lack of uniformity in the application of federal immigration law and increased discrimination.

II. Federal Exclusivity in Immigration Enforcement

Because the 1986 enactment of IRCA made employer sanctions a part of federal immigration regulation, the federal employer sanctions scheme is, of course, not preempted by federal law (it is federal law). However, in establishing a federal employer sanctions mechanism, Congress explicitly preempted the use of subfederal employer sanctions schemes (with the exception of "licensing and similar laws"), suggesting that there is some desire to have federal control particularly well-

118. Manns, supra note 13, at 944 n.252.
119. See id.
120. While employer sanctions are not themselves preempted, Hiroshi Motomura's discussion of "institutional competence" may offer a doctrinal framework for understanding the problem. In The Rights of Others, 59 Duke L.J. 1723, 1737–38 (2010), Motomura discusses Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), which held that the Civil Service Commission could not adopt a rule barring noncitizens from federal employment even if another branch of the federal government could—and indeed, the President successfully passed an Executive Order to that effect. Motomura notes that the Court seems to suggest that even where there is federal authority to take action, not all federal exercises of that authority are equally acceptable. The Civil Service Commission in Hampton lacked what Motomura calls the "institutional competence" to adopt the rule. The idea of "institutional competence" may be a helpful means of characterizing the argument this Note makes: Though employer sanctions are a federal enforcement mechanism, employers themselves may lack the "institutional competence" to properly enforce immigration law.
maintained in the area of employment screening.\footnote{IRCA expressly preempts local/state employer sanctions mechanisms in § 274A(h)(2). See Immigration and Nationality Act § 274A(h)(2), 8 U.S.C. § 1324 (2006). Case law on preemption of state employer sanctions mechanisms in particular is in disarray. In express disagreement with the Ninth Circuit’s opinion in Chicanos Por La Causa, 544 F.3d 976, the Tenth Circuit ruled in February 2010 that an Oklahoma statute mandating use of E-Verify is preempted by federal law. See Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010). In June 2010, however, the Supreme Court granted an application for certiorari in the Ninth Circuit case.} Despite this expression of the importance of federal control, IRCA’s employer sanctions program has resulted in a broad delegation of immigration enforcement power that raises the same problems posed by decentralized immigration authority at the subfederal level.

A. The Recent Increase in Attempts at Subfederal Immigration Enforcement

“With a limited force of approximately 2,000 immigration investigators, and the number of illegal immigrants outnumbering federal agents 5,000 to 1,” some consider “the use of state enforcement . . . essential to the efficient and effective enforcement of federal immigration laws.”\footnote{Ndulo, supra note 17, at 851.} Indeed, since 2007, subfederal legislative activity in the area of immigration enforcement has been on the rise. The National Conference of State Legislatures reported that in the first quarter of 2008, legislative activity on the subject of immigrants continued to increase significantly, with forty-four state legislatures considering more than one thousand bills relating to immigrants, and twenty-six states enacting forty-four laws and thirty-eight resolutions relating to immigrants.\footnote{Motomura, supra note 68, at 2055.}

For example, the town of Hazelton, Pennsylvania, which had experienced an influx of Latino immigrants after 9/11, passed the Illegal Immigration Relief Act Ordinance, which suspended the business license of anyone who “employed, retained, aided, or abetted illegal immigrants.”\footnote{Ndulo, supra note 17, at 858-59.} In Virginia, lawmakers in Prince William County unanimously approved one of the toughest laws on unlawful migration, allowing police officers to check immigration status “of anyone accused of breaking the law even if the officer merely suspects the person is an illegal immigrant” and “provid[ing] for the denial of county services, . . . includ[ing] business licenses, drug counseling, housing assistance, and services for the elderly” due to unlawful immigration status.\footnote{Id. at 857-58.} Similarly, the township of Riverside, New Jersey passed an ordinance making it unlawful to hire illegal
immigrants or to rent, lease, or obtain profit from the use of personal property by illegal immigrants.\textsuperscript{127}

Such subfederal laws are not a new phenomenon, as our country's immigration laws were entirely subfederal until Civil War Reconstruction bolstered the ideas of national citizenship and the supremacy of the federal government.\textsuperscript{128} With the emergence of a national identity came the idea that "the federal government possesses a plenary and exclusive power to regulate immigration, and that the national government's exercise of this power has wholly ousted any state role in regulating ... immigration law."\textsuperscript{129} Despite the fact that states had historically been heavily involved in the regulation of aliens and immigration,\textsuperscript{130} "by 1875, the Supreme Court came to see immigration control as an implicit federal power, inextricably related to the power over foreign affairs."\textsuperscript{131} Thus, the enactment of "direct federal regulation [of immigration] established the general rule that federal statutes, by occupying the immigration field, preempt subfederal immigration laws."\textsuperscript{1311}

Though the infamous Chinese Exclusion case\textsuperscript{1312} declared that immigration law, because of its potential to affect foreign policy, is exclusively a federal power that "cannot be granted away,"\textsuperscript{1313} it has become clear that the federal government has authority to delegate some of its exclusive

\begin{thebibliography}{9}
\bibitem{127} \textit{Id.} at 858.
\bibitem{128} See Motomura, supra note 68, at 2056.
\bibitem{131} Manheim, supra note 49, at 943. See also \textit{id.} at 940 ("State and local governments have no constitutional power to regulate foreign affairs. It is not merely that such power is specifically denied to them by the Constitution.... Power over foreign affairs is a concomitant of national sovereignty, a feature never possessed by the individual states."); Peter J. Spiro, \textit{Learning to Live with Immigration Federalism}, 29 CONN. L. REV. 1627, 1642–44 (1997) (suggesting that other countries consider measures like California's Proposition 187 to be an example of perceived discrimination and mistreatment of aliens that could "poison" inter-country relationships, resulting in trade and investment losses). Indeed, it is the possibility of interference with national sovereignty and foreign affairs that is most commonly cited as the justification for Congress's plenary power in immigration enforcement. See, e.g., \textit{Chae Chan Ping} v. United States, 130 U.S. 581, 606 (1889) ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.... The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth.").
\bibitem{132} Motomura, supra note 68, at 2057.
\bibitem{133} \textit{Chae Chan Ping}, 130 U.S. at 581 (upholding the constitutionality of a federal law flatly prohibiting entry of all Chinese laborers).
\bibitem{134} \textit{Id.} at 609.
\end{thebibliography}
Federal Employer Sanctions

control over immigration enforcement to subfederal entities. Indeed, using employers as immigration screeners is an example of such delegation. But the decentralization of federal control in an area with such far-reaching consequences is normatively troubling, as the following section demonstrates through an examination of the values protected by the preemption doctrine in the context of subfederal immigration enforcement.

