

# ICE WAS NOT MEANT TO BE COLD: THE CASE FOR CIVIL RIGHTS MONITORING OF IMMIGRATION ENFORCEMENT AT THE WORKPLACE

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## INTRODUCTION

In his article, *Monitoring Immigration Enforcement*, Professor Stephen Lee offers an innovative solution to a thorny problem.<sup>1</sup> The roots of the problem are embedded in the Immigration Reform and Control Act of 1986 (“IRCA”).<sup>2</sup> With IRCA, the U.S. Congress experimented with a new way to regulate immigration. Rather than focusing primarily on the U.S.–Mexico border as a strategy to reduce illegal immigration, Congress tried to weaken what it viewed as the leading cause of illegal immigration—job opportunities for unauthorized immigrants. To achieve this goal, Congress required employers to verify the immigration status of their prospective employees and fashioned sanctions for employers who knowingly employ unauthorized employees.<sup>3</sup> Through a later amendment to IRCA, Congress also created sanctions for employees who knowingly use fraudulent documents to gain employment.<sup>4</sup>

Professor Lee and others have convincingly argued that IRCA’s workplace-based immigration enforcement scheme poses a series of formidable obstacles to the workplace-based protections that are afforded to authorized and

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1. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011).

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

3. 8 U.S.C. § 1324a(a)–(b), (f) (2006).

4. *Id.* § 1324c(a), (d).

unauthorized employees.<sup>5</sup> Professor Lee's article highlights the problematic role of the agency in charge of IRCA enforcement, U.S. Immigration and Customs Enforcement ("ICE").<sup>6</sup> ICE's IRCA enforcement consists mainly of workplace investigations, employer audits, and worksite raids. Professor Lee and others have observed that ICE's enforcement activities too often send the message to immigrant employees that immigration law consequences will result if employees dare to complain about health and safety risks, employment discrimination, wage abuses, or employer interference with employees' collective activity for their mutual aid or protection in the workplace.<sup>7</sup>

As Professor Lee discusses, the U.S. Department of Labor ("DOL"), the main agency in charge of health, safety, and wage and hour protections for employees, has failed to ward off the negative effects of IRCA's workplace-based immigration enforcement scheme.<sup>8</sup> Part of the reason for this failure, as Professor Lee convincingly contends, is that ICE has the power to make enforcement decisions that affect the workplace rights of employees without consulting the DOL.<sup>9</sup> For Professor Lee, the DOL's relative impotence, coupled with ICE's lack of regard for employees' workplace rights in its immigration enforcement measures, allows "bad-actor" employers to trample upon employees' rights and "chills the reporting of labor violations by unauthorized workers."<sup>10</sup> Without complaints from employees that identify abusive and non-compliant workplaces, the DOL's enforcement efforts are often thwarted.

To address this thorny problem, Professor Lee develops a novel approach. Similar to other scholars, he advocates better coordination between ICE and the DOL so that workplace-immigration enforcement does not deteriorate employees'

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5. See, e.g., Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 746–52 (2003); Kati L. Griffith, *Discovering "Immemployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 436–41 (2011); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1105–10 (2009); Gerald L. Neuman, *Forward: Dangerous Intersection*, 44 U.S.F. L. REV. 241, 243 (2009); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 652–58 (2004); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 306–11 (2010); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 213.

6. See Lee, *supra* note 1, at 1092–93, 1095, 1104–05.

7. See, e.g., *id.* at 1100–04; Saucedo, *supra* note 5, at 308 ("[W]hile immigration enforcement goals force the round-up and removal of thousands of workers, enforcement of employment and labor laws becomes increasingly difficult in the immigrant workplace. Employees are afraid to advocate for themselves because they risk removal. The fear is real and the stakes continue to escalate."). See generally Barbara L. Jones, *Lawyers Find More Immigrant Clients Fear Civil Justice System*, THE LEGAL LEDGER (St. Paul), June 21, 2007, at 3, 11.

8. Lee, *supra* note 1, at 1098–1105.

9. *Id.* at 1093, 1121, 1127.

10. *Id.* at 1095.

rights.<sup>11</sup> Importantly, however, Professor Lee diverges from prior accounts by focusing on the potential of interagency coordination between these two agencies at the “ex ante stage.”<sup>12</sup> Specifically, Professor Lee contends that, along with ex post visa solutions,<sup>13</sup> the DOL should monitor ICE’s workplace-based immigration enforcement decisions before ICE investigates a workplace.<sup>14</sup> For instance, Professor Lee proposes that the DOL monitor whether there is an ongoing labor dispute at the workplace before ICE takes any enforcement action.<sup>15</sup> Thus, the DOL’s new monitoring role would be to reduce the negative effects of immigration enforcement in the workplace and to strengthen the rights that individuals possess as employees.<sup>16</sup>

Professor Lee’s proposal addresses ICE’s all-too-often myopic focus on aggressive workplace-based immigration enforcement at the expense of its “secondary” consideration for employees’ workplace protections.<sup>17</sup> In this Response Essay, I illuminate that Congress intended worker rights considerations to be central to the federal government’s workplace-based immigration enforcement scheme, despite ICE’s actions to the contrary.<sup>18</sup> In other words, ICE was not meant to be “cold” with respect to employees’ workplace protections. In particular, I expose Congress’s view that employee civil rights are a fundamental aspect of IRCA’s scheme.<sup>19</sup>

While Professor Lee’s extensive focus on the DOL is certainly justified, my focus on workplace protections that are not within the DOL’s purview brings an additional labor agency into the forefront of the immigration monitoring mix. Indeed, exposing Congress’s overlooked civil rights considerations illustrates that the main federal agency in charge of civil rights in the workplace, the Equal

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11. *Id.* at 1094, 1123–27.

12. *Id.* at 1094, 1121–28.

13. *See, e.g.,* Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 944–45 (2008) (contending that U visas should be provided to victims of workplace law abuses more frequently to offset the negative employment law consequences of restrictive immigration enforcement).

14. *Lee, supra* note 1, at 1123–27.

15. *Id.* at 1125.

16. *Id.* at 1123–27.

17. *Id.* at 1125. ICE does, however, sometimes engage in efforts to protect workers. *See, e.g.,* Griffith, *supra* note 5, at 445–49 (describing efforts to reduce ICE’s impact on workers’ rights); Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> (recommending prosecutorial discretion for unauthorized “plaintiffs in non-frivolous lawsuits regarding civil rights” and stating that it is “against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights”).

18. *See* Saucedo, *supra* note 5, at 305 (calling for a “more nuanced reading of” immigration law and stating that the “enforcement principles of immigration law . . . are overemphasized”).

19. *See* Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 136–37 (2002) (describing IRCA’s civil rights protections as one of “three basic components” of the statute).

Employment Opportunity Commission (“EEOC”), should play a key role in monitoring ICE’s workplace-based enforcement actions. Moreover, an intensive focus on Congress’s intent with respect to employee civil rights also reveals that the EEOC should play a complementary role in educating the public about employment civil rights in the immigration enforcement context.

