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WRONGFUL DISCHARGE: THE USE OF FEDERAL LAW AS A SOURCE OF PUBLIC POLICY

Nancy Modesitt*

I. INTRODUCTION

Since the 1970s, states have increasingly recognized claims brought by employees who allege that their employment was terminated in violation of public policy.¹ Indeed, as of 2004, the judiciary of forty-five states had recognized such claims.² The change in the way judges have viewed wrongful termination claims has created a significant increase in potential claims that employees can bring if they are terminated, and the pros and cons of this expansion of claims have been much discussed by legal scholars.³

The key focus of most legal scholars has been on the judicial recognition of claims based on a policy embodied by state law.⁴ Relatively

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1. See DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 11, 95 (2d ed. 2004) [hereinafter *WHISTLEBLOWING*] (noting the expansion of whistleblower protections in the 1970s and 1980s).

2. *Id.* at 95.

3. Cf. Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491, 517 (2001) (“The employment at-will doctrine has been under attack for over thirty years. Since Lawrence E. Blades’ 1967 article criticizing the rule and calling for its replacement with a just cause standard, the rule has been subject to intense debate.”).

4. See, e.g., Benjamin S. Haley, Note, *Porterfield v. Mascari II, Inc.: “A Clear Mandate of Public Policy” Remains Unclear in Maryland’s Wrongful Discharge Jurisprudence*, 63 MD. L. REV. 605 (2004) (reviewing a case where the discharge of an at-will employee who wanted to consult an attorney was upheld as non-violative of public policy); Michael L. Matula, *Twenty Years After Murphy v. City of Topeka: An Overview of Kansas Retaliatory and Public Policy Wrongful Discharge Law*, 72 J. KAN. B. ASS’N 20 (Feb. 2003) (discussing Kansas’ public policy exception to the employment at-will doctrine); James W. Riner, et al., *Wrongful Discharge of At-Will Employees in Missouri*, 59 J. MO. B. 34 (Jan.–Feb. 2003) (discussing Missouri’s adoption of a public policy exception

little attention has been paid to whether judges have recognized claims based on federal, rather than state law.⁵ This lack of attention is particularly fascinating because the sheer volume of federal statutes and regulations suggests that judicial recognition of federal law as a basis for a public policy claim could vastly increase the protections available to employees. It also has the potential to raise thorny legal issues such as the potential preemption of state common law by the federal law cited as the source of public policy.⁶ But perhaps most problematic, and least discussed, are the problems associated with judicial recognition of state common law wrongful discharge claims which rely upon federal law as a source of public policy yet which are not subject to the limitations written into the federal law.⁷

This Article focuses on this neglected area of the law. In Part II, this Article follows the development of the jurisprudence regarding whether states recognize federal law as a basis for a state law claim for wrongful termination. Part III analyzes and critiques the three main approaches courts have taken in evaluating the use of federal law as a source of public policy. Part IV proposes an alternative framework for determining whether a federal law can be the source of public policy for a claim for wrongful discharge in violation of public policy.

to the at-will employment doctrine); Richard A. Morris, Note, *Smith v. Bates Technical College: Washington Extends the Availability of the Tort of Wrongful Discharge in Violation of Public Policy, But a Little Too Far: Employees Should Still Exhaust Other Remedies*, 25 SEATTLE U.L. REV. 677 (2002) (discussing a case where the state's highest court held that tort claims of wrongful termination as a violation of public policy is in fact available to all employees, at will or otherwise); J. Michael McGuinness, *North Carolina's Developing Public Policy Wrongful Discharge Doctrine in the New Millennium: Basic Principles, Causation and Proof of Improper Motive*, 23 CAMPBELL L. REV. 203 (2001) (reviewing the development of the public policy doctrine in North Carolina's wrongful termination cases).

5. See, e.g., Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 538-44 (2004) (examining trends in the tort of wrongful discharge in violation public policy but ignoring the recognition of claims based on federal law).

6. See Part IV *infra* (discussing the potential for preemption).

7. *Id.* (noting, for example, the difficulty in Congress responding to state common law judicial decisions that Congress believes are improper).

II. THE RECOGNITION OF FEDERAL LAW AS THE PUBLIC POLICY OF A STATE

A. *The Claim for Wrongful Discharge in Violation of Public Policy—Background*

There are several types of claims for wrongful discharge.⁸ These include claims based on an employer firing an employee in violation of statutory provisions⁹ as well as claims based on the common law.¹⁰ This Article addresses the latter; specifically, claims for wrongful discharge in violation of public policy. As its name suggests, a common law claim for wrongful discharge in violation of public policy involves an employee who is terminated by the employer, with the employee claiming that the termination violates public policy. A common example of this type of situation is the employer who fires an employee because the employee filed a claim for workers' compensation.¹¹ Because some workers' compensation statutes do not expressly prohibit an employer from firing an employee for filing a claim, courts have allowed employees to bring claims for wrongful discharge under the theory that the workers' compensation statute establishes a policy against employer retaliation.¹²

As one might expect, a common question that arises is what constitutes "public policy" such that a court will recognize a claim for wrongful discharge. Courts have taken widely divergent positions with

8. See generally *id.* at 526 (characterizing wrongful discharge laws as existing on a "structural continuum of conduct").

9. For example, firing an employee who complains about sex discrimination in the workplace violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2000).

10. See David L. Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 646 n.4 (1996) ("[T]hree primary common law doctrines have been used to challenge termination decisions . . . of employers: the public policy, implied contract, and covenant of good faith and fair dealing doctrines.").

11. See Lawrence L. Summers, *Wrongful Discharge: Contract, Public Policy, and Tort Claims*, PLI Litig. & Admin. Practice Course, Handbook Series, No. 663, at 75 (2001) (providing a thorough list of cases which have recognized a public policy tort where an employee is terminated for filing a worker's compensation claim).

12. See, e.g., *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984) (reversing the lower court's finding of a public policy exception to the at-will employment rule); *Murphy v. Topeka*, 630 P.2d 186 (Kan. Ct. App. 1981) (reversing the lower court's dismissal of an action against associated officers, but instructing that should the ex-employee prevail, punitive damages should not be awarded); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (holding that a plaintiff alleging a wrongful retaliatory termination due to having filed a workers' compensation claim has stated a claim upon which relief can be granted).

regard to defining public policy.¹³ Some limitations placed by courts include requiring that the public policy be “clear and compelling,”¹⁴ “important and clearly articulated,”¹⁵ or “involve[] a matter of public concern.”¹⁶ There is also variance among jurisdictions as to what the sources of public policy can be. Some courts have limited the source of public policy to that which is “articulated by constitutional, statutory, or decisional law,”¹⁷ while others have broadened it to include “legislation; administrative rules, regulations or decisions; and judicial decisions,” as well as “a professional code of ethics” in certain circumstances.¹⁸

Even when courts have articulated such parameters, questions remain, including that posed by this Article: How should courts treat federal law when deciding whether it is the public policy of the state?

B. Development of the Law in State Courts

In 1980, California became the first state to recognize federal law as being the public policy of a state on which a wrongful discharge tort could be based.¹⁹ The California Supreme Court determined that the plaintiff had stated a tort claim for wrongful discharge where he alleged that his employer fired him for refusing to engage in price fixing in violation of both federal law (the Sherman Antitrust Act)²⁰ and state law (the Cartwright Act).²¹ The court, focused on whether a wrongful discharge claim sounded in tort or contract, allowed the claim to go forward, implicitly recognizing that federal law could provide a policy on which state wrongful discharge claims could be based.²² The court, however, did not explicitly state this, nor provide guidance on what limitations, if any,

13. See Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1045–46 (2004) (discussing the lack of uniformity in state law regarding the public policy exception).