B. Preemption Doctrine in the Immigration Context

Subfederal regulation of immigration is on the rise, due in large part to states' frustration with what they see as a lack of federal enforcement. But it "is one of the 'great silences of the Constitution'" that "states may not usurp or obstruct federal power, even when that power remains unexercised." While there is no preemption of local/state enforcement of the criminal law provisions of INA, regulation of civil violations of immigration law is generally considered to be under the exclusive purview of the federal government, with states having no authority to enforce civil violations or determine conditions of entry/exclusion. This presumption of exclusively federal authority, however, has not deterred states and localities from attempting to regulate immigrants, and some scholars and policymakers consider this subfederal activity (like the use of employers as screeners) a necessary "quintessential force multiplier." For the purposes of this Note it is not necessary to take sides in the debate about the constitutionality of subfederal enforcement, as the discussion of IRCA's

137. See Mathews v. Diaz, 426 U.S. 67, 84 (1976) (insisting that "it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens"). But see Memorandum from Assistant Attorney General Jay S. Bybee, Off. of Legal Counsel (Apr. 3, 2002) (asserting state governments' "inherent authority" for immigration enforcement); Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 Vand. L. Rev. 787 (2008) (suggesting that although the vast majority of scholars deny the propriety of immigration federalism, the text and structure of the Constitution do not withdraw immigration authority from the states in favor of the national government but rather allow for shared authority).
139. The debate over the constitutionality of immigration federalism is heated and ongoing. Compare id. (discussing the inherent authority of local forces to make immigration-related arrests) and Jeff Sessions & Cynthia Hayden, The Growing Role for State &
employer sanctions is one of normative rather than strictly constitutional implications; however, an analysis of the preemption doctrine serves to illuminate the relevant values undermined by the use of employer sanctions. This section outlines preemption doctrine in the immigration context to illustrate the values that would be undermined by a heightened scheme of employer sanctions: uniformity of a complex federal immigration scheme and avoidance of discrimination.

Subfederal laws can either be expressly or impliedly preempted by federal regulation. Where preemption is not made explicit in the language of the federal statute, subfederal laws can be impliedly preempted through either conflict or field preemption, both of which can inform the discussion of the problems of federal employer sanctions. Conflict preemption "occurs when either 'compliance with both federal and state regulations is a physical impossibility,' or 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Field preemption, which occurs "where 'the depth and breadth of a congressional scheme ... occupies the legislative field,'" suggests that even if subfederal enforcement is not in conflict with federal laws, such enforcement may be unjustified given the expansiveness of Congress's top-down regulation. Where Congress has intended to "occupy the field" of immigration, subfederal regulations and private employer decisionmaking might interfere with the uniformity of federal regulation.

Before IRCA's passage and the creation of federal employer sanctions, the U.S. Supreme Court in De Canas v. Bica underscored the fact that the "[p]ower to regulate immigration is unquestionably exclusively a federal power ... [b]ut the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." The Court avoided declaring a bright-line rule of preemp-

Local Enforcement in the Realm of Immigration Law, 16 Stan. L. & Pol'y Rev. 323 (2005) (discussing the need for state/local intervention in immigration law) with Pham, supra note 18, at 966 (describing Attorney General Ashcroft's announcement of inherent authority to enforce immigration law as a reversal in position), and Wishnie, supra note 129 (describing Attorney General Ashcroft's announcement regarding states’ "inherent authority" to enforce immigration laws as legally incorrect).


141. Id.

142. De Canas v. Bica, 424 U.S. 351, 352 (1976) (upholding California Labor Code § 2805(a), which prohibited employers from “knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers”) (quoting Cal. Lab. Code § 2805(a) (West 2003)).

143. Id. at 344–55. In 1986, however, Congress passed IRCA, explicitly preempting state and local employer sanctions schemes (except licensing and similar laws) in 8 U.S.C.
tion whenever subfederal laws even remotely touch on immigration or immigrants. Instead, the Court simply noted that “there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause.”\textsuperscript{144} The \textit{De Canas} Court determined that where local regulation has a “purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.”\textsuperscript{145} According to this reasoning, it presumably follows that if regulations demonstrating only a speculative and indirect impact on immigration are acceptable, regulations with a non-speculative and direct impact may trespass into territory reserved for the federal government.\textsuperscript{146}

Since \textit{De Canas}, attempts at subfederal regulation of immigration have been invalidated for departing from federal definitions of unlawful presence,\textsuperscript{147} for using standards other than those authorized by the federal government,\textsuperscript{148} for conflicting with federal interpretations,\textsuperscript{149} and for interfering with the federal government’s attempt to strike a “balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of

\textsuperscript{144}. \textit{De Canas}, 424 U.S. at 357–58.
\textsuperscript{145}. \textit{Id.} at 355–56.
\textsuperscript{146}. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) (reading \textit{De Canas} to indicate that preemption applies to state regulatory schemes concerning immigration where such schemes have more than a “purely speculative and indirect impact on immigration”).
\textsuperscript{147}. In Farmers Branch, Texas, a law was passed requiring any lessor of rental housing to have “evidence of citizenship or eligible immigration status for each tenant family” based on eligibility for federal housing subsidies (which might have excluded certain noncitizens who were in the states lawfully but nonetheless did not qualify for federal subsidies—students, for example). Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 762 (N.D. Tex. 2007). Because the Farmers Branch ordinance strayed from the federal definitions of unlawful presence, the court found preemption relatively easily.
\textsuperscript{148}. \textit{Equal Access Education v. Merten} involved an opinion by the Virginia Attorney General prohibiting unlawful immigrants from enrolling in Virginia’s public institutions of higher education, which the court said would be preempted if Virginia were to use standards other than those outlined under federal law. See \textit{Equal Access Educ. v. Merten}, 325 F. Supp. 2d 655, 660–72 (E.D. Va. 2004); Motomura, \textit{supra} note 68, at 2061.
\textsuperscript{149}. In Mauro Roldan–Santoyo, Int. Dec. 3377, 1999 WL 126433, *1, *12 (BIA 1999) (reversed by the Ninth Circuit as applied to first-time drug offenses, since it conflicted with the Federal First Offender Act, see Lujan–Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000)), the Board of Immigration Appeals held that giving effect to various state drug rehabilitation statutes would conflict with Congress’s desire for a uniform immigration standard by changing the meaning of “conviction” and attendant immigration consequences.
a burden on employers and workers." The argument for federal preemption of local immigration enforcement mechanisms and other ordinances that "create circumstances that [affect] the flow of immigrants into the applicable state" is that immigration law was intended to be an exclusively federal power. Federal exclusivity furthers uniformity in immigration law by avoiding a variety of enforcement approaches and techniques that could result in the problem of "a thousand borders."  