The civil rights issues that arise in the midst of IRCA’s workplace-based enforcement scheme merit special consideration.<sup>20</sup> Along with the wage and hour and health and safety concerns that Professor Lee portrays,<sup>21</sup> too many immigrant laborers suffer illegal employment discrimination.<sup>22</sup> The EEOC, for instance, settled a case that involved unauthorized women who had suffered under “a sexually hostile work environment,” which included “sexual assault and rape by supervisors.”<sup>23</sup> In another case, 15 warehouse employees alleged that they were subjected to “daily slurs” against Mexicans, such as “wetback” and “mojado.”<sup>24</sup>

Heightened civil rights monitoring of ICE is needed because the interplay between workplace-based immigration enforcement and the enforcement of employees’ civil rights is often troubling in ways that are similar to what Professor Lee describes in the DOL context.<sup>25</sup> As civil rights scholar and advocate William Tamayo has stated, due to the “vulnerability” of unauthorized workers, “there is always a strong temptation for employers to use and abuse them, and to retaliate

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20. See *id.* at 142 (“With higher levels of immigration enforcement, the State’s response to heightened levels of discrimination must keep pace.”); see also *id.* (stating that when “immigration controls tighten,” as they are now, “the potential for resulting discrimination intensifies”).

21. Lee, *supra* note 1, at 1092, 1100, 1128; see also Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 484–501 (2009) (describing health and safety abuses against foreign-born workers).

22. See, e.g., Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 562 (2010) (citing research on the “particular vulnerability of immigrant workers . . . for sexual harassment”); William R. Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F. L. REV. 253, 261–64 (2009) (discussing numerous EEOC employment discrimination cases involving low-wage immigrants). See generally Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345 (describing various types of discrimination against low-wage and unauthorized immigrants).

23. Alec MacGillis, *Egg Firm Has Long Record of Violations*, WASH. POST, Aug. 22, 2010, at A1; see also Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES, July 27, 2008, at A1 (reporting that “[t]he Equal Employment Opportunity Commission [was] examining accusations of sexual harassment of women at the plant” in the wake of a large-scale workplace raid).

24. James Pinkerton & Susan Carroll, *Raid on Shipley Headquarters*, HOUS. CHRON., Apr. 17, 2008, at A1.

25. Lee, *supra* note 1, at 1092, 1099–1102, 1123–28; see also Saucedo, *supra* note 5, at 305 (“The enforcement goals of immigration law tend to compete with enforcement goals in other areas of law, such as employment law, producing mixed results.”).

and intimidate them when they assert their rights under law.”<sup>26</sup> In the warehouse employees’ case described above, for instance, one of the employee–plaintiffs testified that the plant manager had “threatened him with deportation if he complained” about the discrimination against him as a Mexican.<sup>27</sup> ICE raided this workplace one month after the civil rights case settled, allegedly based on “a tip from disgruntled workers also involved in the discrimination case.”<sup>28</sup> Even though the EEOC’s consistent stance is that immigration status is not relevant in civil rights cases, it recognizes “that it is very difficult for immigrants to access the civil legal system.”<sup>29</sup> This is the case, at least in part, because of “an ever-present implicit fear of deportation.”<sup>30</sup>

Workplace-based immigration enforcement not only affects civil rights enforcement on behalf of unauthorized immigrants. It impacts the civil rights of authorized employees as well. As the Ninth Circuit Court of Appeals has acknowledged, even authorized immigrants “may fear that their immigration status would be changed” or that they may bring “immigration problems” to those around them if they come forward with employment discrimination complaints.<sup>31</sup>

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26. Tamayo, *supra* note 22, at 271; *see also id.* at 268 (referring to an EEOC case finding that an employer retaliated against an immigrant worker “after he complained about national origin discrimination”).

27. Pinkerton & Carroll, *supra* note 24; *see also id.* (reporting on plaintiff–employee’s statement that the plant manager had told him that “he had some police friends and that he could tell them to arrest me and deport me”). In another case, the plaintiff–employee did not complain earlier about sexual harassment because “she was worried about being deported.” Jones, *supra* note 7, at 3; *see also* Gleeson, *supra* note 22, at 563 (“[A]dvocates continue to uncover egregious instances of employer intimidation in which the immigration status of a worker is often wielded as an overt threat against would-be claimants.” (citation omitted)).

28. Mary Flood, *Shipleys Forks Over Hefty Fine After Raid*, HOUS. CHRON., Aug. 8, 2009, at B1; *see also* REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS 27 (2009), available at [http://nelp.3cdn.net/75a43e6ae48f67216a\\_w2m6bplak.pdf](http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bplak.pdf) (“According to news reports, ICE initiated a criminal investigation of Shipley in January 2008, after learning of the federal employment discrimination lawsuit . . . . A worksite raid followed in April 2008, during which 20 workers were arrested.”); Jones, *supra* note 7, at 11 (describing a discrimination case involving an immigrant woman who won her civil rights case but “was deported within a week”).

29. Jones, *supra* note 7, at 3, 11.

30. Gleeson, *supra* note 22, at 580 (finding, based on 41 interviews, that both employer intimidation and fear of deportation “inhibit claims making”).

31. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004); *see also id.* (“[N]ew legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.”); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 315 (2004) (“[B]rown collar workers may fear immigration consequences if they come forward with complaints. This holds true whether a brown collar worker is documented or undocumented. The current immigration law framework engenders fear in a population that does not understand immigration law and its evolving standards. The fear is

Moreover, the seemingly close relationship between immigration and workplace enforcement can intimidate authorized immigrant employees who are in the United States on employment visas. In a recent employment discrimination case, for instance, plaintiff employees claimed that “rather than protecting the Indian [guest] workers, immigration officials coached the company on how to silence and deport them.”<sup>32</sup>

To show that employee civil rights should be viewed as a central component of the federal government’s workplace-based immigration enforcement scheme, Parts I and II draw from IRCA’s text and its 15-year-long legislative history. As this analysis illuminates, while Congress did intend to bring restrictive immigration enforcement into the workplace, it did not intend to do so in a way that weakens the existing civil rights that individuals possess as employees. Furthermore, these Parts reveal that Congress viewed interagency coordination and public education involving the EEOC as critical to achieving IRCA’s civil rights goals. Given this view and the paramount civil rights considerations embedded in IRCA, Part III expands upon Professor Lee’s proposal to make the case that the EEOC should become a civil rights monitor and educator in the workplace-based immigration enforcement context.<sup>33</sup>

## I. CIVIL RIGHTS AND IRCA

One does not need to look far to see that the preservation of workers’ rights in general, and civil rights in particular, are an essential ingredient of Congress’s workplace-based immigration enforcement scheme under IRCA. Congress included, for example, an appropriation of funding to the DOL to increase enforcement of federal wage and hour law on behalf of unauthorized employees.<sup>34</sup> Moreover, Congress embedded significant civil rights protections for employees and potential employees directly in the structure of IRCA.<sup>35</sup>

With IRCA, Congress provided new employment discrimination protections to supplement Title VII of the Civil Rights Act (“Title VII”). Title VII, which is enforced by the EEOC, protects employees from discrimination based on

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not without some reason, as immigration authorities have targeted brown collar industries like meatpacking for enforcement of immigration laws.”).

32. Editorial, *Standing Up for Guest Workers*, N.Y. TIMES, May 2, 2011, at A26.

33. While it is not the focus here, other labor agencies are coordinating efforts with immigration authorities to some extent. See, e.g., Revised Memorandum of Understanding Between U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor I (Mar. 31, 2011), available at [http://www.dol.gov/\\_sec/media/reports/HispanicLaborForce/dhs-dol-mou.pdf](http://www.dol.gov/_sec/media/reports/HispanicLaborForce/dhs-dol-mou.pdf); Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, Nat’l Labor Relations Bd. (June 7, 2011), available at <http://www.ilw.com/immigrationdaily/news/2011,0609-nlrb.pdf>.