14. *Burk v. K-Mart Corp.*, 770 P.2d 24, 29 (Ok. 1989).

15. *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731, 737 (Conn. 2002).

16. *Edmondson v. Shearer Lumber Products*, 75 P.3d 733, 738 (Idaho 2003).

17. See, e.g., *Burk*, 770 P.2d at 28 (adopting this more limited approach in Oklahoma).

18. See, e.g., *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (adopting the broader approach in New Jersey). See also Clyde W. Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMP. RTS. & EMP. POL'Y J. 453, 462 (2001) (noting that “contrary to common judicial practices and the nature of the common law, the courts generally insist that they cannot make public policy”).

19. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

20. See 15 U.S.C. § 1 *et seq.* (providing for penalties in monopolies and other restraints of trade).

21. See Cal. Bus. & Prof. Code § 16720 *et seq.* (providing for penalties for restraints of trade in California).

22. See *Tameny*, 610 P.2d at 1335–37 (stating that employees cannot be rightfully terminated for refusing to commit criminal acts).

would be placed on using federal law as the basis for a wrongful discharge claim.²³ Not having been explicitly addressed by the court, few scholars at the time noted the potential expansion of the tort by allowing federal law to articulate the public policy of a state.

The lack of substantive discussion in this initial recognition of federal law as the basis for a claim was not unique. In *Boyle v. Vista Eyewear, Inc.*,²⁴ the Missouri Court of Appeals recognized a wrongful discharge claim where the public policy relied upon by the plaintiff was found in regulations promulgated by the federal Food and Drug Administration. This recognition occurred without any substantive discussion of the use of federal law as the basis for the claim; instead, the court merely stated that “the federal regulation in question, 21 C.F.R. § 801.410, is a clear mandate of public policy.”²⁵ The only justification the court provided for finding that federal law was a mandate of public policy was that the federal Food and Drug Administration was the agency charged with overseeing the manufacture of eyeglasses, which was the business of the employer in the case.²⁶ In summing up its decision, the court broadly articulated the rule of what could be a source of public policy, noting that “[t]he employer is bound to know the public policies of the state *and nation* as expressed in their constitutions, statutes, judicial decisions and administrative regulations”²⁷

Other courts addressed the issue similarly. The Texas Supreme Court, in a decision the same year as *Boyle*, also failed to discuss why federal law could be the basis for a state law claim when it defined public policy as being “the laws of this state and the United States which carry criminal penalties.”²⁸ Similarly, the Supreme Court of Washington stated baldly that “the Foreign Corrupt Practices Act [was] a clear expression of public policy.”²⁹

This approach of unlimited acceptance of federal law as stating the public policy of state would not last, and the first indications of a change in approach came two years later, in Illinois. In *Pratt v. Caterpillar Tractor Co.*,³⁰ the Illinois appellate Court explicitly stated that federal law would not always be considered a source of state public policy. Instead, the federal law had to have some impact on the state’s citizens; statutes that articulated “exclusively Federal concerns,” such as the Foreign Corrupt

23. *See id.*

24. 700 S.W.2d 859 (Mo. App. 1985).

25. *Id.* at 876.

26. *Id.*

27. *Id.* at 877 (emphasis added).

28. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

29. *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1090 (Wash. 1984).

30. 500 N.E.2d 1001, 1003 (Ill. App. 1987).

Practices Act and Export Administration Act, would not support a claim.³¹ A New Jersey appellate court reached a similar result in *Cerracchio v. Alden Leeds, Inc.*³² when it grappled with the question of whether a claim for wrongful discharge would be recognized where the source of the public policy was the federal Occupational Safety and Health Act (OSHA). The court determined that OSHA could be the basis of the claim because “there is a strong public policy in New Jersey favoring safety in the workplace.”³³ The court explained its decision by noting that the policy was stated in New Jersey’s own statutes.³⁴

However, courts did not rush to follow the analysis of *Pratt* or *Cerracchio*. It was not until 1992, in *Peterson v. Browning*, that Utah became the next state to question the acceptance of federal law as being fungible with state law.³⁵ In response to a certified question from the U.S. District Court for the District of Utah, the Utah Supreme Court held that “[t]o provide the basis for an action under the public policy exception, a violation of a state or federal law must contravene the clear and substantial public policy of the state of Utah.”³⁶ The court noted the existence of many “ancient, anachronistic, and unenforced” federal laws, and thus declined to wholesale adopt federal criminal law (as well as other states’ laws) as stating Utah’s public policy.³⁷ Instead, although it did not cite *Pratt* or *Cerracchio*, it followed their approach in stating that federal law can serve as the basis for a claim where the plaintiff alleges an employer violates a federal law, and the violation “contravenes the clear and substantial public policies of the state of Utah.”³⁸

Up to the time of *Pratt* and *Cerracchio*, then, courts had simply been treating federal law as fungible with state law in analyzing wrongful discharges in violation of public policy claims.³⁹ Published decisions did not even articulate the question of whether federal law and state law should

31. *Id.*

32. 538 A.2d 1292 (N.J. Super. Ct. App. Div. 1988).

33. *Id.* at 1298.

34. *Id.*

35. 832 P.2d 1280 (Utah 1992).

36. *Id.* at 1283.

37. *Id.*

38. *Id.*

39. *See, e.g., Cloutier v. Great Atl. & Pac. Tea Co., Inc.*, 436 A.2d 1140, 1145 (N.H. 1981) (holding that the public policy of protecting employees from harm existed “with or without OSHA”). This is not to suggest that courts had been blindly accepting any federal statute as the basis for a claim. Rather, courts were conducting their standard analysis as to whether the laws in question were of a type that stated public policy *without* focusing on the fact that the laws were federal, not state. *See, e.g., Montoya v. Local Union III of Int’l Bhd. of Elec. Workers*, 755 P.2d 1221 (Colo. Ct. App. 1988) (holding that OSHA did not provide a basis for a public policy claim, in part because the statute was too broad and general in nature).

be treated the same. Even after *Pratt*, many courts still did not focus on whether federal law should be treated the same as state law as a basis for public policy.⁴⁰ As late as 1992, when *Peterson* was decided, many courts were engaging in a cursory discussion of whether federal law should be treated the same as state law.⁴¹

In addition to Illinois and Utah, Ohio, Washington, North Carolina, Oklahoma, Pennsylvania, and Kansas have all articulated limitations on when federal law can be the public policy of a state.⁴² While some of these jurisdictions have explicitly outlined the requirements of proving that federal law is a state's public policy,⁴³ others have not stated what would be required but suggested that merely citing federal law would not be enough.⁴⁴ For example, in Ohio, the approach seems similar to that of Utah but lacks the explicit statement of the rule.⁴⁵ In *Kulch*, the court recognized OSHA's anti-retaliation provision as being public policy, noting that "Ohio's public policy is clearly in keeping with the laudable objectives of

40. See, e.g., *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (finding that 18 U.S.C. § 1001 supported a claim for wrongful discharge, yet not addressing whether the analysis for federal statutes differs from that for state statutes); *Luethans v. Washington Univ.*, 838 S.W.2d 117, 120 (Mo. 1992) (holding that the employee stated a claim for wrongful discharge based on the federal Animal Welfare Act, 7 U.S.C. § 2143, and 9 C.F.R. § 2.32(c)(4)); *Petersimes v. Crane Co.*, 835 S.W.2d 514, 517 (Mo. Ct. App. 1992) (holding that employee stated a claim for wrongful discharge based on 18 U.S.C. § 1001).