C. Exception to the Preemption of Subfederal Enforcement: 287(g) Agreements

While many subfederal ordinances have been invalidated and some commentators suggest that federal immigration power is "incapable of transfer" and "cannot be granted away," there are limited instances in which the federal government has expressly authorized delegations of

150. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–28 (M.D. Pa. 2007). The District Court in Lozano struck down several local ordinances requiring proof of lawful residence despite the apparent use of federal immigration standards because of concern that the local laws would over-enforce federal immigration law. By contrast, the District Court in Garrett v. City of Escondido feared the local law would undermine federal immigration enforcement by overburdening the federal databases used to check unlawful presence at the local level. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006). These contrasting opinions lend credence to the idea that there is a delicate balance struck by federal standards with which subfederal laws might interfere. See also Chamber of Commerce v. Edmonson, 594 F.3d 742, 769 (10th Cir. 2010) (finding that Oklahoma’s attempt to make E-Verify mandatory at the state level undermined Congress’s “carefully constructed balance” in allowing voluntary use of the pilot program, which has many documented failings and leads to inaccurate determinations of work eligibility).


152. See Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone."); Pham, supra note 18, at 1141–42 (asserting that “[t]he federal government’s authority to exercise immigration power—and to exercise it exclusively—is clear” and that the Supreme Court has indicated (and reiterated in multiple cases) that “the immigration power belongs exclusively to the federal government”).

153. Id. at 995.

154. Wishnie, supra note 129, at 1089 (Chae Chan Ping, 130 U.S. at 609 (1889)). Following the Office of Legal Counsel’s publication of its 2002 memo suggesting that states have some “inherent authority” to regulate immigration, see Memorandum from Assistant Attorney Gen. Jay S. Bybee, Office of Legal Counsel (Apr. 3, 2002), there has been much debate (which exceeds the scope of this Note, see supra notes 138–139 and accompanying text) about whether Congress really does have exclusive power with regard to immigration such that delegation would be necessary to bring about subfederal authority.
immigration enforcement power to subfederal entities.\footnote{155} Under INA § 287(g),\footnote{156} adopted through IIRIRA,\footnote{157} immigration enforcement authority may be delegated to state and local law enforcement agencies through the signing of a Memorandum of Agreement (MOA).\footnote{158} Depending on the terms of the MOA, 287(g) authority can include not only the power to arrest, but also the power to investigate immigration violations, collect evidence and put together a case for prosecution or removal, take custody of aliens on behalf of the federal government, and other powers of immigration enforcement.\footnote{159} Before exercising this authority, however, designated agency officials must undergo extensive training to be cross-deputized as immigration officers and must submit to federal supervision by sworn ICE officers.\footnote{160} Though only a small fraction of... subfederal government entities have entered into MOAs,\footnote{161} such express delegation of enforcement power(s) ... renders moot the question" of preemption in these contexts.\footnote{162}

\footnote{155} Yet even delegations of federal authority have been questioned as potentially violative of the constitutional requirement of uniform citizenship standards. See In re Aliessa v. Novello, 754 N.E. 2d 1085, 1096 (N.Y. 2001) (invalidating a New York state restriction on Medicaid benefits for only lawfully present noncitizens because the federal government cannot delegate its authority to the states if the states' use of such authority undermines federal uniformity).


\footnote{158} Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. Immigration & Customs Enforcement, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Nov. 18, 2010). See Motomura, supra note 68, at 2058. The only other mention of local and state enforcement in the INA is in response to "an actual or imminent influx" of aliens presenting "urgent circumstances requiring an immediate Federal response," which allows local officers to perform what is normally exclusively a federal function. INA § 103(a)(10), 8 U.S.C. § 1103(a)(10).

\footnote{159} See Kobach, supra note 138, at 197; U.S. Gov't Accountability Office, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Immigration Laws 2 (2009) [hereinafter GAO, Better Controls Needed]. 287(g) agreements go beyond state and local officers' existing ability to obtain immigration status information from ICE and to alert ICE to any removable aliens they identify. Under these agreements, state and local officers have direct access to ICE databases and act as ICE agents by processing aliens for removal. They are authorized to initiate removal proceedings by preparing a notice to appear in immigration court and transporting aliens to ICE-approved detention facilities for further proceedings. Id. at 7.


\footnote{161} The first such agreement was signed in 2002, and by October 2008 there were sixty-seven state and local agencies with 287(g) agreements. See GAO, Better Controls Needed, supra note 159, at 2.

\footnote{162} Motomura, supra note 68, at 2058.
The allowance for subfederal involvement under § 287(g) indicates congressional intent to allow local intrusion in immigration enforcement "only pursuant to a detailed congressional scheme, guaranteeing federal training, supervision and oversight." Thus, the 287(g) exception demonstrates that oversight and training should be central to any local enforcement efforts and that those efforts, while seen as crucial to the federal enforcement of immigration law, should remain limited both in scope and number. The limited nature of this federal delegation of authority, requiring extensive training and supervision, suggests that immigration enforcement is a particularly sensitive type of regulation not amenable to federalist division — at least not without training and federal oversight to maintain uniformity and avoid abuses of discretion.