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

35. See Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1975, 1984 (2011) (describing IRCA’s antidiscrimination protections and suggesting that antidiscrimination protections were part of Congress’s intent to balance “a variety of interests”).

race, color, religion, sex, and national origin.<sup>36</sup> IRCA's new employment discrimination protections prohibit employers from discriminating based on an authorized employee's national origin or citizenship status.<sup>37</sup> IRCA also prohibits individuals from retaliating against authorized employees who complain, or who intend to complain, about employment discrimination based on national origin or citizenship status.<sup>38</sup> Moreover, according to IRCA, employers cannot implement their verification procedures for ensuring that their employees are work authorized in ways that discriminate based on national origin or citizenship status.<sup>39</sup> Through a 1990 amendment, Congress increased monetary penalties for violations of IRCA's antidiscrimination protections so that they match monetary sanctions on employers for violations of other aspects of IRCA.<sup>40</sup>

Congress created a new federal agency to enforce IRCA's employment discrimination protections. This new agency, the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("Special Counsel"), is housed in the U.S. Department of Justice.<sup>41</sup> Unlike typical immigration enforcement agencies—which do not involve the participation of private individuals—the Special Counsel includes private and public enforcement measures.<sup>42</sup> It mainly enforces its civil rights protections through the receipt and investigation of employee-initiated complaints about discrimination or retaliation. If employees are successful in their suits, they can receive injunctive relief, civil penalties, reinstatement, and back pay for the time they missed work due to their employers' discriminatory acts.<sup>43</sup> The Special Counsel can also take affirmative enforcement actions in the absence of a private complaint from an employee to address larger pattern or practice violations.<sup>44</sup>

While IRCA contained its own protections against discrimination and its own agency to enforce those protections, Congress also viewed interagency coordination with the EEOC as crucial to protect against any discrimination that would ensue as a result of workplace-based immigration enforcement. For instance, Congress created a "joint taskforce," which included the EEOC and the Attorney General.<sup>45</sup> The taskforce was charged with working together to evaluate, over a three-year period, whether IRCA resulted in employment discrimination based on citizenship status or national origin.<sup>46</sup> Moreover, Congress intended the Special Counsel to work in coordination with the EEOC to remedy employment

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36. See 42 U.S.C. § 2000e-2(a) (2006).

37. See 8 U.S.C. § 1324b(a)(1) (2006).

38. See *id.* § 1324b(a)(5).

39. See *id.* § 1324b(a)(6).

40. See *id.* § 1324b(g)(2)(B).

41. See *id.* § 1324b(c).

42. See Stumpf & Friedman, *supra* note 19, at 136 ("IRCA combines the private enforcement characteristic of civil rights laws with the federalized public enforcement of the immigration laws.")

43. 8 U.S.C. § 1324b(g)(2)(B) (2006).

44. See *id.* § 1324b(c)(2).

45. See 8 U.S.C. § 1324a(j)(1), (k)(1) (1994) (repealed 1996).

46. See *id.*

discrimination.<sup>47</sup> For cases involving national origin discrimination, for example, the Special Counsel takes cases that involve workplaces with between 4 and 14 employees.<sup>48</sup> If an employer has 15 or more employees, the Special Counsel refers the case to the EEOC.<sup>49</sup> Similarly, if the EEOC receives a case that it does not have jurisdiction over, it will refer the case to the Special Counsel.<sup>50</sup>

To support these civil rights measures, Congress fostered an educational campaign along with the interagency coordination described above. Specifically, through a 1990 amendment, Congress required a number of agencies to disseminate information in order to “increas[e] the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies” related to these civil rights protections.<sup>51</sup> To “carry out the campaign” the Special Counsel was required to “consult with” the EEOC, the DOL, and the Administrator of the Small Business Administration “as may be appropriate.”<sup>52</sup>

Congress saw IRCA and Title VII as working together to protect against civil rights infringements that may result from workplace-based immigration enforcement. Notably, IRCA’s educational campaign related not only to IRCA’s antidiscrimination protections, but also to Title VII’s protections. IRCA requires agencies to disseminate information about IRCA and Title VII’s protections against “unfair immigration-related employment practices.”<sup>53</sup>

As this Part demonstrated, civil rights were a basic tenet of the workplace-based immigration enforcement scheme that Congress created with IRCA. Moreover, Congress undoubtedly intended interagency coordination and public education to facilitate IRCA and Title VII’s antidiscrimination goals. Thus, ICE’s workplace-based immigration enforcement actions should consistently be informed by civil rights considerations. The EEOC should help ensure that ICE fulfills this central mission of IRCA through an *ex ante* monitoring and educational role. As Part II will explore, IRCA’s legislative history supports this view.

## II. CIVIL RIGHTS AND IRCA’S LEGISLATIVE HISTORY

IRCA’s 15-year legislative history illustrates Congress’s concern about employees’ workplace rights and the employment discrimination that could result

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47. See 8 U.S.C. § 1324b(b)(2) (2006) (stating that an employee cannot file a complaint under IRCA’s discrimination protections “if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under [T]itle VII . . . , unless the charge is dismissed as being outside the scope of such title”).

48. See *id.*

49. See 42 U.S.C. § 2000e(b) (2006).

50. A memorandum of understanding between the EEOC and the Special Counsel details the ongoing interagency coordination. See Memorandum of Understanding Between the Equal Emp’t Opportunity Comm’n and the Office of Special Counsel for Immigration Related Unfair Emp’t Practices (Dec. 18, 1997), available at <http://www.eeoc.gov/policy/docs/oscmou.html>.

51. 8 U.S.C. § 1324b(l)(1) (2006).

52. *Id.* § 1324b(l)(1)(2).

53. *Id.* § 1324b(l).

from the imposition of workplace-based immigration enforcement. It also shows Congress's intent to involve the EEOC in interagency coordination and education to protect against employment discrimination.

Throughout legislative consideration of what eventually became IRCA, lawmakers often couched the need for workplace-based immigration reform within a broader concern about the workplace experiences of authorized and unauthorized workers.<sup>54</sup> With respect to authorized workers, a good deal of the unease focused on what many viewed as unfair job competition between authorized and unauthorized workers.<sup>55</sup> For instance, in 1975, Representative Joshua Eilberg stated that the proposed legislation “deal[s] with the real culprit, the employer who repeatedly and with impunity hires illegal aliens rather than giving the jobs to citizens and legal residents who could demand a living wage and decent working conditions.”<sup>56</sup>

With respect to unauthorized workers, many members communicated that workplace-based immigration reform was necessary to offset ongoing employer abuses against these workers. One lawmaker, for example, referred to workplace conditions for unauthorized workers as “tragic.”<sup>57</sup> Another described “vile forms of exploitation and extortion,” including unauthorized workers who worked long hours without any pay at all.<sup>58</sup> Indeed, as noted in Part I, the enacted legislation included increased wage and hour enforcement on behalf of unauthorized

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54. See Wishnie, *supra* note 5, at 203–05 (citing legislative history showing Congress's concerns about workers).