41. See *Sargent v. Cent. Nat'l Bank & Trust Co. of Enid*, 809 P.2d 1298, 1300-01 (Okla. 1991) (finding that the employee stated a wrongful discharge claim where he articulated several state statutes as well as 18 U.S.C. § 1005 as stating public policy); *Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445 (N.C. 1989) (allowing a claim where the plaintiff cited U.S. Department of Transportation regulations as the source of public policy); see also *Smuck v. Nat'l Mgmt. Corp.*, 540 N.W.2d 669 (Iowa Ct. App. 1995) (holding that, at least on first impression, violation of federal law may serve as public policy exemption in the context of wrongful termination).

42. *Hysten v. Burlington N. Santa Fe Ry.*, 85 P.3d 1183 (Kan. 2004); *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997); *Sedlacek v. Hillis*, 36 P.3d 1014 (Wash. 2001); *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 288 (Pa. 2000); *Griffin v. Mullinix*, 947 P.2d 177 (Okla. 1997).

43. See *Sedlacek*, 36 P.3d at 1021 (holding that the ADA cannot serve as the state's public policy because there is a Washington statute addressing disability discrimination, and the employee's claims are not prohibited by the Washington statute); *McLaughlin*, 750 A.2d at 288 (finding that federal regulations cannot support a wrongful discharge claim "unless of course the employee is able to articulate a particular policy within the Commonwealth that is threatened"); *Griffin*, 947 P.2d at 179 ("[A] federal statute cannot serve as an articulation of Oklahoma public policy, absent a specific Oklahoma decision, statute or constitutional provision.").

44. See *Hysten*, 85 P.3d at 1187 (finding, without establishing a test going forward, that the Federal Employers Liability Act stated Kansas public policy, based in part on the fact that its policy is "identical" to the policy embodied in the Kansas Workers Compensation Act).

45. *Kulch*, 677 N.E.2d 308 (1997).

the federal Occupational Safety and Health Act.”⁴⁶ This language used by the court in reaching its decision suggests that some link between federal law and state policy would be required for the federal law to serve as the state’s public policy.

On the other hand, other courts have been far less exacting, not requiring a link between federal law and state public policy. For example, Iowa’s first decision on the issue, which was after *Pratt and Cerracchio*, reflects a more inclusive approach toward federal law as being a source of public policy than does *Peterson*. In *Smuck v. National Management Corp.*,⁴⁷ the court ultimately held that federal law could serve as the state’s public policy, reaching its decision by citing to cases which, without discussion, had already recognized federal law based wrongful discharge claims.⁴⁸ The court also noted that its decision was grounded in its belief that “state and federal law need not be mutually exclusive,” and that “[a]ny other finding would leave many employees with the difficult decision of either breaking federal law or losing their jobs.”⁴⁹ Unlike the *Cerracchio* and *Peterson* formulations, which required linkage of federal law to a state policy, *Smuck* did not create any limitations on its decision.⁵⁰ Going one step beyond *Smuck*, in 1997, Connecticut’s Supreme Court explicitly decided that no link was required between a federal statute and state public policy in order to state a claim for wrongful discharge based on a federal criminal statute.⁵¹ In reaching its decision, the court noted that “[w]e perceive no difference between a situation in which an employee is forced to engage in conduct that may expose him to federal criminal sanctions and a situation in which an employee is forced to engage in conduct that may

46. *Id.* at 322.

47. 540 N.W.2d 669 (Iowa Ct. App. 1995).

48. *See id.* at 672 (“Although Iowa has not yet identified federal law standing alone as a source of public policy in wrongful termination cases, several other states have adopted federal law as state policy.”).

49. *Id.* at 672–73.

50. *See id.* (holding that federal law can serve as an appropriate source for state policy). Interestingly, when the issue finally made it to the New Jersey Supreme Court, that court failed to use the *Cerracchio* approach, or even note it. *D’Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305 (N.J. 1993). Instead, the court engaged in an analysis somewhat similar to that of the court in *Smuck*, listing numerous cases where federal statutes had been found to be sources of public policy, and citing approvingly the analysis of other jurisdictions, without ever expressly identifying what factors courts should consider in determining whether federal law is state public policy. *See id.* at 529–31 (determining that the Foreign Corrupt Practices Act is a valid source of state policy by virtue of the Supremacy Clause and the federal government’s plenary authority over foreign affairs). Wisconsin has also followed a similar approach to *Smuck*. *See Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 458 (Wisc. 2000) (avoiding an express requirement that federal law be linked to a state statute or policy, but noting in its decision that “Wisconsin has an interest in compliance with federal tax laws”).

51. *Faulkner v. United Technologies Corp.*, 693 A.2d 293, 297 (Conn. 1997).

expose him to state criminal sanctions.”⁵²

As the two approaches discussed above were being developed, a third approach surfaced. The final approach taken in this issue is that federal law cannot be a source of public policy. To date, no state supreme court has affirmatively held that federal law can *never* be the source of public policy. However, Virginia courts have stated that it is that state’s law, not federal law, which is the source of public policy, and implied that federal law will not be recognized as a source of public policy.⁵³

The development of this area of law has been anything but linear. Even as these explorations into whether federal and state law would be treated the same for the public policy exception were occurring, some state courts still seemed not to have identified, failing to mention any concern about federal law as a source of public policy.⁵⁴

The reason for the development of the three approaches outlined above may in part be the result of whether the discharged employee was being asked to violate federal law by his employer. In such circumstances, such as in *Smuck* and *Faulkner*, courts have been more likely to recognize federal law as stating public policy without requiring any link to state law.⁵⁵ Washington recognized this distinction in its own cases, and in *Sedlacek v. Hillis*, clarified that a link between state and federal law would be required where there is “no violation or potential violation of an enforceable law.”⁵⁶ However, this does not explain cases where the employee was asked to violate federal law yet the courts refused to adopt a broad rule recognizing federal law as a source of public policy without a link to state law.⁵⁷

52. *Id.* at 296.

53. *See* Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806 (Va. 1996) (refusing to allow a claim where the plaintiff had failed to identify “specific Virginia statutes” which were the source of public policy). *See also* Oakley v. May Dep’t Stores Co., 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (noting that Virginia does not appear to recognize federal law as a source of public policy).

54. *See, e.g.,* Holmes v. General Dynamics Corp., 22 Cal. Rptr. 2d 172 (Cal. Ct. App. 1993) (holding that a violation of the False Statements Act significantly implicates a substantial public policy); *see also* Magee v. DanSources Technical Serv., Inc., 769 A.2d 231 (Md. Ct. Spec. App. 2001) (holding that 18 U.S.C. § 24 and § 1347 provide a source of public policy); Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147 (Mo. Ct. App. 1995) (holding that wrongful discharge violative of a federal regulation can give rise to a narrow public policy exception to the at-will employment doctrine); Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288 (Or. Ct. App. 1994) (holding that federal and state statutes, bank rules, and common law principles protecting customer information against disclosure by banks served as basis for public policy claim).

55. *See Faulkner*, 693 A.2d at 296 (employee alleged that he was discharged for refusing to violate 18 U.S.C. § 1031); *Smuck*, 540 N.W.2d at 672–73 (employee alleged that he was discharged for refusing to violate 18 U.S.C. § 1001).

56. *Sedlacek*, 36 P.3d at 1021.

57. *See, e.g.,* Peterson v. Browning, 832 P.2d 1280 (Utah 1992) (requiring a link where employee claimed to be terminated for refusing to engage in the unlawful act of falsifying

In sum, then, there are three main approaches that state courts have taken in analyzing wrongful discharge claims where the public policy source is federal law. Some states have required that there be some link between federal law and state public policy for the claim to succeed. Other states have expressly declined to require such a link, placing federal law on the same footing as state law. Similarly, some states have not clearly addressed the issue, and it appears from the lack of discussion that federal law may well be treated the same as state law in determining whether it can be the basis for a wrongful discharge claim. On the other extreme, some courts have refused to allow any federal law to be the source of a wrongful discharge claim.