III. LESSONS LEARNED FROM PREEMPTION AND THE 287(g) EXCEPTION

Because federal immigration enforcement is a complex balancing scheme, decentralization of enforcement power can be problematic. Where limited immigration enforcement power has been delegated, however, the federal government has required training and supervision in an effort to minimize the highly discretionary nature of immigration enforcement. Maintaining centralized authority in immigration enforcement is crucial to avoid undermining the uniformity of the comprehensive federal scheme and creating conflicts with federal law, the primary purposes of preemption doctrine. This section outlines the ways in which calls to increase employer sanctions raise the very issues that the preemption doctrine seeks to avoid.

A. Subfederal and Private-Employer Enforcement Threaten Uniformity

In the years following 9/11, Congress and the Department of Justice have increasingly enlisted the support of state and local police in the routine enforcement of federal immigration laws, despite preemption questions and the potential to undermine the uniformity of federal im-

163. Wishnie, supra note 129, at 1095. It is clear that Congress intended 287(g) authority to provide ICE with greater resources in the form of state and local law enforcement officers. See GAO, BETTER CONTROLS NEEDED, supra note 159, at 9. In 2006, Congress expressly provided funding to facilitate the 287(g) program as part of DHS appropriations. Id. However, committee reports accompanying subsequent appropriations have emphasized the importance of ICE's supervisory and training duties prior to delegating "limited immigration enforcement functions." Id. Program participants must pass a background investigation and are required to undergo four weeks of training on immigration law (including identification of fraudulent documents) and pass mandatory examinations to be certified. Id. at 20.

164. See Huntington, supra note 137, at 828 (citing uniformity as an important value in any debate on the devolution of federal power).
Federal Employer Sanctions

1. Subfederal Regulation

States and localities attract immigrants at different rates and have different reactions to the resulting population growth. Therefore, if given the authority to affect federal regulation, subfederal entities “will enforce federal immigration laws with varying degrees of vigor and resources, and some will continue to opt out of enforcement. [As a result], non-citizens will be more or less vulnerable depending on where they live and travel.” Indeed, subfederal regulations run the gamut from prohibiting landlords’ renting to noncitizens to issuing municipal identification cards to all residents regardless of immigration status to ensure equal

165. Wishnie, supra note 129, at 1085.
166. Motomura, supra note 68, at 2068–69.
167. Id.
168. Id. at 2063–64.
169. Id.
170. Indeed, for the first time in a long time, California’s dominance as a destination of choice is declining, with Colorado, Georgia, Nevada, and North Carolina seeing their foreign-born populations grow at more than double the national average. Though San Francisco and Los Angeles are still major destinations, along with historically popular Chicago and New York, immigrants are increasingly choosing Atlanta, Georgia; Dallas, Texas; Denver, Colorado; Portland, Oregon; Seattle, Washington; and Washington, D.C. See Audrey Singer, Brookings Inst., The Rise of New Immigrant Gateways 1–7 (2004), available at http://www.brookings.edu/urban/pubs/20040301_gateways.pdf.
171. Huntington, supra note 137, at 843.
172. See id. at 803 (citing, among other anti-immigrant laws, the California (Escondido, Cal., Ordinance 2006-38 R § 3 (Oct. 18, 2006)), Georgia (Cherokee County, Ga., Ordinance 2006-003 (Dec. 5, 2006)), and Texas (Farmers, Branch, Tex. Ordinance 2903 (May 12, 2007)) ordinances prohibiting rental to unlawfully present individuals).
access to local public services. These varying interpretations and applications of immigration enforcement lead to what has been called the "thousand borders' problem, violating the constitutional mandate for uniform immigration laws as local authorities will enforce federal immigration laws differently, creating, in effect, different immigration laws."

While subfederal governments may see their intervention into immigration regulation as filling holes left by the federal government, Hiroshi Motomura points out that "de facto policy is still policy, and federal immigration law is a matter of inaction as much as affirmative decisionmaking. Consequently, any decisions by state and local officials put them in conflict with the knowing balance of enforcement and tolerance that constitutes actual federal immigration law." Federal immigration policy is decidedly complex, and federal policies can run in seemingly contradictory directions, such as when "Congress elects to permit employment of undocumented workers, extends labor law protection to them, and provides them with free medical care, despite efforts to prohibit their entry."

Given this complex scheme, "state self-help may complicate national efforts. It ought not be left to each state to determine how best to effectuate federal policies." The argument in favor of preemption (or against federalism in the immigration context) suggests that having one top-down implementation process for enforcement avoids the problem of varying degrees of enforcement activity that may or may not reflect the federal government's choices. This uniformity is particularly important in the immigration context because "[i]mmigration policy not only speaks to the nation's vision of itself, it also signals its position in the world and its relationships with other nation-states. At one level this means that foreign policy invariably becomes implicated in the formulation of immigration policy." Thus, while the debate about the constitutionality of state and local measures rages on, one thing is clear:

173. See id. at 803–04 (citing, among other examples of immigrant-friendly laws, New Haven and San Francisco's issuance of ID cards regardless of immigration status).
175. Motomura, supra note 68, at 2063.
177. Id.
178. See, e.g., Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 541 (M.D. Pa. 2007) (discussing the discretionary nature of local enforcement mechanisms, including landlord and employer enforcement, and the strong possibility of discrimination given the amount of discretion).
normatively speaking, there is much to be said for utilizing federal exclusivity to protect uniformity in the enforcement of immigration law.

2. Employer Enforcement

Just as subfederal regulations threaten immigration uniformity, employer sanctions "magnify[ variations in the meaning of unlawful presence and broaden[ ] the range of discretion in immigration law enforcement . . . . [Similarly,] state and local immigration law enforcement introduces incentives, motives, and priorities that may be in tension with even-handed federal enforcement." Preemption doctrine indicates that subfederal regulations cannot stand where they have more than a trivial impact on immigration enforcement, interfere with the uniform application of delicately balanced federal standards, or otherwise conflict with federal law. While employer enforcement can be said to be more indirect than the direct enforcement of detention and removal, there is no question that the federal employer sanctions scheme was put in place to have a substantial impact on flows of migration, directly contributing to the weakening of the job magnet. Therefore, the discretionary decisions that employers make were intended to have a substantial, direct impact on immigration law, such that they constitute a nontrivial delegation of immigration authority. Given the sheer number of employers with enforcement authority, it is likely that their decisions will, on frequent occasion, depart from federal definitions of unlawful presence, use standards other than those authorized by the federal government, conflict with federal interpretations, or interfere with the federal government’s attempt to strike a delicate balance.