55. See, e.g., *Illegal Aliens: Hearings on H.R. 982 and Related Bills Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 112–14, 139, 240, 325 (1975) [hereinafter *Hearings on H.R. 982*] (describing unfair competition between authorized and unauthorized workers as motivation for new legislation); SUPPLEMENT TO THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 506–16 (1981) [hereinafter SCIRP SUPPLEMENT TO THE FINAL REPORT] (describing negative labor market effects as the “major consequence” of the presence of unauthorized workers); 128 CONG. REC. 20,829 (1982) (statement of Sen. Simpson) (referring to a goal “to eliminate the illegal subclass of persons” whose “illegal status and their resulting weak bargaining position cause these people to depress U.S. wages and working conditions . . . [and] may have the effect of hindering the participation even of legal immigrants from the same country of origin, as they become people who are afraid to . . . go to their employer”); 119 CONG. REC. 14,186 (1973) (statement of Rep. Rodino) (describing the legislation as an effort “to [e]nsure that such [job] opportunities are made available for U.S. citizens and lawful permanent residents who have been severely disadvantaged by the presence of large numbers of illegal aliens in this country”).

56. *Hearings on H.R. 982*, *supra* note 55, at 1 (statement of Rep. Eilberg, Chairman, Subcomm. on Immigration, Citizenship, and Int'l Law).

57. *Id.*; see also *id.* (stating that unauthorized workers “are forced to live under the worst conditions and as a result of their precarious status they must accept any form of abuse and mistreatment their employers choose to hand out”).

58. *Id.* at 135 (statement of Rep. Biaggi); see also *id.* (referring to “tales of horror regarding [unauthorized workers'] working conditions”); SCIRP SUPPLEMENT TO THE FINAL REPORT, *supra* note 55, at 516 (describing unauthorized workers as “vulnerable” to employer abuse).

employees in order to address some of these injustices and to “reduce the incentive for employers to hire undocumented” workers.<sup>59</sup>

While many lawmakers viewed workplace-based immigration enforcement as something that could eventually offset ongoing workplace abuses against employees, many also saw that it could foster a new kind of abuse of employee rights—employment discrimination against authorized workers based on their perceived national origin or citizenship status. Representative Edward Roybal summed up this sentiment well: “In our zeal to eradicate the evils of labor exploitation and unemployment, we must be careful not to create legislation that would inadvertently perpetuate discrimination and lack of equal opportunity in employment.”<sup>60</sup> Indeed, fear about the negative civil rights consequences of a new workplace-immigration enforcement scheme was ever-present from the early 1970s when Congress started to consider legislative action<sup>61</sup> until 1986, when Congress finally passed IRCA.<sup>62</sup>

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59. S. REP. NO. 97-485, at 120 (1982); *id.* (“Part of the incentive to hire undocumented aliens is their willingness to accept substandard wages and working conditions. We must therefore intensify the enforcement of existing laws, including the minimum wage . . . .”); 129 CONG. REC. 12,816 (1983) (statement of Sen. Cranston) (“A less expensive and more effective alternative to the employer sanctions law would be to enforce labor laws already on the books. There would be little profitability in exploiting undocumented workers—and little incentive to hire them—if minimum wage, OSHA and fair labor standards laws were strictly enforced.”); *see also* S. REP. NO. 99-132, at 29 (1985) (proposing to authorize an increase in appropriations for wage and hour enforcement); U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 70 (1981) (same).

60. *Illegal Aliens: Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 93d Cong. 83 (1973) [hereinafter *Hearings Before the Subcomm. No. 1*].

61. *See, e.g.*, 118 CONG. REC. 30,182–83 (1972) (statement of Rep. Badillo) (noting concern about employment discrimination); *id.* at 30,167 (statement of Rep. Kazen) (same); *see also, e.g., Hearings on H.R. 982, supra* note 55, at 168 (statement of Rep. White) (noting “the obvious discrimination that will result against any prospective employee who might be suspected to be an alien because of appearance or spoken accent”); *id.* at 51–52 (statement of Rep. Holtzman, Member, Comm. on the Judiciary and the Subcomm. on Immigration, Citizenship, and Int’l Law) (“I am terribly concerned that these people, some of whom are naturalized U.S. citizens and some of whom are lawful residents, would be put to an intolerable burden under this legislation.”); 119 CONG. REC. 14,195 (1973) (statement of Rep. Kazen) (stating “that this bill will encourage discrimination”); *id.* at 14,192 (statement of Rep. Clausen) (stating the bill “would set a dangerous precedent”).

62. *See, e.g.*, S. REP. NO. 97-485, at 119 (1982) (noting that during SCIRP’s “work, as well as during the extensive hearings of the Subcommittee on Immigration and Refugee Policy” one of the “central objections” that was “raised again and again” was “that the proposed employer sanctions might result in discrimination”); SCIRP SUPPLEMENT TO THE FINAL REPORT, *supra* note 55, at 566–76 (describing fear of employment discrimination and referring to it as one of the “major criticisms” launched against earlier proposals); *see also Immigration Reform and Control Act of 1982: Joint Hearings on H.R. 5872 and S. 2222 Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 101 (1982) [hereinafter *Joint Hearings on H.R. 5872 and S. 2222*] (statement of Sen. Kennedy, Member, Comm. on the Judiciary) (noting concern about

Lawmakers directed their civil rights concerns at both explicit and more subtle forms of employment discrimination that could result if Congress passed the proposed legislation. As Representative Augustus Hawkins stated in 1984, “employers who are inclined to discriminate [will have] a convenient pretext for their action.”<sup>63</sup> He went on to note that other employers, out of fear of liability, will discriminate as they “make a good faith effort to comply with the [new] law.”<sup>64</sup> According to Representative Hawkins, this would be the case because the legislation “will necessarily create a suspect class of persons who, on the basis of physical appearance, language or other factors, appear foreign to employers.”<sup>65</sup> Representative Hawkins’s latter statement represented many other lawmakers’ worries that too many employers, out of fear of potential sanctions for hiring an unauthorized employee, would exclude most or all applicants from particular national origins in order to “play it safe.”<sup>66</sup>

IRCA’s legislative history demonstrates that lawmakers were particularly worried about the legislation’s impact on the civil rights of Latino<sup>67</sup> and Asian<sup>68</sup>

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employment discrimination); *Immigration Reform, Part 2: Hearings Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary*, 97th Cong. 1031 (1981) (statement of Rep. Roybal) (same); 132 CONG. REC. 31,632 (1986) (statement of Rep. Rodino) (same); 130 CONG. REC. 16,230 (1984) (statement of Rep. Hawkins) (same); *id.* at 16,222 (statement of Rep. Edwards) (same); *id.* at 15,882 (statement of Rep. Richardson) (same); 129 CONG. REC. 12,867 (1983) (statement of Sen. Wilson) (same); 128 CONG. REC. 20,850 (1982) (statement of Sen. Hart) (same).

63. 130 CONG. REC. 15,740 (1984) (statement of Rep. Hawkins); *see also id.* at 15,910 (same) (“[D]espite the laudable purpose behind this bill, there are those in this Nation who would use this measure as a pretext to deny employment to U.S. citizens and aliens lawfully residing here and by right, simply because they look or sound foreign.”).

64. *Id.* at 15,740.