C. *Development of the Law in Federal Courts*

Because the federal courts are required to follow the lead of the state courts on this issue, one might posit they would be more sensitive than state courts to the need to determine whether federal law could articulate the state's public policy. However, federal courts were even less attuned than state courts to the possibility that states might not wholesale adopt federal law as comparable to their own laws for public policy purposes. Like state courts, for years most federal courts that addressed the issue failed to clearly address whether federal law is fungible with state law in claims for wrongful discharge in violation of public policy.⁵⁸ There was, however, one early case that did analyze the issue. In 1982, the U.S. District Court for the District of Maryland became the first federal court to determine whether federal law could serve as the state's public policy.⁵⁹ In *Adler v. American Standard Corp.*, the court held that an employee stated a claim for wrongful discharge based on the employer's alleged violation of federal tax laws.⁶⁰ While not explicitly establishing a test to determine when federal law articulates the state's public policy, the court focused on

tax documents).

58. See, e.g., *Norris v. Cumberman's Mut. Cas. Co.*, 881 F.2d 1144 (1st Cir. 1989) (allowing wrongful discharge claim under Massachusetts law based on the Energy Reorganization Act); *Radwan v. Beecham Laboratories*, 850 F.2d 147 (3d Cir. 1988) (opining that the state supreme court would recognize a public policy even though it was based on federal law, but recognizing that the termination violated state public policy anyway).

59. See *Adler v. Am. Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982) (holding that under Maryland law, federal law may be the source of public policy). One other federal court had previously allowed a claim based on federal law but did not directly address under what conditions federal law should be allowed to be the source of public policy for a wrongful discharge claim. See *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (recognizing the Clayton Act as a basis for a state claim of wrongful discharge arising from alleged antitrust violations).

60. *Adler*, 538 F. Supp. at 580.

two key points: (1) not to allow federal law to be Maryland's public policy would result in "the State of Maryland [closing] its eyes and, as a matter of policy, not [being] concerned with violations of federal law";⁶¹ and (2) because Maryland tax returns are heavily based on federal tax returns, Maryland would be harmed by federal tax evasion.⁶² The second point raised by the court in *Adler* is the first hint at the test ultimately expressed in *Pratt*, *Cerracchio*, and *Peterson*: that the federal law must be linked to some state interest or policy.

Even though *Adler* identified the issue clearly and began the process of establishing the standards for when federal law articulates the public policy of the state, it was years before other federal courts addressed the issue directly. Like many state courts, some federal courts appeared to assume that federal law was fungible with state law.⁶³ Meanwhile, other federal courts grappled with the related question of whether the state wrongful discharge claim was preempted by the federal statute that the plaintiff identified as being one of, if not the, source of public policy.⁶⁴ And, on occasion, some courts addressed preemption explicitly while still failing to articulate standards for when federal law could serve as the public policy of the state.⁶⁵

Interestingly, it took federal courts longer than state courts to realize that states might not simply want to treat federal and state law as fungible

61. *Id.* at 579.

62. *See id.* at 580 (noting the adverse effect of federal tax evasion on the state of Maryland).

63. *See, e.g.,* *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (holding that the plaintiff stated a claim under Pennsylvania law for wrongful discharge, based on the public policy articulated in both the federal and state constitutional provisions protecting freedom of association); *Buttell v. Am. Podiatric Medical Ass'n*, 700 F. Supp. 592 (D.D.C. 1988) (allowing wrongful discharge claim under District of Columbia law, based on the public policy articulated in the Age Discrimination in Employment Act); *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982) (holding that the plaintiff stated a claim under New York law for wrongful discharge, based on the public policy articulated in the National Labor Relations Act, 29 U.S.C. § 158(b)(1)). *But see* *Rachford v. Evergreen Intern. Airlines, Inc.*, 596 F. Supp. 384, 385 (N.D. Ill. 1984) (refusing to allow claim based on federal law).

64. *See, e.g.,* *Norris v. Lumberman's Mutual Cas. Co.*, 881 F.2d 1144 (1st Cir. 1989) (holding that the Energy Reorganization Act does not preempt a state claim for wrongful discharge in violation of public policy); *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985) (finding that ERISA preempts state wrongful discharge in violation of public policy claim); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1981) (holding that the Age Discrimination in Employment Act does not preempt state wrongful discharge in violation of public policy claim).

65. *See* *Hines v. Elf Atochem N. Am., Inc.*, 813 F. Supp. 550 (W.D. Ky. 1993) (holding that OSHA can serve as public policy of Kentucky, but that it preempts a state wrongful discharge claim); *Sorge v. Wright's Knitwear Corp.* 832 F. Supp. 118 (E.D. Pa. 1993) (holding that federal law (OSHA) can serve as public policy of Pennsylvania, and that OSHA does not preempt a state claim for wrongful discharge).

in terms of whether federal law could serve as the public policy of the state.⁶⁶ While the *Adler* court recognized in 1982 that there might be a question of when federal law could serve as the public policy of a state, only a handful of federal courts even acknowledged this concern in the decade following *Adler*.⁶⁷ It was years later when a few federal courts decided that federal law was not fungible with state law, and these courts reached their decisions because there were strong indications in the state supreme court's prior decisions that the court would limit public policy sources to state law.⁶⁸ These cases were *not* circumstances of federal courts conducting an independent, first impression analysis of whether it would be proper for federal law to serve as state public policy. Rather, they were courts bound to follow the analysis that the state courts previously had established, or where the state's analysis was not clearly established, there were at least hints that the state would not treat federal law the same as state law in determining whether the public policy exception would apply.⁶⁹

Despite federal courts' apparent initial assurance that states would wholesale adopt federal law as the public policy of the states, after state courts began indicating that there were limits on the use of federal law to support wrongful discharge claims, federal courts slowly began recognizing

66. While some states articulated concern over this issue as early as 1987, federal courts were not acknowledging this concern even into the 1990s. *Compare* *Pratt v. Caterpillar Tractor Co.*, 506 N.E.2d 959, 959 (Ill. App. 1987) (allowing leave to appeal in order to determine "the extent to which statements of public policy by the federal government are cognizable in State courts and protected by civil actions for retaliatory discharge") with *Hanson v. Gichner Systems Group, Inc.*, 831 F. Supp. 403 (M.D. Pa. 1993) (noting that federalism imposes duties on states to respect federal law, and that it is in states' citizens' interests to enforce federal law), and *Hutson v. Analytic Scis. Corp.*, 860 F. Supp. 6 (D. Mass. 1994) (holding that a wrongful discharge claim can be based solely on federal law, and noting a "lack of contrary authority" to the proposition).

67. *See Hanson*, 831 F. Supp. 403, 406 (allowing claims based on federal law despite employer's assertion that only Pennsylvania law could be source of public policy, and noting that the doctrine of federalism imposes some duties on the states); *Hutson*, 860 F. Supp. 6 (analyzing cases that allowed federal law to be the source of public policy and concluding that the Massachusetts Supreme Judicial Court would "approve consideration of federal law as a potential source" of public policy).

68. *See McKenzie v. Renberg's, Inc.*, 94 F.3d 1478, 1487 (10th Cir. 1996) (stating that the plaintiff could prevail only by showing that Oklahoma had "a clearly established public policy regarding maximum work hours and overtime pay"); *see also* *Richmond v. Oneok, Inc.*, 120 F.3d 205, 210 (10th Cir. 1997) (citing *McKenzie*, but not Oklahoma court decisions, as the basis for its decision); *McCarthy v. Texas Instruments, Inc.*, 999 F. Supp. 823, 829 (E.D. Va. 1998) (limiting the source of state public policy to state statutes); *Oakley v. May Dept. Stores Co.*, 17 F. Supp. 2d 533, 535-36 (E.D. Va. 1998) (holding that Virginia law does not recognize Title VII as a basis for wrongful discharge claims).