With both private employers and subfederal regulations, the influence of the varying regional impacts of immigration also leads to wide variation in the application of enforcement mechanisms. Employers in some areas might feel great pressure to bring in immigrant labor, while others feel more pressure to keep immigrants out to avoid changing local demographics, and still others feel isolated from immigration and are not part of the debate. Previous experience with individual immigrant employees or groups from certain countries may also influence

180. Motomura, supra note 68, at 2069–70.
182. See discussion in Introduction, supra notes 7–8 and accompanying text.
183. See Lozano, 496 F. Supp. 2d at 541 (discussing the discretionary nature of local enforcement mechanisms, including landlord and employer enforcement, and the strong possibility for discrimination given the amount of discretion).
particular employers' application of the law in both positive and negative directions. Especially in the context of the current economic crisis where anti-immigrant sentiment is common, increased implementation of employer verification at the level of individual, private employers may exacerbate discrimination “caused by plain, old-fashioned animus. Private enforcement laws can certainly not be blamed for creating this animus, but they do provide the perfect cover.” Conversely, just as some subfederal entities have implemented immigrant-friendly policies, so might some well-meaning employers seek to skirt federal requirements for the benefit of unauthorized workers or simply to maintain the necessary workforce.

In addition to subfederal entities' and employers' wide variations in motivation and attitudes toward immigrant populations, the lack of immigration enforcement training in both contexts further exacerbates the potential for differential enforcement at the subfederal level. Though expected to recognize government documents as fraudulent or valid, which often requires a fairly sophisticated understanding of immigration status, employers receive no formal training until they are thought to be in violation of IRCA. Subfederal agencies that take enforcement upon themselves often insist that they are merely applying federal standards in verifying immigration status, but without training in immigration law, they are equally likely to make mistakes.

184. Huntington, supra note 137, at 806 (describing the fact that more punitive immigration measures are often enacted in areas new to receiving significant populations of non-citizens). Huntington points out, however, that until 1952 the federal government had explicitly race-based immigration laws in effect, suggesting that there's no reason to think that a uniform federal policy will be any more protective of individual rights than regional/state enforcement. Id. at 834.

185. Pham, supra note 5, at 826. Pham refers here to the local immigration enforcement actions proposed/adopted in recent years, but anti-immigrant sentiment may have similar effects on employers' enforcement of immigration law.

186. See Huntington, supra note 173, for the example of issuance of identification cards for use in receipt of public benefits regardless of immigration status.

187. Given the lack of available legal alternatives, many employers feel forced to augment their workforce by hiring unauthorized workers, especially in areas subject to seasonal increases in demand. For example, “Mr. Gilsdorf was able to fill his labor force with legal immigrants from Mexico through a federal guest worker program. But that program has a tight annual cap, and Mr. Gilsdorf realized that he might not be so lucky next year. His business could fail, he said, and then even his American workers would lose their jobs. ‘We’re not hiring illegals, we’re not paying under the table,’ Mr. Gilsdorf said. ‘But if we don’t get in under the cap and nobody is answering our ads, we don’t have employees.’ His group, Colorado Employers for Immigration Reform, is pressing Congress for a much larger and more flexible guest worker program.” Julia Preston, Employers Fight Tough Measures on Immigration, N.Y. TIMES, July 6, 2008, at A1.

188. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, supra note 80 (discussing the 2007 implementation of a voluntary education and training program).
In contrast, the federal government’s formal delegation of immigration authority through 287(g) agreements requires that contracting entities cross-deputize officers and provide training in immigration law. If employers, as recipients of delegated federal authority, are to act as private enforcers of immigration law, they should, at the very least, be subject to some of the same training and cross-deputizing required before 287(g) agreement-holders are allowed to enforce immigration law at the local level. Still, training alone may not be enough to avoid problems of delegated authority: despite the fact that 287(g) participants receive some training and are supposed to be supervised, agencies acting under MOA authority still have problems maintaining uniform enforcement. ICE has been criticized for failure to adequately supervise 287(g) participants as statutorily required, and the 287(g) program itself has been criticized for a lack of program objectives that would help ensure that participants are working toward a uniform purpose.189 “ICE has not described the nature and extent of the agency’s supervision over participating agencies’ implementation of the program, [which] has led to wide variation in the perception of the nature and extent of supervisory responsibility among ICE field officials. . . .”190 These failures make the growing 287(g) program vulnerable to weakening federal control over local enforcement, thereby rendering 287(g) actors more like other local/state actors not authorized to broadly enforce immigration law.

Of course, 287(g) actors and other interior immigration enforcement mechanisms regulate immigration law in a very direct way, usually through the use of officers with immigration law training who are authorized to initiate removal proceedings. Employer enforcement, on the other hand, is qualitatively different because it does not necessarily result in immediate removal or direct immigration-related consequences. As discussed earlier, however, employer sanctions were designed to have a significant impact on migrants’ ability to come to and remain in this country.191 As a result, just as with subfederal enforcement, heightened employer sanctions would lead to wide variations in the application of immigration enforcement. In addition to the various subfederal interpretations of immigration law, each place of private employment would become one of the “thousand borders,” representing a threat to national sovereignty, undermining the uniformity of federal immigration law, and potentially having a detrimental impact on foreign relations. If truly enforced, employer sanctions would serve to decentralize immigration

189. GAO, BETTER CONTROLS NEEDED, supra note 159, at *. For example, ICE claims that a program objective is addressing serious crime, such as drug smuggling, committed by removable aliens, but four of the twenty-nine program participants reviewed in the GAO study processed individuals for minor crimes like speeding, contrary to the stated program objective.
190. Id. at 4.
191. See Pham, supra note 18, at 1123–24.
enforcement authority even more broadly than actions taken by subfederal agencies, authorizing and requiring employers to use their considerable discretion in the context of inaccurate verification mechanisms. Therefore, the concept of field preemption would suggest that, like subfederal enforcement, employer sanctions should be invalid for undermining the uniformity of the federal law meant to “occupy the field” of immigration enforcement.