65. *Id.*; *see also id.* at 15,945 (statement of Rep. Evans) (“Employers who want to discriminate against minorities will have a legitimate reason for doing so. And to [e]nsure that they are complying with the law, overcautious employers may quit hiring suspected illegals.”).

66. *See, e.g.*, 132 CONG. REC. 33,220 (1986) (statement of Sen. Hart) (“The employer sanctions in the legislation will undoubtedly act as an incentive for businesses to ‘play it safe’ and refuse to hire individuals whose status may be in question.”); *see also, e.g., id.* at 29,994 (statement of Rep. Roybal) (referring to the likelihood that employers will discriminate because they will want to avoid sanctions under the new law); *id.* at 29,992 (statement of Rep. Garcia) (same); 130 CONG. REC. 16,208 (1984) (statement of Rep. Schroeder) (same); *id.* at 15,715 (statement of Rep. Hance) (same); 118 CONG. REC. 30,183 (1972) (statement of Rep. Roybal) (same).

67. *See, e.g.*, S. REP. NO. 97-485, at 119 (1982) (statement of Sen. Kennedy) (expressing concern for “Hispanic Americans”); 132 CONG. REC. 31,631–32 (1986) (statement of Rep. Rodino) (referring to concern about the Hispanic community); 130 CONG. REC. 15,882 (1984) (statement of Rep. Richardson) (expressing concern for “Americans of Hispanic origin that are not fair haired”); *id.* at 15,715 (statement of Rep. Hance) (expressing concern for individuals “with a Spanish surname”); 119 CONG. REC. 14,187 (1973) (statement of Rep. Ketchum) (expressing concern for “Mexican-American constituents” and describing proposed legislation as “aimed right down the throat of every American of Mexican descent in the United States”); 118 CONG. REC. 30,182 (1972) (statement of Rep. Badillo) (expressing concern for “anyone who speaks with an accent and/or has the appearance of being Latin or Hispanic”).

workers. In 1972, for instance, a congressperson stated that “illegal alien” was a “code word” for Latinos in the United States.<sup>69</sup> Moreover, in 1986, Representative Roybal stated that many members were “fearful” that some employers would want to avoid employer sanctions and would “just not interview anyone who may appear to be Hispanic and quite obviously Asian.”<sup>70</sup> This is consistent with an abundance of other lawmakers’ statements that Latinos and Asians would be particularly disadvantaged when searching for jobs.<sup>71</sup>

Thus, due to these employee civil rights concerns, many lawmakers called for solutions to offset the employment discrimination that could result from IRCA.<sup>72</sup> Indeed, during Congress’s long deliberations, there were various proposals for how to reduce the likelihood that workplace-based immigration enforcement would result in employment discrimination.<sup>73</sup> Early forms of the proposed legislation, for example, had included employer sanctions for hiring unauthorized workers but had not required employers to check the work authorization of *all* prospective employees. Instead, under this proposal, the employer could request a statement from some employees about their immigration

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68. See, e.g., 132 CONG. REC. 33,242 (1986) (statement of Sen. Biden) (expressing concern for the Hispanic and Asian communities); 119 CONG. REC. 14,201 (1973) (statement of Rep. Roybal) (describing the bill as “the most discriminatory bill against Mexican Americans and Asians which has been brought to the floor of this House”); 118 CONG. REC. 30,183 (1972) (same) (expressing concern for “Americans from Mexican and Asian heritage”).

69. 118 CONG. REC. 30,182 (1972) (statement of Rep. Badillo); see also 119 CONG. REC. 14,187 (1973) (statement of Rep. Ketchum) (“When we think in terms of illegal aliens, we think only of one ethnic group—those of Mexican origin.”). See generally Kevin R. Johnson, “*Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*,” 28 U. MIAMI INTER-AM. L. REV. 263, 264–71 (1997) (discussing the use of the term “alien” and its effect on the treatment of noncitizens).

70. 132 CONG. REC. 29,994 (1986) (statement of Rep. Roybal).

71. See, e.g., *id.*; 129 CONG. REC. 12,816 (1983) (statement of Sen. Cranston); 119 CONG. REC. 14,187 (1973) (statement of Rep. Ketchum); 118 CONG. REC. 30,183 (1972) (statement of Rep. Roybal).

72. See, e.g., H.R. REP. NO. 99-682, pt. 2, at 12 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5761 (“The Committee on Education and Labor strongly endorses this provision and . . . has consistently expressed its fear that the imposition of employer sanctions will give rise to employment discrimination against Hispanic Americans and other minority group members.”); H.R. REP. NO. 94-506, at 15 (1975) (describing a “provision which specifically authorizes the Attorney General to bring civil actions” to remedy discrimination); 130 CONG. REC. 15,953 (1984) (statement of Rep. McCain) (stating that “we must have a verification system” that avoids discrimination); 118 CONG. REC. 30,155 (1972) (statement of Rep. Rodino) (describing aspects of the proposal that would “[e]nsure that employment discrimination against members of ethnic and minority groups does not occur”).

73. For instance, many argued that Congress should keep the burdens on employers minimal in order to reduce incentives for employers to discriminate out of fear of violating employer sanctions laws. See, e.g., H.R. REP. NO. 99-682, pt. 1, at 68 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5672; STAFF OF THE SUBCOMM. NO. 1 OF THE H. COMM. ON THE JUDICIARY, 93D CONG., ILLEGAL ALIENS, A REVIEW OF HEARINGS CONDUCTED DURING THE 92D CONGRESS (Comm. Print 1973) [hereinafter A REVIEW OF HEARINGS CONDUCTED DURING THE 92D CONGRESS].

status in order to defend against accusations that they were in violation of the employer sanctions law.<sup>74</sup>

A number of members of Congress successfully advocated for changing the proposed legislation so that employers were required to treat all employees equally. The concern was that employers would require a statement “of certain people and not of others, largely based upon appearance, or language . . . and that this in effect would mean that Mexican-Americans . . . would be required to file statements while other persons would not.”<sup>75</sup> By the early 1980s, legislative proposals commonly included a requirement that employers verify the work authorization of all of their prospective employees.<sup>76</sup>

Throughout Congress’s consideration of IRCA, there was broad agreement among lawmakers that part of the solution was for the legislation, and those enforcing it, to work in coordination with the EEOC and Title VII to protect employees’ civil rights. For instance, lawmakers called for an antidiscrimination taskforce, which included interagency coordination between the EEOC and the U.S. Attorney General.<sup>77</sup> As illuminated above, a joint antidiscrimination taskforce was eventually incorporated into the legislation to evaluate whether it had discriminatory effects.

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74. See, e.g., *Hearings on H.R. 982*, *supra* note 55, at 27–28 (testimony of Laurence H. Silberman, Acting U.S. Att’y Gen.) (critiquing proposal because “an American citizen with a foreign surname or foreign accent might be required to execute an affidavit regarding his citizenship in order to get a job, while other Americans might not be asked for a similar statement”).

75. *Id.* at 201 (statement of Kenneth A. Meiklejohn, Legislative Counsel, Dep’t of Legislation, Am. Fed’n of Labor and Cong. of Indus. Orgs.); see also *id.* at 208 (statement of Rep. Russo, Member, Comm. on the Judiciary and the Subcomm. on Immigration, Citizenship, and Int’l Law) (“It would seem to me that if somebody walked in who had a name like Miller or Smith and had no accent you would not ask him for anything. Yet if he walked in with a name like Russo or something else and had a foreign accent, they would request identification.”); *Hearings Before the Subcomm. No. 1*, *supra* note 60, at 84 (statement of Rep. Roybal) (expressing concern that the bill “provides the employer with immunity if he obtains from the prospective employee a signed statement in writing that such a person is not an illegal”).