69. For example, in *Buser v. Southern Food Service, Inc.*, the court determined that a wrongful discharge claim could not be based on the FMLA because North Carolina did not have a statute expressing North Carolina's policy on family and medical leave and also because prior state cases had used language suggesting that public policy must be found in state statutes. 73 F. Supp. 2d 556, 566-68 (M.D.N.C. 1999).

this concern.⁷⁰ *Szaller v. American National Red Cross*⁷¹ illustrates this shift in the federal courts. There, the court refused to allow a wrongful discharge claim under Maryland law based on federal regulations. The court based its decision on a concern that allowing federal regulations to be considered Maryland's public policy would greatly expand a state-based tort exception to the employment at will doctrine; the court felt that only a Maryland state court should make the decision to expand the reach of the tort.⁷² The *Szaller* court was unique in its discussion of the potential impact on state law—this concern was not raised by federal courts prior to this decision and has only been raised infrequently since the decision.⁷³

Overall, state and federal courts have been on parallel paths in the development of the law regarding whether federal law can be the basis for a wrongful discharge in violation of public policy claim. Federal courts have been quicker than state courts to identify the potential preemption issues involved in basing claims on federal law. However, federal courts have lagged behind state courts in recognizing limitations on the use of federal law in these claims.

70. See, e.g., *Szaller v. Am. Nat'l Red Cross*, 293 F.3d 148, 151 (4th Cir. 2002) ("Although federal law can preempt state law under the Supremacy Clause, this in no way implies that federal law automatically defines state policy, or that federal agencies can determine its parameters."); *Simas v. First Citizens' Fed. Credit Union*, 63 F. Supp. 2d 110 (D. Mass. 1999) (noting that not all federal law serves as the public policy of Massachusetts; rather, that the federal law must concern or involve Massachusetts' public policy to be the basis of a wrongful discharge claim). *Simas* is particularly fascinating because the court cites to *Hutson* for this proposition, despite the fact that the *Hutson* court appeared to embrace a far more generous role for federal law—a presumption that if the federal law articulated federal policy on which there was no state policy equivalent (for example, nuclear regulation), then federal law could be state policy. But see *Lau v. Behr Heat Transfer Systems, Inc.*, 150 F. Supp. 2d 1017 (D.S.D. 2001) (deciding, under South Dakota law, that the FMLA is analogous to the state worker's compensation statutes, and therefore allowing a claim for wrongful termination based solely on the FMLA); *Schatzman v. Martin Newark Dealership, Inc.*, 158 F. Supp. 2d 392 (D. Del. 2001) (allowing a wrongful discharge claim based on Title VII without discussing whether federal law can be the source of public policy).

71. 293 F.3d 148 (4th Cir. 2002).

72. See *id.* at 152 (denouncing the possibility of a federal court imposing "the entire Code of Federal Regulations on every Maryland employer").

73. See *id.* (reasoning that the narrow wrongful discharge exception is not intended to supplant federalism); see also *Howell v. Operations Mgmt. Int'l, Inc.*, 77 Fed. Appx. 248, 252 (5th Cir. 2003) (fearing that allowing claim based on violations of OSHA regulations would create "a significant change in Mississippi labor law" because of the potentially huge number of federal regulations that apply to employers).

III. DEFICIENCIES IN THE THREE MAIN APPROACHES TO FEDERAL LAW AS A SOURCE OF PUBLIC POLICY

As noted above, some states do allow wrongful discharge claims to be brought based on federal law, without any requirement that the plaintiff prove that federal law is consistent with the public policy of the state.⁷⁴ This position was to a large extent the default rule that courts operated under for years. In addition to courts assuming that federal law could serve as the public policy of the state, legal scholars did as well.⁷⁵ As courts began to reconsider whether federal law could be used to support state law wrongful discharge claims, some legal scholars began to note this.⁷⁶ However, most legal scholars focused on developing a framework for analyzing public policy claims generally, and in this process, paid little attention to the specific issue of relying on federal law as the source of public policy.⁷⁷ To date, legal scholars have not substantively evaluated the different approaches used by courts.

There are three main approaches that courts have taken in determining to what extent federal law can be the basis of a claim for wrongful discharge in violation of public policy: (1) treating federal law the same as state law in evaluating whether it can serve as the state's public policy; (2) requiring the plaintiff to establish some link between federal law and the state's public policy in order to base the claim on federal law; and (3)

74. See *supra* notes 37–42 and accompanying text.

75. See, e.g., Thomas L. Cluff, Jr., Comment, *In Defense of a Narrow Public Policy Exception of the Employment At Will Rule*, 16 MISS. C.L. REV. 437 (1996) (equating federal and state law as sources of public policy, without discussion); Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 507–18 (1992) (discussing the sources of public policy without distinguishing between federal and state sources); Elleta Sangrey Callahan, *The Public Policy Exception to the Employment At Will Rule Comes of Age: A Proposed Framework*, 29 AM. BUS. L.J. 481, 490–94 (1991) (explaining the sources of public policy without distinguishing between federal and state law); John E. Gardner, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491 (1989) (assuming, without discussion, that states would find that the NLRA could be the public policy supporting a wrongful discharge claim).

76. See, e.g., Robert B. Fitzpatrick, *Vox Populi: The Public Policy Tort in the Workplace*, 17th Annual ALI-ABA Course of Study, Dec. 2–4, 2004, SK033 ALI-ABA 765 (noting that the public policy exception can include federal law in some state as a source of public policy); Michael D. Moberly, *Begging the Federal Question: Removal Jurisdiction in Wrongful Discharge Claims*, 20 SEATTLE U.L. REV. 81, 87 (1996) (claiming that “the better view is that at least some federal expressions of public policy” support a wrongful discharge claim).

77. See Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000) (discussing the possibility of the employment at will doctrine eroding because of the public policy exception); Callahan, *supra* note 75, at 490–504 (proposing a four-element test for public policy claims). See also Moberly, *supra* note 76 (raising the issue whether a state law claim based on an alleged violation of federal law necessarily invokes federal question jurisdiction).

refusing to allow federal law to be the source of public policy.⁷⁸ Part II of this Article described the historical development of these approaches, and Part III will examine each approach, including the justifications provided by the courts, in detail.

A. *Treating Federal and State Law in an Identical Manner*

Commonly used rationales for treating federal law the same as state law as a source of public policy specifically, by not requiring some express link between federal and state law, include the following: (1) other courts have allowed use of federal law without a link;⁷⁹ (2) the Supremacy Clause indicates that federal law should be given equal force to state law;⁸⁰ (3) states have an interest in promoting compliance with federal law;⁸¹ and (4) not allowing equal status would force employees to make the unpalatable choice of either violating federal law or keeping their jobs.⁸²

As to the first rationale, the fact that there are cases where courts allowed claims based on federal law to go forward does not, in and of itself, provide sound analytical support for this approach. As noted in Part II, many courts did not initially consider the question of whether federal law could serve as the state's public policy. It took years for the issue of federal law supplying the public policy in a wrongful discharge claim to be recognized and addressed, and once addressed, courts have been split on whether to continue to assume that federal law is a source of state public policy for wrongful discharge claims.⁸³ This, then, does not provide a sound analytical basis for continuing to treat federal law the same as state law in analyzing whether it is the public policy of the state.

