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Section on Labor Relations and Employment Law
Panel: *At the Border and Beyond: California and the Evolving*
Workplace

Private Actors, Public Policy:
Employment Discrimination & the Domestication of Immigration Law
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Good afternoon. I'd like to thank Mike Selmi and Section on Labor Relations and Employment for inviting me to join the panel.

I'm going to talk about how employment law has played a leading role in one of the most recent trends in immigration law – the domestication of immigration law, or its movement from being viewed as a foreign policy matter to a domestic issue that states and local governments feel competent to regulate. Immigration enforcement is poised to change the landscape of the newer generation of employment discrimination cases – those involving noncitizens or citizens often perceived as noncitizens— usually Latinos, Asians, and those of Middle Eastern origin. California has been a hotseat of immigration law and policy since the beginning. Its attempts to regulate immigrants form the back story of federal regulation of immigration law and its connections with employment law.

I'll start with a contrast. Our employment discrimination laws primarily rely on a private attorney general model in which the risk of suit by individual employees provides an incentive for employers to comply with antidiscrimination laws. Because every employee belongs to a protected class, every employee is a potential private attorney-general.

So employment discrimination is mostly privately enforced, although government agencies such as the EEOC and state civil rights agencies play roles. It's also not exclusively federal –state and federal law governs employment discrimination concurrently.

The enforcement model for immigration law historically was very different. Since late 1800s, the federal government has had exclusive federal control over immigration law – laws that regulated the comings and goings of noncitizens and the length and conditions of their stay. Those issues, said the Court, constituted foreign policy matters that only the federal government could regulate. States and local governments were preempted from the immigration arena – including California.

So in contrast to the employment discrimination enforcement scheme, immigration law was purely a federal function, and enforcement was public, not private.

All that changed in the 1980s. Since the 1980s, immigration law has evolved from being a backwater of foreign policy focused on border enforcement to a more domestic focus, operating in three areas well within the US borders: employment law, welfare, and criminal law. That transformation began with employment. And California was the catalyst for that change.

In 1971, a California statute sought to control unauthorized immigration by criminalizing employers who hired undocumented employees. In *DeCanas v. Bica*, that law survived a preemption challenge claiming that it infringed on the federal government's exclusive power over immigration. It was one

of the first state initiatives directed at controlling unlawful immigration to survive a preemption challenge.

But it didn't survive for long. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which set out to curb unauthorized immigration in a similar way -- by requiring employers to verify that employees had authorization to work, and by sanctioning employers who knowingly or intentionally hired undocumented immigrants. Similar to the California statute that served as its model, IRCA imposed civil fines for violations, and criminal penalties for employers with a pattern or practice of violating its provisions.

IRCA broadly preempted state or local laws that imposed civil fines or criminal penalties for employing unauthorized aliens. But it permitted some subnational regulation through "licensing and similar laws." That exception, though, lay dormant until just a few years ago.

IRCA was the first major step toward treating immigration law as a domestic issue, rather than as pure foreign policy. And it achieved that move by expanding immigration enforcement into employment -- by regulating hiring and termination, arguably the two most important employment decisions (aside from tenure).

The domestication of immigration law started with employment, but continued in two additional areas -- with laws seeking to enforce immigration law by restricting welfare benefits for noncitizens and through immigration law - criminalizing violations of immigration law and broadly imposing immigration consequences for criminal acts.

IRCA also deputized employers as private monitors of compliance with immigration law. That move created a tension between enforcing antidiscrimination laws and enforcing immigration law. Sanctions for hiring undocumented employees provided employers with an incentive to discriminate against applicants and employees they perceived as looking or sounding foreign.

The antidiscrimination laws have handled this in two ways. First, Title VII prohibits race, ethnicity and national origin discrimination regardless of the immigration status of the plaintiff. Employers may not discriminate on the basis of Russian national origin even if the Russian employee is not authorized to work. (Whether the plaintiff could recover back pay is another question (Hoffman Plastics)). However, Title VII doesn't cover discrimination based on citizenship status alone, unless it's a proxy for one of the protected classes such as national origin or race.

IRCA included a provision prohibiting employment discrimination on the basis of citizenship status. But it excluded coverage for undocumented employees.