76. See, e.g., *Joint Hearings on H.R. 5872 and S. 2222*, *supra* note 62, at 274 (statement of Rep. Mazzoli) (stating that all employers should be required “to show their eligibility,” and these measures “might eliminate some of the discrimination, some of the selectivity of the enforcement, some of the Government intervention at the workplace”); SCIRP SUPPLEMENT TO THE FINAL REPORT, *supra* note 55, at 577 (describing proposal that employers verify the status of “all persons”).

77. See, e.g., H.R. REP. NO. 97-890, pt. 1, at 44 (1982) (referring to proposed taskforce, including the Attorney General, the DOL, and the EEOC to examine charges of discrimination); H.R. REP. NO. 94-506, at 15–16 (1975) (referring to proposal authorizing the U.S. Attorney General to bring discrimination claims while the EEOC worked through its backlog); 130 CONG. REC. 15,710 (1984) (statement of Rep. Fish) (same); *id.* at 15,740 (statement of Rep. Hawkins) (describing inadequate proposal for coordination between immigration officials, EEOC, and other labor departments to “monitor if discrimination is actually happening”).

Despite broad agreement about the necessity of interagency coordination involving the EEOC and the importance of Title VII,<sup>78</sup> however, there was lengthy congressional debate about whether Title VII and the EEOC alone were sufficient to remedy the discrimination that would ensue or whether Congress needed to make legislative changes to heighten civil rights protections. As Part I described, the latter view ultimately prevailed and Congress relied on the EEOC and Title VII in conjunction with the Special Counsel and IRCA's new civil rights protections.

Nonetheless, the debate about whether Congress needed to create additional civil rights protections as part of the legislation illustrates the centrality of civil rights to the workplace-based immigration enforcement scheme that Congress eventually enacted. It also illuminates the close relationship between IRCA and Title VII/EEOC. On the one hand, some lawmakers expressed the sentiment that Title VII and the EEOC were sufficient to offset any discrimination that would result from workplace-based immigration enforcement.<sup>79</sup> In 1973, for instance, Representative Mario Biaggi stated: "[I]t bears repeating that the Civil Rights Act of 1964 clearly prohibits any discrimination based on national origin. Employers may find themselves afoul of this law, should they choose to bar any foreign born person from their employ."<sup>80</sup> Similarly, in 1986, Senator Orrin Hatch stated that "the hard fact of the matter is that current civil rights law already prohibits discrimination on the basis of national origin, as well as race, gender, and religion. This is more than adequate to deal with a pattern of discrimination in any business, industry, or agricultural setting."<sup>81</sup>

On the other hand, however, many members of Congress expressed the concern that Title VII and the EEOC were necessary, but not sufficient, to counteract the employment discrimination that would likely flow from workplace-

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78. See, e.g., H.R. REP. NO. 97-890, pt. 1, at 44 (1982) ("It is clear from this decision and regulations which have been promulgated by the Equal [Employment] Opportunity Commission subsequent to this decision that any outright refusal by an employer to hire, as well as the dismissal of, individuals because of their foreign appearance or ethnic background would contravene the provisions of Title VII."); SCIRP SUPPLEMENT TO THE FINAL REPORT, *supra* note 55, at 573 (referring to Title VII as a possible approach to protecting against national origin discrimination); A REVIEW OF HEARINGS CONDUCTED DURING THE 92D CONGRESS, *supra* note 73, at 25 (noting that Title VII would help protect employees from national origin discrimination).

79. See, e.g., H.R. REP. NO. 93-108, at 13 (1974) ("[R]ecognizing the constraints of Title VII of the Civil Rights Act of 1964, the Committee feels that the fear that employment discrimination will result is not well founded."); 130 CONG. REC. 15,721 (1984) (statement of Rep. Berman) (suggesting that the EEOC and Title VII are sufficient to address employment discrimination); *id.* at 15,716 (statement of Rep. Smith) ("[T]he bill does not in any way diminish existing antidiscrimination laws . . ."); 119 CONG. REC. 14,196 (1973) (statement of Rep. Eilberg) (referring to the EEOC, among other agencies, as "effective" and "working"); *id.* at 14,186 (statement of Rep. Rodino) ("Moreover, it should be emphasized that [T]itle VII of the Civil Rights Act of 1964 and the guidelines issued by the Equal Employment Opportunity Commission prohibit employment discrimination based on national origin. Therefore, any refusal by an employer to interview or hire permanent resident aliens or citizens of certain ethnic backgrounds . . . [is] prohibited.").

80. 119 CONG. REC. 14,190 (1973) (statement of Rep. Biaggi).

81. 132 CONG. REC. 33,243 (1986) (statement of Sen. Hatch).

based immigration enforcement.<sup>82</sup> Some called for increased funding for EEOC enforcement of Title VII if Congress passed employer sanctions.<sup>83</sup> Others identified Title VII's jurisdictional limit, which applies only to workplaces with 15 or more employees, as particularly problematic. Because of this limit in Title VII's coverage, some lawmakers felt that small employers would be allowed to discriminate based on national origin.<sup>84</sup> Moreover, others identified Title VII's failure to consistently protect employees from citizenship status discrimination as worrisome.<sup>85</sup> Thus, for these lawmakers, there was insufficient assurance that Title VII's protections against national origin discrimination would protect individuals who were not citizens, but who were authorized to work in the United States, from discrimination.<sup>86</sup>

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82. See, e.g., 132 CONG. REC. 29,994 (1986) (statement of Rep. Roybal) ("There are Members of this House who believe that we already have some protection against discrimination or that we are going to establish a group that will look into it. The truth of the matter is that we don't."); 130 CONG. REC. 16,209 (1984) (statement of Rep. Schroeder) ("And don't be fooled that [T]itle VII will fully protect these Americans. Not all discriminatory practices are made unlawful by [T]itle VII."); *id.* at 15,910 (statement of Rep. Hawkins) (advocating a proposal that employees have a cause of action for employment discrimination "which augments but does not duplicate the jurisdiction of [T]itle VII of the Civil Rights Act of 1964").

83. See, e.g., *Joint Hearings on H.R. 5872 and S. 2222, supra* note 62, at 180 (statement of John H.F. Shattuck, Director, Am. Civil Liberties Union) ("I think it is absolutely essential that this Congress make it clear that the employment discrimination laws . . . not only be enforced, but that the appropriations for them be greatly increased."); S. REP. NO. 97-485, at 120 (1982) (statement of Sen. Kennedy) ("Part of the incentive to hire undocumented aliens is their willingness to accept substandard wages and working conditions. We must therefore intensify the enforcement of existing laws, including . . . Title VII of the Civil Rights Act."); 119 CONG. REC. 14,201 (1973) (statement of Rep. Roybal) (expressing the sentiment that the EEOC was already overburdened as it was).