The second rationale was articulated clearly in *Brandon v. Anesthesia*

78. See Part II.A., *supra*.

79. See, e.g., *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 297–98 (Conn. 1997) (holding that neither violation of state public policy, nor explicit connection between state policy and federal statute, is necessary to establish a cause of action and noting that “[w]e find support for our conclusion in the decision of the courts of many other jurisdictions”); *D’Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305, 312–14 (N.J. 1993) (affirming the Foreign Corrupt Practices Act as a source of state public policy, for purposes of a wrongful discharge claim).

80. See, e.g., *D’Agostino*, 628 A.2d at 313 (citing approvingly the dissent in *Pratt v. Caterpillar Tractor Co.*, 506 N.E.2d 959, 959 (Ill. 1997) where Justice Simon relied on the Supremacy Clause to support his position).

81. See, e.g., *Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 578–79 (D. Md. 1982) (holding that incorporating federal public policy into state law is consistent with state sovereignty).

82. See, e.g., *Faulkner*, 693 A.2d at 296 (noting that “the effect on the employee of being forced to choose between violating the law or facing discharge by his employer is the same regardless of which sovereign criminalizes the conduct”).

83. See Part II.A., *supra*.

& Pain Management Associates,⁸⁴ where the court noted that “under the Supremacy Clause of the United States Constitution, the state is required to treat federal law on a parity with state law, and thus it is not entitled to relegate violations of federal law or policy to second-class citizenship.”⁸⁵ Under this theory, states must treat federal law as a source of public policy as they do state law. There is, however, a significant flaw with this theory. The Supremacy Clause only requires that states abide by and follow federal laws, not that they adopt the *policy* behind federal law as a potential exception to employment at will.⁸⁶ For example, the Supremacy Clause requires state courts to enforce the Family and Medical Leave Act; however, it does not require that the state implement its own, additional remedies for violations of the FMLA. Requiring states to treat federal law as an equal source of public policy would in fact create that result, by giving employees remedies not provided by the federal law. Under the Supremacy Clause, all that the state is required to do is enforce federal law as it is written, not create new remedies based on federal law simply because a state has chosen to create some wrongful discharge remedies based on state law.

The weakness in this position is seen even more clearly in the following example: suppose a state were to enact legislation providing an employee with a claim for wrongful termination if the employer fired the employee for refusing to violate certain enumerated state statutes. The Supremacy Clause would not require, and certainly no court would require, that the state include federal laws in that list. It would be entirely up to the state what laws the list would contain. The result is no different when the claim is a common law claim. Essentially, state courts are in the process of creating a list like that indicated in this example. It no more follows that state courts must add federal law to that list than it would were the state legislature to create the list. Clearly, the Supremacy Clause does not require that federal law be included in the state’s sources of public policy.

The third rationale for treating federal law the same as state law, that states have an interest in promoting the enforcement of federal law, would appear to be analytically sound. The theory is that by punishing employers (via awarding damages to employees) for breaking federal law, the states create incentives for employers to abide by federal laws. Facially, at least, it appears accurate—what state would say that it does not have such an interest?⁸⁷ The problem is that, while states may have an interest in

84. 277 F.3d 936, 942 (7th Cir. 2002).

85. *Id.* (citations omitted).

86. *See Szaller v. Am. Nat’l Red Cross*, 293 F.3d 148, 151–52 (4th Cir. 2002) (stating that federal law does not define state policy).

87. *But cf. Rachford v. Evergreen Int’l Airlines, Inc.*, 596 F. Supp. 385, 385–86 (N.D. Ill. 1984) (dismissing the plaintiff’s wrongful discharge claim because it was based on FAA

enforcing federal law by providing remedies that the federal government has not opted to provide, in using the federal law as a source of public policy for a wrongful discharge claim, states go beyond mere enforcement of the law and create remedies not intended by Congress. The potential result of this is to substantially alter the balance of interests that Congress created in the underlying federal law.⁸⁸

A second problem with the idea that states should treat federal law as they do state law is the difficulty of correcting state court decisions with which Congress disagrees. While states can alter the results of state court decisions that are seen as being particularly problematic,⁸⁹ this type of action is not always possible by Congress. First, it would require Congress to monitor thousands of state court decisions to see what federal laws were being used as sources of public policy and determine whether any of the decisions were inconsistent with that federal law. Second, it would be difficult, if not impossible, for Congress to legislatively overrule these decisions. Unlike state legislatures, which can amend state law and exclude a particular kind of state law claim, Congress cannot reach to the state level and overrule a state's determination that a federal statute is a source of public policy.⁹⁰ Instead, it is likely that the only real option would be for Congress to attempt to preempt the state law by amending the federal law to expressly prohibit state tort actions based on the law. Putting to one side the potential political repercussions of such action, even if Congress amended federal law, there are potential constitutional problems with this approach.⁹¹

regulations rather than state law, and subsequently noting that Illinois "has no interest in enforcing federal law").

88. For instance, when Congress created Title VII, it exempted from its purview employers with few employees. Thus, employees of small employers who were retaliated against for opposing their employer's discriminatory actions were not protected against discharge. However, when a state uses the policies in Title VII as the basis for a wrongful discharge claim, the state in fact subjects the small employer to potentially greater damages than larger employers covered by Title VII because Title VII contains a damages cap. This result is inconsistent with the congressional intent not to require small employers to comply with Title VII.

89. For example, in *Lockhart v. Commonw. Educ. Sys. Corp.*, 439 S.E.2d 328 (Va. 1994), the Virginia Supreme Court recognized a common law action for racial discrimination in employment based on the Virginia Human Rights Act. The Virginia legislature responded the next year by amending the Act to preclude such a claim.

90. Cf. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, § 3.9 (2d ed.) (2002) (noting that the Supreme Court has resurrected the Tenth Amendment as a tool to protect state sovereignty from federal intrusion).

91. See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003) (discussing the requirement that federal law must be constitutionally valid in order to preempt state law under the Supremacy Clause). This potential problem is likely to arise where states retain extensive power to legislate/regulate. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("Where, as here, the field which

The fourth rationale posited by courts in support of treating federal law the same as state law as a source of public policy is that if federal law is not a source of public policy, employees would be faced with the difficult decision of whether to violate federal law or refuse and potentially lose their jobs.⁹² This rationale seems particularly compelling because it appears to present a perfect Catch-22 situation if federal law is not treated the same as state law. However, despite its appeal, there is one weakness with this rationale. Under many of the statutes identified by employees as a source of public policy, there is no possibility whatsoever that the *employee* would be violating federal law.⁹³ The argument must then become more complex to be valid: employees should not be faced with a choice between helping their employers violate federal law or refusing and potentially losing their jobs.

While the impetus behind the rationale is lessened in this reworking of the argument because it recognizes that the employee may not be at risk of being prosecuted or held liable for his actions, it does suggest a valid reason for treating federal law similar to state law. Employees should not be engaging in actions that promote the violation of law. However, the countervailing concerns noted above, particularly the difficulty of “correcting” decisions that do not align with what Congress intended, suggest that caution, rather than wholesale adoption of federal law as a source of public policy, is appropriate. And, as discussed in Part III.C *infra*, there are other substantive reasons courts have noted for limiting the

Congress is said to have pre-empted has been traditionally occupied by the States . . . ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (citations omitted).

92. *Cf.* *Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 447 (N.C. 1989) (“Plaintiff allegedly was faced with the dilemma of violating that public policy and risking imprisonment, or complying with that public policy and being fired from his employment.”) (citation omitted); *Sheets v. Teddy’s Frosted Foods, Inc.*, 427 A.2d 385, 388 (Conn. 1980) (noting that if the plaintiff had not complained to his employer about the employer’s repeated violations of state food and drug laws, he might have been exposed to the “possibility of criminal prosecution”).