B. Subfederal and Employer Enforcement Could Exacerbate Discrimination

1. Subfederal Regulation

In the context of local enforcement, many states “fear that local cooperation with federal immigration laws could result in illegal acts such as racial profiling.” Unlike federal immigration officers, who receive substantial training, including courses in immigration and nationality law, local officers are unschooled in complex immigration procedures. “A lack of training, coupled with [a] lack of hands-on enforcement experience, may tempt local authorities to rely on racial profiling and other prohibited practices in enforcing immigration laws.” Such effects could be worsened in communities where anti-immigrant sentiments exist. The recent Arizona law, S.B. 1070, which requires local law enforcement to question people about their immigration status, provides a perfect example. Backlash to the law, which critics fear will lead to rampant racial profiling of Latinos, has included criticism from foreign nations, including Mexico City’s mayor, Marcelo Ebrard, who called the measure “planned Apartheid against Mexicans.”

Even in the context of a 287(g) agreement, which might “moot constitutional questions of preemption and maybe even equal protection,” the question remains “about the proper subfederal role, particularly if state and local measures are rooted in animus against newcomers, especially unlawful migrants who come outside the law from Latin America.” Over half of the twenty-nine agencies with 287(g) agreements studied in

192. Ndulo, supra note 17, at 879. See also Motomura, supra note 120, at 1744 (discussing the role that fear of racial and ethnic profiling might play in district court decisions finding preemption of subfederal immigration enforcement).
193. Id.
194. Id.
Federal Employer Sanctions

A recent Government Accountability Office (GAO) report cited concerns from community members that use of the program authority would lead to racial profiling and intimidation by law enforcement officials. Thus, despite the designated authority and training accompanying a 287(g) agreement, concerns about racial profiling and discrimination (similar to those raised at the inception of employer sanctions) have contributed to negative press about this latest enforcement-expanding approach.

"Even before the September 11 attacks, INS regularly engaged in racial profiling and selective enforcement based on ethnic appearance ... [Especially in] worksite raids, federal agents [continue to] single out worksites ... based on the presence of 'Spanish music' or workers of 'Hispanic appearance,' and target individual Latinos—from amidst ethnically diverse workforces—for questioning, arrest, and prosecution." The fact that "even federal immigration officials, trained in the arcana of immigration law and (presumably) the risks of improper reliance on profiling, frequently resorted to stereotypes and discrimination, confirms that the move to enlist or conscript state and local police in ordinary immigration enforcement is fraught with risk" and the "very real prospect of expanded, and unlawful, profiling." Equal application of the law is arguably better protected by an exclusively federal scheme not as subject to individual bias at the local level. Federal exclusivity might better protect "the fundamental rights of individuals and groups, as evidenced by the history of race relations

198. GAO, Better Controls Needed, supra note 157, at 6.
199. See, e.g., ACLU-NC, New Study Finds Dramatic Problems With 287(g) Immigration Program, Feb 18. 2009, http://acluofnc.org/?q=new-study-finds-dramatic-problems-287g-immigration-program (discussing the "climate of racial profiling and community insecurity" created by 287(g) agreements); Napolitano Condemns Arizona Anti-Immigrant Law, New America Media (Mar. 26, 2010), http://news.newamerica.media.org/news/view_article.html?article_id=202c1030c429443c0876f135b0e276 (chronicling the protests of the 287(g) program in Phoenix, Arizona, which critics say has led to "attacking Latinos" and jailing undocumented immigrants for minor violations like traffic stops, so they could be deported); Franco Ordonez, Union County Joins Deportation Program, Charlotte Observer, Apr. 1, 2010, available at http://www.charlotteobserver.com/2010/04/01/1348816/union-county-joins-deportation.html (citing the "controversy over civil liberties issues" surrounding 287(g)); John Harbin, Residents Say Program Too Harsh, Blue Ridge Times, Mar. 28, 2010, available at http://www.blueridgenow.com/article/20100328/SERVICES03/3281083?Title=Residents-say-program-too-harsh. Indeed, the National Immigration Law Center was able to get 521 organizations/advocates to petition President Obama, calling for the termination of the 287(g) program. See Letter from the National Immigration Law Center to President Barack Obama (Aug. 25, 2009), available at http://www.nilc.org/ilmmlawpolicy/LocalLaw/287g-Letter-2009-08-25.pdf.
200. Wishnie, supra note 129, at 1104.
201. Id. at 1104–05.
and the numerous Supreme Court decisions striking down state laws that infringed on freedom of speech, free exercise, and the rights of criminal defendants. Of course, an advantage of pluralistic society and federalist experimentation may be greater protection of individual rights (as evidenced by the immigrant-friendly policies noted above), and it may just be an unwarranted assumption that local enforcement leads to greater discrimination than federal enforcement. However, the presumption is that federal enforcement, by virtue of its ability to be more uniform across localities, is less susceptible to local influence and is therefore more protective.

2. Employer Enforcement

Just as the decentralization of power at the subfederal level may heighten the role that animus, racial profiling, and anti-immigrant sentiment play in immigration enforcement, employer sanctions are equally susceptible to local, indeed even individual, feelings of animus. Moreover, proposals to increase employer sanctions “may result in greater incentives for discrimination against citizens and legal aliens who appear to be of foreign origin.” Indeed, in the two years following enactment of employer sanctions, “employers appear[ed] to have anticipated higher levels of enforcement against employing undocumented aliens and ... responded by significantly heightening discrimination against individuals of foreign origin regardless of employment status.”

Discrimination against Latino Americans, Asian Americans, or others who “looked foreign” was a major concern at IRCA’s inception and one that would be heightened with an increase in the enforcement of employer sanctions. As part of IRCA’s passage, Congress required the GAO

203. Huntington, supra note 137, at 829. Though Huntington cites uniformity and strong national government as key to advancing fairness and equality, as well as protection of fundamental rights, she does not endorse an exclusively federal approach to immigration law, preferring instead a system of shared powers between state and federal governments.


205. Manns, supra note 13, at 970. See also Pham, supra note 18, at 1121–22 (discussing the threat of “permanent borders of discrimination” and the denial of important benefits in spite of legal status for those who “look like immigrants”). While most commentators focus on the negative impact racial profiling has on citizens and legal aliens (perhaps because those are more politically popular populations), it is equally morally problematic to subject unauthorized immigrants to treatment solely on the basis of their race or ethnicity.