84. See, e.g., H.R. REP. NO. 99-682, pt. 2, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 ("[Title VII leaves] unprotected those employees employed by employers of less than 15 employees. Those falling within this class would be denied protection from any act of discrimination based on alienage or national origin."); H.R. REP. NO. 97-890, pt. 1, at 222 (1982) ("[E]xisting federal anti-discrimination agencies either lack jurisdiction, in many cases, or are incapable of handling the increased workload that would result from this legislation.")

85. See, e.g., SCIRP SUPPLEMENT TO THE FINAL REPORT, *supra* note 55, at 573 (describing views that Title VII could not adequately protect against citizenship status discrimination).

86. See, e.g., *Hearings Before the Subcomm. No. 1, supra* note 60, at 84 (statement of Rep. Roybal) ("The burden [to prove discrimination] is impossible because the Civil Rights Act only prohibits discrimination based on national origin but not on citizenship."); H.R. REP. NO. 99-682, pt. 2, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5762 ("Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so." (citation omitted)).

IRCA's legislative history further brings to light Congress's promotion of a public education campaign to protect against discrimination.<sup>87</sup> Moreover, the legislative history, similar to the enacted legislation as described in Part I, suggests that lawmakers wanted immigration agents, along with other federal agencies, to engage in education about civil rights protections. For instance, in 1973, Representative Jonathan Bingham stated:

Government agencies have a duty to remind employers that [T]itle VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of national origin, and the agencies must [e]nsure that the implementation of [workplace-based immigration enforcement] does not cause job discrimination against legitimate employees of the affected ethnic and minority groups.<sup>88</sup>

Similarly, in 1975, lawmakers expected "the Attorney General to fully inform employers as to the various provisions contained in [the proposed legislation] and to explain to them their respective responsibilities under this legislation and Title VII."<sup>89</sup>

As this review of IRCA's legislative history demonstrates, civil rights protections against employment discrimination are not "secondary" to IRCA's workplace-based immigration enforcement scheme. In fact, one lawmaker even went so far as to describe IRCA's antidiscrimination provision as "one of the most far-reaching and important civil rights provisions in recent history."<sup>90</sup> Employee civil rights became part of the heart of the legislation, at least in part, because employment discrimination was "the principal objection raised to employer sanctions" during Congress's deliberations.<sup>91</sup> In 1986, Senator Joseph Biden referred to the prohibitions against citizenship and national origin discrimination,

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87. See, e.g., H.R. REP. NO. 97-890, pt. 1, at 43 (1982) (referencing "an extensive public education program" as part of the legislation's efforts to "minimize" the "possibility of national origins employment discrimination").

88. 119 CONG. REC. 14,192 (1973) (statement of Rep. Bingham); see also H.R. REP. NO. 93-108, at 13 (1974) (stating that "the Committee anticipates that INS officials will fully advise employers as to their respective responsibilities under Title VII and this bill").

89. H.R. REP. NO. 94-506, at 16 (1975); see also *S. 2252: Alien Adjustment and Employment Act of 1977, Part 2: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 7 (1978) (statement of Harry Surface, Agent, U.S. Immigration and Naturalization Serv.) ("My own personal belief is that, through a cooperative effort between employers and the Immigration and Naturalization Service, [workplace-based immigration enforcement] can be done without discriminating against persons of Latin or Hispanic History."); H.R. REP. NO. 94-506, at 16 (1975) ("It is the expectation of this Committee that [workplace-based immigration enforcement] be implemented in a manner which prevents job discrimination against ethnic and minority groups, and the Committee intends to closely scrutinize the administration of this section . . . by the Attorney General.").

90. 132 CONG. REC. 31,632 (1986) (statement of Rep. Rodino); see also *id.* ("Antidiscrimination legislation of this nature is unprecedented in that it is based upon anticipated discrimination, rather than [a] historical pattern of past discrimination.").

91. 130 CONG. REC. 15,710 (1984) (statement of Rep. Fish); see also 132 CONG. REC. 29,984 (1986) (statement of Rep. Rodino) (referring to discrimination concerns and to discrimination protections as "an essential element of employer sanctions").

as well as the Special Counsel, as “absolutely essential to the success of this experiment.”<sup>92</sup> Nonetheless, while IRCA’s civil rights protections may have been viewed as far-reaching by some, to others they were merely sufficient enough to support the overall legislation, which included an extensive legalization program.<sup>93</sup> Still others felt that the bill, even with the enhanced protections against discrimination that were added over the course of lengthy legislative consideration, would likely result in invidious employment discrimination.<sup>94</sup>

### III. THE EEOC AS CIVIL RIGHTS MONITOR

It is imperative to give the EEOC an ex ante civil rights monitoring and educational role. As Parts I and II illuminated, it would accord with Congress’s intent to incorporate civil rights protections into the heart of IRCA’s workplace-based immigration enforcement scheme. Congress intended IRCA to both reduce illegal immigration *and* to preserve employees’ civil rights.<sup>95</sup> Furthermore, the EEOC’s new role would be consistent with Congress’s intent to include the EEOC and Title VII in various forms of interagency coordination and public education to protect against employment discrimination.

The inadequacies of current interagency coordination between ICE and the DOL and the monitoring solution that Professor Lee constructs are similarly applicable to the EEOC context. Even though the EEOC and ICE are, as Professor Lee portrays, “empowered to jointly regulate the workplace on relatively equal terms,”<sup>96</sup> there has been an “asymmetrical” relationship between these agencies. Much of this asymmetry is attributable to the informational challenges that Professor Lee describes.<sup>97</sup> Given the apparent tangle of immigration enforcement

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92. 132 CONG. REC. 33,245 (1986) (statement of Sen. Biden); *see also* H.R. REP. NO. 99-682, pt. 2, at 12 (1986), *reprinted in* 1986 U.S.C.A.N. 5757, 5761 (“It is the [Committee on Education and Labor’s] view that if there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs.”); 132 CONG. REC. 30,905 (1986) (joint explanatory statement) (“The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context.”).

93. *See, e.g.*, 132 CONG. REC. 33,234 (1986) (statement of Sen. Cranston) (expressing support for the bill but stating that it ultimately may not “deter or alleviate some of the consequences of . . . discrimination”); *id.* at 33,223 (statement of Sen. Bingaman) (stating that the amendments “strike a fairer balance between individual and national interests”); *id.* (noting the inadequate safeguards to protect against discrimination in prior bills and stating “the new version now before the Senate is a bill which this Congress should pass”).

94. *See, e.g., id.* at 33,224 (statement of Sen. Domenici) (“[M]y vote is one that says this bill will not work. I would like very much to be wrong.”); *id.* at 31,637 (statement of Rep. Roybal) (highlighting problems with protections against discrimination); *id.* at 31,635 (statement of Rep. Edwards) (expressing opposition to the bill despite enhanced protections against discrimination and stating that the bill “is an invitation to racial discrimination”).

95. *See* Stumpf & Friedman, *supra* note 19, at 136 (referring to IRCA’s “dual purpose of strengthening civil rights and increasing immigration restrictions in the labor market”).