93. Under OSHA, a frequently cited statute in support of wrongful discharge claims, individual employees are not criminally liable for OSHA violations, or subject to civil penalties, except in very rare circumstances, such as when the employee is in fact a sole proprietor of the business. *See, e.g.*, *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (finding employees not criminally liable); *Atl. & Gulf Stevedores v. Occupational Safety & Health Review Comm’n*, 534 F.2d 541 (3d Cir. 1976) (finding employees not civilly liable). Title VII also provides an example of this. If an employer ordered an employee to call a co-worker racist names, the individual employee would not be held liable for violating Title VII; however, his employer might be. *See, e.g.*, *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995) (finding no individual liability for supervisors under Title VII); EEOC COMPLIANCE MANUAL § 2-III.B.2.b. (noting that the majority of federal appeals courts have held that supervisors are not liable under Title VII).

use of federal public policies to those that have a connection to the state and its public policies which must be weighed against this interest to determine what the proper approach should be.

B. *Requiring Some Link Between Federal Law and State Public Policy*

Some of the early cases that suggested or explicitly required that there be a link between federal law and state public policy for the federal law to be the source of public policy for a claim for wrongful discharge failed to explain why such a link would be required.⁹⁴ Later cases have provided some rationales for this approach: (1) there are many federal laws that may be outdated, or not enforced, and violations of such laws would not violate the public policy of the state;⁹⁵ (2) at times, federal law supports a broad policy that goes beyond what the state desires;⁹⁶ (3) the state legislature, not Congress, is the body vested with the power to articulate public policy for the state;⁹⁷ and (4) allowing federal law to articulate state public policy will create so many exceptions to the employment at will doctrine that the exceptions will swallow the rule.⁹⁸

As to the first rationale, while it may be accurate that there are numerous outdated and/or unenforced federal laws, the same could also be said for state laws. Indeed, this fact was recognized in the very case that provided this rationale.⁹⁹ Furthermore, if the statute were outdated or not enforced, even if it were treated the same as state law, it would likely fail to pass the requirements of being a “substantial” public policy and would not support a wrongful discharge action.¹⁰⁰ Thus, this rationale fails as a basis

94. See *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292, 1298–99 (N.J. Super. Ct. App. Div. 1988) (holding that employees in New Jersey could maintain private actions in tort or contract for retaliatory discharge “as a result of the filing of an OSHA complaint because such discharge contravenes our public policy,” but failing to explain why the initial basis for the link requirement); *Pratt v. Caterpillar Tractor Co.*, 500 N.E.2d 1001, 1003 (Ill. App. Ct. 1986) (“The common theme of our courts’ decisions sustaining a plaintiff’s cause of action for retaliatory discharge is there must be a State public policy at issue.”).

95. See *Peterson v. Browning*, 832 P.2d 1280, 1283 (Utah 1992) (stating that violations of outdated laws would not necessarily violate Utah public policy).

96. See *Sedlacek v. Hillis*, 36 P.3d 1014, 1020–21 (Wash. 2001) (holding that the ADA does not provide a mandate of Washington public policy when it conflicts with state law).

97. See *Griffin v. Mullinix*, 947 P.2d 177, 179 (Okla. 1997) (stating that the Oklahoma state legislature, not Congress, declares Oklahoma public policy).

98. See *McLaughlin v. Gastrointestinal Specialists, Inc.* 750 A.2d 283, 290 (Pa. 2000) (“If it becomes the law that an employee may bring a wrongful discharge claim pursuant to the ‘public policy’ exception . . . merely by restating a private cause of action for the violation of some federal regulation, the exception would soon swallow the rule.”).

99. See *Peterson*, 832 P.2d at 1283 (stating that outdated state laws exist).

100. A policy is “substantial” if it is of “overreaching importance to the public.” *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998). Outdated and unenforced statutes are not likely to meet this standard.

for requiring a connection between federal and state law. However, the latter three rationales do provide some justification for such a requirement.

The second rationale provides a more substantive basis for requiring a connection between state and federal law. It recognizes a basic fact of the American political system—that there are two, sister sovereigns. Whenever there are dual lawmakers, there is potential for differences to exist between state and federal law.¹⁰¹ In some conflicts between federal and state law, federal law preempts state law.¹⁰² However, in the public policy arena, differences between state and federal law may not rise to the level of a head-on conflict such that preemption would occur. In *Sedlacek v. Hillis*,¹⁰³ the Washington Supreme Court, sitting *en banc*, addressed such a difference. The federal law upon which the plaintiff relied as a source of public policy was the Americans with Disabilities Act (ADA), which prohibits retaliation against employees by virtue of their relationship with a qualified disabled employee.¹⁰⁴ State law, enacted after the ADA, did not protect such associational interests.¹⁰⁵ In the face of the difference in the two laws, the Washington Supreme Court held that federal law could not be the source of viable public policy.¹⁰⁶ This approach is justifiable by virtue of the fact that the tort itself is a creation of state law, not federal law. Thus, unless there is a conflict such that federal law preempts state law, where there are differences in policy, the state law based tort should be based on state law.¹⁰⁷

In part, the *Sedlacek* court's justification for its decision rested on the third rationale for requiring a connection between federal and state law—that primary authority for articulating the public policy of a state rests with the state legislature.¹⁰⁸ The degree to which states subscribe to the proposition that the legislature is the fundamental source of a state's public

101. See generally RESTATEMENT (SECOND) CONFLICT OF LAWS § 2 cmt. b, illus. 5–9 (2005) (describing the provisions in the U.S. Constitution which serve to limit the power of the States).

102. See, e.g., *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 214 (2004) (holding that the Employee Retirement Income Security Act preempts the Texas Health Care Liability Act).
103. 36 P.3d 1014 (Wash. 2001).

104. See 42 U.S.C. § 12112(b)(4) (2000) (prohibiting the denial of equal jobs or benefits based on associations with disabled employees).

105. See *Sedlacek*, 36 P.3d at 1020 (stating that the Washington statute did not provide protections to those associated with disabled individuals).

106. *Id.* at 1021.

107. This is essentially the opposite side of the Supremacy Clause argument: if federal law is not supreme in the sense that it preempts state law, then states are free to do as they like with the contours of their tort laws.

108. See *Sedlacek*, 36 P.3d at 1019 (“[A]doption of a previously unrecognized public policy under Washington law is better addressed to the Legislature.”); see also *Adler v. Am. Standard Corp.*, 432 A.2d 464, 472 (Md. 1981) (“[D]eclaration of public policy is normally the function of the legislative branch.”).

policy varies;¹⁰⁹ but even those states that do not limit the source of public policy to the legislature agree that the legislature is at least a significant source of the state's public policy.¹¹⁰ Since the state legislature is the primary source of public policy, its approach should be given weight over that of Congress's. In addition, given that a law could easily be passed at the federal level without a single state representative or Senator voting for it, a law passed at the state level, with a majority of that state's local representatives voting for it, is clearly the more accurate representation of what that state's public policies are.

As to the final argument for requiring a connection between federal law and the state's public policies, there is certainly truth to the proposition that unlimited allowance of federal law as the public policy of the state would expand the potential number of claims employees could bring because of the sheer volume of federal law.¹¹¹ Whether it would in fact add such substantial numbers of protections that it would swallow the employment at will rule is a far harder proposition to prove or disprove.¹¹² The limitations imposed on sources of public policy, specifically that the policy must be "clear" and "substantial," would probably operate to diminish the number of federal statutes and regulations that courts would recognize as sources of public policy.¹¹³

In sum, of the four rationales offered by courts for requiring a connection between federal and state law in order for federal law to be the public policy on which a wrongful discharge claim is based, three provide some justification for the approach.