206. Manns, supra note 13, at 970. See also Espenoza, supra note 54, at 344–45 (discussing the “new forms of discrimination against Hispanic citizens, Asian citizens, and authorized foreign workers” that resulted from adoption of IRCA’s employer sanctions).
to prepare three annual reports, which, if they showed widespread discrimination and Congress adopted a joint resolution stating it approved of the reports' findings, would result in the termination of the employer sanctions program.\ap  The final GAO Report found that national origin discrimination existed in more than just a few isolated cases; in fact, the report revealed a serious pattern of discrimination: more than 460,000 employers engaged in illegal national-origin discrimination based on a person's foreign appearance or accent\ap (6.6 percent of employers stopped hiring applicants who looked or sounded foreign; 8.6 percent only examined documents of employees who looked or sounded foreign; 9.8 percent suspected that applicants with foreign appearances or accents might be illegal, so employers required them to provide documents before making a job offer);\ap and an additional 430,000 engaged in illegal citizenship discrimination in response to sanctions\ap (14.7 percent hired only applicants born in the U.S., and 13 percent stopped hiring those with only temporary work authorization).\ap Despite these findings, Congress did not adopt a joint resolution, and employer sanctions remained.\ap

The GAO data suggested that at least some of the discrimination was attributable to employer confusion regarding the required verification process. Surveys revealed that employers who discriminated were more likely to report that they did not understand the law and were in need of a better verification system.\ap It should come as no surprise, therefore, that "[w]hen enforcers not trained in immigration law are expected to make immigration determinations, they are going to rely on appearance, accents, and foreign birthplace as proxies for immigration status."\ap Given

\begin{footnotes}
\footnote{207. Vernon M. Briggs, Jr., Employer Sanctions and the Question of Discrimination: The GAO Study in Perspective, Articles & Chapters, Paper 8, at 806 (1990), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=articles.}
\footnote{208. GAO, QUESTION OF DISCRIMINATION, supra note 16, at 38.}
\footnote{209. Id. at 117, 120.}
\footnote{210. Id. at 38.}
\footnote{211. Id. at 120.}
\footnote{213. GAO, QUESTION OF DISCRIMINATION, supra note 16, at 62–63. See also Pham, supra note 18, at 1158.}
\footnote{214. Pham, supra note 18, at 1159. Of course, even with crystal clear requirements and extensive training, some employers will continue to engage in discriminatory practices either due to animus against specific groups or immigrants more generally, but this Note intends to highlight the problematic nature of employer sanctions mechanisms from the perspective of the most willing, compliant, non-discriminatory employer faced with inadequate verification methods.}
\end{footnotes}
that employers still receive little to no training and are still expected to rely on faulty verification systems like I-9 and E-Verify, the increased threat of employer sanctions liability under congressional proposals means the likelihood of discrimination remains very real.

Moreover, the threat of discrimination in the employer sanctions context is not well-mitigated by the availability of legal recourse or antidiscrimination protection. When IRCA was passed, Title VII215 barred national origin discrimination but not discrimination based on alienage216, and applied only to employers with fifteen or more full-time employees.217 To fill this loophole, Congress adopted INA § 274B, which established the Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice, to investigate and pursue charges of employment discrimination based on national origin or citizenship status by employers with four or more employees.218 Still, § 274B covers only citizenship status discrimination against citizens and certain classes of aliens;219 even lawful permanent residents are not covered if they do not initiate the naturalization process within six months of eligibility.220 Nonimmigrants, even those authorized to work, and parolees are likewise excluded from § 274B protections. Moreover, unlike Title VII, § 274B applies only to hiring, referral for a fee, and firing, and offers no remedy for discrimination on the job.221 Therefore, existing laws preclude legal aliens who are not “actively pursuing” naturalization and anyone working for an employer with three or fewer employees from antidiscrimination protection, and anyone covered by these provisions is only protected with regard to hiring, firing, and referral for a fee.222

Where interior enforcement mechanisms lead untrained private enforcers, like employers, to choose discrimination as a means of avoiding potential liability, individuals singled out for discriminatory treatment on the basis of their “looking foreign” might “never be able to make the

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221. See INA § 274B, 8 U.S.C. § 1324(b). Congress amended the statute to clarify the meaning of “discrimination” in section 274B(a)(6), saying that requiring more or different documents to establish work authorization or refusing to honor facially valid documents constitute “an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual.” INA § 274B(a)(6), 8 U.S.C. § 1324(b)(a)(6).
222. Manns, supra note 13, at 970–71.
transition from ‘foreigner to governor,’ from ‘out-group to in-group’ in any meaningful way,” even if they eventually naturalize, have already naturalized, or have always been citizens by virtue of being born in this country. Like subfederal enforcement motivated by hostility, heightened employer sanctions that inevitably lead to discrimination reinforce racism, anti-immigrant sentiment, and animus against Latinos, Asians, and anyone who looks or sounds foreign. “These discriminatory messages, whether intended or not, dilute the laws’ symbolic impact.”

It might be politically difficult to reach a result that both maintains strict employer sanctions and limits discrimination: it is prohibitively expensive to educate each individual employer as to avoidance of discrimination and proper use of available verification systems, inadequate though they are, but even if it weren’t, “it is not likely that education [would] alleviate employers’ concerns regarding monetary and criminal sanctions which could result from non-compliance with the sanctions provision.”

Especially given proposals to remove the “good faith compliance” standard in favor of a constructive knowledge standard, employers faced with a greater likelihood of sanction will be likely to defensively discriminate. Moreover, because the “default response to employment discrimination against legal aliens or citizens based on national origin or citizenship status is the issuance of cease and desist orders,” employers faced with the prospect of heightened sanctions, whether increased civil penalties or heavier criminal penalties, will see the cease and desist orders as preferable, making such punishment “far too weak to overcome the incentives to discriminate against legal aliens.” Even employers with no animus toward immigrants and no interest in discriminating may find that the increased threat of sanctions without an accompanying increase in the accuracy of the available verification mechanisms makes discriminating