96. Lee, *supra* note 1, at 1095.

97. *Id.* at 1101–05.

in the workplace, many employees do not have proper incentive to come forward to complain about civil rights abuses in the workplace. This is even more problematic in the EEOC context because the EEOC's enforcement scheme is completely reliant on the receipt of complaints from employees. Unlike the DOL, the EEOC cannot act in the absence of an employee complaint, even if the EEOC has reason to believe that there are major civil rights abuses occurring.<sup>98</sup>

The asymmetrical relationship between the EEOC and ICE cannot be solved through executive oversight or by giving the EEOC immigration enforcement authority, for the same reasons that Professor Lee cites in the DOL context.<sup>99</sup> Instead, ex ante interagency monitoring that includes the EEOC, coupled with existing ex post solutions, is a superior way to offset the existing asymmetry between ICE and the EEOC. The EEOC, along with the DOL, could monitor and restrict ICE's reliance on "tips" that come from retaliatory employers or disgruntled co-workers when deciding about which workplaces to target. Moreover, these labor agencies could work with civil society groups, which have close relationships with workers, to help them calculate the labor consequences of immigration enforcement activities at particular workplaces.<sup>100</sup> These kinds of ex ante approaches could reduce the "likelihood that immigration law will be co-opted" to endanger workers' rights.<sup>101</sup>

This Response Essay's close review of IRCA's text and legislative history brings an additional proposal to the forefront—an interagency public education campaign involving the EEOC. Along with its monitoring role, the EEOC should play a role in disseminating information to employees about their civil rights in the context of workplace-based immigration enforcement. Moreover, the EEOC and other labor agencies should coordinate educational efforts with ICE so that ICE no longer engages in "misinformation" campaigns that confuse employees about the relationship between immigration enforcement and the enforcement of employee rights.<sup>102</sup> Ideally, a robust interagency educational campaign would help facilitate claims-making by consistently assuring employees that their assertion of rights in the workplace would not lead to their deportation or other immigration consequences. As part of the solution, it is essential to directly address this informational gap. Employees themselves will continue to be key private enforcers of workplace rights, given limited agency resources and the "logic" of complaint-driven workplace regulation.<sup>103</sup>

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98. See 42 U.S.C. § 2000e-5 (2006).

99. Lee, *supra* note 1, at 1105–13.

100. See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 553, 560–62 (2010) (describing proposal to give workers' organizations heightened role in workplace law enforcement).

101. Lee, *supra* note 1, at 1118; see also Stumpf & Friedman, *supra* note 19, at 146 (stating that government-initiated regulation in the civil rights context "is an appropriate and necessary response to the barriers to private enforcement").

102. Lee, *supra* note 1, at 1092, 1100, 1122–23; see also *id.* at 1100–05 (describing "information-related challenges" that labor agencies face).

103. See Fine & Gordon, *supra* note 100, at 556 (describing current "logic" of DOL enforcement as reliant on "complaint-driven investigation[s]"); see also Griffith,

The EEOC's ex ante civil rights monitoring and educational role could help address the early trepidations expressed by some lawmakers that workplace-based immigration enforcement can push immigrant workers further into the shadows. As one representative stated during the first year that Congress considered workplace-based immigration enforcement, employers sometimes "threaten to expose the [unauthorized immigrant] to immigration officials" if the immigrant complains about working conditions.<sup>104</sup> And, as Senator Kennedy stated in 1982, the threat of workplace raids by immigration authorities can "spread unnecessary fear and alarm in the Hispanic community."<sup>105</sup> The EEOC, and other labor agencies, could help to ameliorate these dynamics.

Some may wonder why my civil rights monitoring proposal focuses primarily on the EEOC, rather than the Special Counsel. Undoubtedly, the Special Counsel should continue its ongoing efforts and is well-positioned to play a supportive role in the proposed civil rights monitoring and educational framework. The EEOC, however, is better situated to spearhead the proposed efforts for a number of reasons. Title VII and the EEOC, for instance, provide a broader scope of civil rights protections than IRCA and the Special Counsel. Title VII protects employees from employment discrimination based on national origin, race, color, ethnicity, sex, or religion. IRCA covers only national origin and citizenship status discrimination. While Title VII prohibits employers from discriminatory acts that affect employees' conditions of employment,<sup>106</sup> IRCA more narrowly prohibits employers' discriminatory hiring, termination, and recruitment practices.<sup>107</sup> Perhaps most importantly, Title VII's civil rights protections extend to unauthorized employees and IRCA's protections do not.<sup>108</sup> Thus, the EEOC is in a stronger position to take the lead in a new civil rights monitoring and education regime. The EEOC's new duties would be consistent with its goal "to make sure that immigration law, immigration status, and immigration officers are not weapons in the arsenal of an unscrupulous employer, and that a worker can pursue her federal civil rights claims."<sup>109</sup>

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*supra* note 5, at 431–36 (showing FLSA and Title VII's reliance on private employee complaints through statutory text, legislative history, and Supreme Court precedent); Stumpf & Friedman, *supra* note 19, at 142 (referring to unauthorized workers' "lack of information and resources, and high turnover" rates as challenges to complaint-driven regulation).

104. 118 CONG. REC. 30,154 (1972) (statement of Rep. Rodino).

105. S. REP. NO. 97-485, at 119 (1982) (statement of Sen. Kennedy).

106. 42 U.S.C. § 2000e-2(a) (2006).

107. *See* 8 U.S.C. § 1324b(a)(1) (2006).

108. *See id.* (explicitly excluding "unauthorized aliens" from IRCA's discrimination protections); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1075 (9th Cir. 2004) (concluding that "immigration status [is not] relevant to the determination whether a defendant has committed national origin discrimination under Title VII"). There are other differences as well. Unlike Title VII, for instance, IRCA's employment discrimination protections require a showing of intent. 28 C.F.R. § 44.200(a) (2011). Moreover, unlike Title VII's protections, IRCA's protections are adjudicated in administrative (rather than federal) courts. 8 U.S.C. § 1324b(e) (2006).

109. Tamayo, *supra* note 22, at 269 (referring to the EEOC's view "as a whole").

### CONCLUSION

Professor Lee's article, *Monitoring Immigration Enforcement*, rightfully encourages us to turn our attention to the agencies that are, as well as the agencies that should be, involved in workplace-based immigration enforcement. He illuminates that ICE currently views labor goals as secondary to its "primary mission of detaining and removing noncitizens," and too often fails to properly consider the workplace rights of employees.<sup>110</sup> To respond to this problem, he emphasizes the need to involve the DOL and other labor agencies in ex ante monitoring of ICE's workplace enforcement actions.

My aim in this Response Essay has been twofold. First, I argue that ICE must change its view of its mission to accord with congressional intent. As Parts I and II explained, the preservation of employee civil rights in the face of workplace-based immigration enforcement is not secondary to IRCA's workplace-based immigration enforcement scheme. Instead, employee civil rights are—and therefore should be consistently viewed as—fundamental aspects of IRCA.

Second, I contend that the EEOC should become an ex ante civil rights monitor and educator in the workplace-based immigration enforcement context. Through statutory interpretation and an extensive review of legislative history, this Response Essay demonstrated that Congress intended Title VII and the EEOC to be folded into IRCA's civil rights agenda. Given the sometimes contradictory impulses between the vigorous enforcement of exclusionary aspects of immigration law and civil rights enforcement, the EEOC should help to ensure that ICE adequately considers the employee civil rights consequences of its workplace-based immigration enforcement actions. Moreover, given existing informational gaps and other inhibitors of civil rights enforcement, the EEOC should engage in extensive employee education to offset immigrant employees' fear of coming forward when they experience sexual harassment, assault, or other forms of discrimination in the workplace.

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110. Lee, *supra* note 1, at 1094.