In other words, Title VII overrides private immigration enforcement by permitting suits by undocumented immigrants when there is a sufficient connection with race, ethnicity or national origin discrimination. But when the connection to immigration becomes stronger and the membership claim weaker, as with pure citizenship status claims, Title VII does not apply. Similarly, IRCA's ban on citizenship status discrimination ends where national immigration policy kicks in – by permitting such discrimination against undocumented employees.

How is an employer to negotiate this maze? By not discriminating when acting in its role as an immigration inspector – for example, by verifying the work authorization of employees without taking into account race, national origin, ethnicity etc. Easy, right?

State involvement, rise of raids: What has changed? The exclusively federal nature of immigration enforcement has. The entry of immigration law into areas that the states have traditionally regulated opened the way for state and local governments to claim a role in regulating immigration law. From a relative rarity prior to 2005, states enacted 84 immigration-related laws in 2006, then tripled that to 246 in 2007. In 2008, 19 of the 205 laws and resolutions addressing immigrants related to employment.

A number of these state laws,¹ like IRCA, prohibit knowingly hiring undocumented workers and impose suspension of the company's business license as a sanction. In imposing the loss of license as a sanction, the states rely on IRCA's exception to federal preemption when the state is regulating "licensing and similar laws."

The courts are just now issuing decisions on preemption challenges to those laws. The preemption argument is that immigration law is an exclusively federal area, and that IRCA's licensing exception should be narrowly construed. So far, one district court has found the licensing suspension preempted (*Lozano v. City of Hazleton*). Two district courts (*Candelaria* (AZ) and *Gray* (Mo)) and the 9th circuit (*Chicanos por la Causa*) have upheld them. All four decisions were heavily influenced by whether the court understood the law to relate to foreign policy or a domestic issue. Decisions finding no preemption relied on the traditional

¹ AZ, TN, West V, Missouri (ordinance)

role of states in employment law, and distanced the law from foreign policy. These cases suggest that the domestication of federal immigration law weakens the longstanding federal exclusivity of immigration regulation.

These developments raise two issues for employment discrimination laws. The first has to do with enforcement. Courts rejecting preemption challenges have reasoned that the state laws do not increase discrimination because employers already have to verify work authorization under IRCA. What the cases don't take into account is the comparison between sanctions for immigration violations versus sanctions for discriminatory employment decisions, and the enforcement models for each.

Take as an example an employer confronted with a job applicant who appears to be of Arab ancestry and speaks with an accent. The applicant claims to be a US citizen. On the one hand, the employment discrimination laws prohibit the employer from taking race, ethnicity, or national origin into account in making the hiring decision. On the other, if the applicant turns out to be undocumented and the government decides the employer knew that, the employer risks not just a civil fine, but now complete failure of the business due to the loss of license.

The employer may also take into account the likelihood that the applicant would sue if rejected – pretty low because of the applicant's lack of information about the hiring decision—as well as the likelihood that a discrimination suit would succeed, and the potential award. In contrast, although the likelihood is low that any individual employer will become a target of immigration enforcement, immigration raids are well-publicized, which creates the perception that they are more common. Raids also

disrupt businesses in ways that go beyond the individual employees affected.

So what do we have? Two legal schemes with enforcement strategies in tension with one another. Employer sanctions plus federal immigration raids plus state licensing laws create an imbalance with employment discrimination's enforcement model based on private attorneys-general. A reasonably risk-averse employer may well decide it's worth it to discriminate against anyone seen as an immigration risk.

When government seeks to increase compliance through private actors, incentives for private actors to comply must be carefully calibrated to the policies being implemented. That calibration problem is complicated by disagreement about which policy is more important. But so far, the courts haven't taken into account the effect on the traditional model of employment discrimination when undertaking the immigration law preemption analysis.

What's the moral of my story? That people interested in employment law and employment discrimination are well-advised to pay attention to what's happening in immigration law. The contraction of the economy usually goes hand in hand with more restrictive immigration policies. The lines between immigration law and employment law are porous, and it is inevitable that the direction of immigration law will affect the development of employment law and employment discrimination. As we know from the Beach Boys, the fun fun fun starts in California, but soon becomes a national phenomenon.