223. Pham, supra note 18, at 1162.
224. Id. The result of this discrimination due to heightened enforcement is the undermining of the “cherished narrative that gaining citizenship means gaining full membership rights.” Id. at 1163. Pham points out the irony that what is designed as a means of encouraging only lawful entry into the United States weakens the value of that legal status for people who might naturalize but would still, and always, “look foreign” in the eyes of discriminatory enforcers. Id.
225. Pham, supra note 5, at 819.
226. Kaplan, supra note 85, at 557.
227. This controversial policy, whereby a no-match letter from SSA or DHS would be treated as constructive knowledge of unlawful employees, opening employers up to liability, was passed and then rescinded and has never been implemented. See Press Release, ACLU, Government Rescinds “No Match” Rule Harmful to Legal Workers (July 8, 2009), available at http://www.aclu.org/immigrants-rights/government-rescinds-no-match-rule-harmful-legal-workers.
228. Kaplan, supra note 85, at 557.
229. Manns, supra note 13, at 971.
against “foreign-looking” applicants a safer means of avoiding legal liability.230

Unless sanctions for employment discrimination approximate sanctions for hiring unauthorized employees, discrimination will remain a cost-effective strategy for limiting liability in the context of heightened employer sanctions enforcement. 231 However, while equalizing the cost of the competing liabilities might make discrimination a less obvious way to avoid immigration sanctions, the inaccuracy of the I-9 and E-Verify verification mechanisms would leave even well-meaning employers with no reliable means of simultaneously complying with both civil rights law and employer sanctions provisions.

The lessons of conflict preemption provide a framework for analyzing these dueling liabilities. While federal employer sanctions cannot be preempted because they are federal law, the purpose of federal conflict preemption is still implicated where employer sanctions, as implemented in the context of fraudulent documents and unreliable databases, open employers up to an impossibility of compliance with applicable immigration and antidiscrimination law, thereby “[standing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”232 with respect to two sets of law. If employer sanctions are increased as indicated by congressional proposals, the inaccuracy of verification mechanisms on which employers must rely would lead to a conflict in laws, which preemption doctrine seeks to avoid. Thus, conflict preemption principles suggest that the delegation of federal authority to private employers should be invalid. No one benefits from a situation where the least expensive of the two infractions will be chosen as the necessary evil in making hiring/firing decisions.

230. See Pham, supra note 18, at 1159.

231. Manns, supra note 13, at 971. Manns suggests that compensation levels for intentional discrimination laid out in the Civil Rights Act of 1991 provide a useful benchmark: Firms with fifteen to a hundred employees face a cap of $50,000 per violation, employers of 101 to 200 face a cap of $100,000, employers of 201 to 500 face a cap of $200,000, and a maximum of $300,000 for employers of over 500 employees. Id. at 971–72. Manns also points out that political constraints may limit the range of sanctions that can be applied to employer violations. Id. at 890 n.6. While courts have consistently analyzed discrimination in the immigration context differently than in the domestic context, the Supreme Court did hold that INS agents may not stop people on the basis of “ethnic appearance alone” when performing searches at locations other than the border. United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975)). This suggests that perhaps employers and local enforcement agents, both of whom are a form of interior control, should be held to a higher standard than border inspectors in terms of leniency toward racial/ethnic profiling.

CONCLUSION

While it is clear that employer sanctions are universally considered a failure in terms of their ability to curb unlawful migration, reform proposals still advocate ramping up enforcement and increasing sanctions. This Note argues that increasing employer sanctions is not the appropriate response. Given employers' lack of training in complex matters of immigration law, the state of verification systems available to employers, and the widespread availability of fraudulent documents, enhanced enforcement can only undermine uniformity of immigration enforcement and open employers up to dueling liabilities, having a predictable discriminatory impact on employee populations, particularly those that "look foreign."

Turning a blind eye to unlawful employment may have become the norm because there are no economically or politically feasible means by which to provide effective training and uniform enforcement of immigration law through employers, but some might say the real reason is that "informal undocumented migration ... benefits all parties concerned." Indeed, "[t]he history of discretionary enforcement reflects tacit agreement among politically powerful groups, including employers who need foreign workers and the consumers who want to keep down the price of groceries, hotel rooms, and everything else." Still, politicians have incentives to appear tough on immigration, regardless of whether policies work or cause harm to immigrants, in order to reap short-term political gains. As a result, amidst calls for heightened enforcement, laws are weakly enforced because "strict immigration law enforcement would drag down the

233. Niles Hansen, The Border Economy: Regional Development in the Southwest 158 (1981). In the context of Mexican migration, Hansen noted over twenty-five years ago that the "United States gains relatively cheap labor willing to perform tasks that citizen workers are reluctant to undertake. The available evidence shows that undocumented Mexican workers do not use social services to any significant extent, though they do pay numerous taxes. . . . Mexico exports some of its unemployment and gains foreign exchange that workers send or bring home as well as some technical skills when workers return home. The migrants gain higher incomes and, frequently, better working conditions than in Mexico." Id. at 158-59.


235. See Kevin Johnson, Law and the Border: Open Borders?, 51 UCLA L. REV. 193, 262 (2003). The political expediency of visible, high-impact enforcement underlies the emphasis placed on border enforcement (as opposed to interior enforcement, including employer sanctions). While border enforcement involves visible fences and security cameras and an equally visible impact on the numbers of people attempting to cross at heavily protected points, employer sanctions efforts "[impose] visible burdens on business. As a result, significant interest group pressure quietly helps push Congress toward underfunding these enforcement endeavors . . . . Proposed revisions in the employers' obligations generate determined resistance among a highly influential interest group. Border measures, in contrast, step on almost no influential toes." Martin, supra note 45, at 545.
U.S. economy, block reunification of families, and otherwise hurt broad segments of American society. [Thus,] [c]hronic but broadly accepted tolerance of illegal immigration prevails, even if politics demands an occasional show of force.236

Short-term political expediency and the symbolic importance of get-tough immigration proposals may be the only reason politicians continue to call for the enhancement of employer sanctions, despite clear downsides. If the symbolic value is important enough, we can all tacitly acknowledge that fact and continue to look the other way, rather than sacrifice employers, uniformity of federal law, and civil rights protections in the name of enhanced interior enforcement of immigration laws.

236. MOTOMURA, supra note 233, at 178. “[W]hen interviewing members of Congress involved in drafting key IRCA provisions, researchers found that the drafters were most concerned with establishing the legal principle that employers could not hire undocumented workers, ‘regardless of whether it was financially, technically, or politically possible to enforce it rigorously in the short run.’ ” Pham, supra note 5, at 802.