C. *Refusing to Allow Public Policy to Be Based on Federal Law.*

As noted above, while no state has yet explicitly determined that federal law can never be the public policy source for a wrongful discharge

109. Compare *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806 (Va. 1996) (noting that source of public policy must be articulated in a state statute) with *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (1980) (stating that the source of public policy can also include regulations, judicial decisions, and in some cases, professional codes of ethics).

110. See, e.g., *Pierce*, 417 A.2d at 512 (listing the legislature, before other potential items, as a source of public policy).

111. This is particularly true if administrative regulations are considered sources of public policy, as some states have held. See, e.g., *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998) (stating that federal safety regulations are a source of public policy); *Pierce*, 417 A.2d at 512 (finding that administrative rules are a source of public policy).

112. See *Hysten v. Burlington N. Sante Fe Ry. Co.*, 108 P.3d 437, 441 (Kan. 2004) (dismissing the defendant employer's concern that "any federal law [would] become[] fodder for a state law claim" as a "parade of horrors" argument and "a perennial favorite of litigants and their counsel").

113. See *id.* (explaining several limitations imposed on sources of public policy before they may become the basis for a wrongful discharge claim).

claim, several Virginia courts have suggested that this approach will be taken.¹¹⁴ Perhaps because the Virginia Supreme Court has not yet clearly decided this issue, courts have not articulated a rationale for this position. It appears to derive from the extremely narrow scope of the wrongful discharge in violation of public policy claim in Virginia.¹¹⁵ Even without a rationale or certain ruling, lower courts have refused to recognize claims based on federal law based on the Virginia Supreme Court's statement that the plaintiff must "identify a Virginia statute establishing the public policy" relied upon.¹¹⁶

Given the lack of articulated rationale, it is difficult to evaluate this approach to disallowing federal law to be the public policy of the state. However, the approach suffers from several weaknesses. While it is the state's prerogative to determine the scope of its tort laws, once it has articulated the idea that some policies are so important that they create an exception, it is difficult to justify a flat ban on federal law as a source of that policy. Also, this approach fails to account for the fact that states cannot legislate in some areas of exclusively federal concern.¹¹⁷ Thus, for some matters, there cannot be a state statute to articulate public policy. Merely because there is no state statute does not necessarily indicate that the state has no public interest in that area. Moreover, even in the absence of a prohibition on state law, if the state has failed to legislate, such failure might in part be based on the state's knowledge of an existing adequate federal law, which should then be able to serve as the policy of the state.

114. See *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 809 (Va. 1996) (noting that the plaintiff "does not have a cause of action for wrongful discharge because he is unable to identify any Virginia statute establishing a public policy"); see also *Oakley v. May Dep't Stores Co.*, 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (holding that Title VII cannot serve as a public policy and noting that the plaintiff's claim must be based on public policies "derived from Virginia statutes, not federal laws"); *Wenig v. Hecht Co.*, 47 Va. Cir. 290, 1998 WL 972350, at *3 (Fairfax Cty. Oct. 29, 1998) ("Wenig [the plaintiff] argues that a federal statute can serve as the basis for her wrongful termination action. This argument fails in that Wenig is obliged to cite a Virginia statute to support her claim.").

115. See *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002) (noting that "we continue to consider this exception to be a 'narrow' exception . . .").

116. *Oakley*, 17 F. Supp. 2d at 536 (citations omitted); see also *Wenig*, 1998 WL 972350, at *3 (citing *Lawrence*, 465 S.E.2d at 809).

117. For example, regulating interstate commerce is limited to the federal government. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 818-19 (1996) (explaining why states are not capable of, and thus are constitutionally prohibited from, regulating interstate commerce). Other examples that arise more frequently in the employment context include employee benefit plans (preempted by ERISA) and matters involving unions (preempted by the NLRA). See also Tristin K. Green, Comment, *Complete Preemption—Removing the Mystery from Removal*, 86 CAL. L. REV. 363, 363 (1998) (addressing the doctrine of federal question removal based on complete preemption).

IV. A PROPOSED MODEL FOR ANALYZING FEDERAL LAW AS A SOURCE OF PUBLIC POLICY

Part III established that there are flaws with the current rationales and approaches taken by the courts in determining when federal law articulates the public policy of a state. What is needed, then, is an analytically sound approach to the issue. This Part articulates such an approach to determine whether federal law is an appropriate source of public policy, and uses Title VII of the Civil Rights Act of 1964¹¹⁸ as an example of this analysis.¹¹⁹

The approach begins with an initial premise that courts should directly address the issue and not simply assume that federal law articulates the public policy of the states. There is a very simple reason for this: anytime that federal law is involved, there is a potential for federal law to preempt state law. Thus, although many courts have done so,¹²⁰ courts should not assume that federal law is to be treated the same as state law because of the possible preemption of state tort law remedies by federal law.

There are three ways that state law can be preempted. First, federal law expressly preempts state law when the federal statute so provides.¹²¹ Second, federal law preempts state law when there is a comprehensive federal regulatory scheme indicating that Congress “left no room” for state law on the topic (“field” preemption).¹²² Third, where state law actually conflicts with federal law such that compliance with both is impossible, or where state law is an obstacle to the operation of federal law, state law is preempted.¹²³ When federal law is the articulated source for a claim of wrongful discharge in violation of public policy, any one of these three theories of preemption may apply. Given the potential for preemption to prevent a wrongful discharge claim based on federal law,¹²⁴ it should be the first major consideration of the court in determining whether a complaint states a claim.

Using Title VII as an exemplar, the statute does not purport to expressly preempt state law generally.¹²⁵ Nor is there any indication that

118. 42 U.S.C. § 2000 (2005).

119. Title VII was selected because it has been cited in numerous cases as a federal law supporting a claim for wrongful discharge in violation of public policy.

120. See Parts III.B and III.C, *supra* (discussing the failure of some courts to directly address how federal law should be analyzed when cited as a source of public policy).

121. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

122. See *id.* at 281 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

123. *Id.* at 281 (citations omitted).

124. See *Ewing v. Koppers*, 537 A.2d 1173, 1178 (Md. 1988) (discussing preemption of wrongful discharge action by LMRA).

125. 42 U.S.C. § 2000e-7 (2000). See *Cal. Fed. Savings & Loan Ass’n*, 479 U.S. at 281–82 (stating state law would be preempted only if it conflicted with federal law); see also Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth*

Title VII was intended to occupy the field and impliedly preempt state law; indeed, Title VII explicitly disclaims such intent.¹²⁶ Title VII only preempts state law where state law requires or permits an act which is unlawful under Title VII.¹²⁷ Thus, only in the situation where a wrongful discharge claim would require or permit acts that Title VII prohibits would there be a preemption issue, and this situation appears unlikely to occur.¹²⁸

If preemption does not occur, the next step in the analysis is to determine whether federal law accurately articulates a state's public policy such that it provides a proper basis for a wrongful discharge claim. As noted in Part III, assuming either that federal law is equivalent to state law or that it cannot ever be a source of public policy is analytically unsound. As to the former, there are two main reasons why courts should not assume that federal law can automatically serve as the public policy of the state. First, the state may not have a sufficient interest in the federal law to allow it to serve as the state's public policy.¹²⁹ Second, it is quite possible for there to be a difference between federal and state law, and it would be improper to assume that federal law accurately articulates the state's public policy.¹³⁰ Indeed, basic tenets of federalism enunciated in the Constitution, bolstered by the country's long history of recognizing the benefits offered

Century Revolution in the Law of the American Workplace, 62 *FORDHAM L. REV.* 469, 537 (1993) (discussing when the FLSA supplants state law). For an example of a statute with an express preemption provision, see the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 (1998).

126. 42 U.S.C. § 2000h-4 (2000). See *Cal. Fed. Savings & Loan Ass'n*, 479 U.S. at 281-82 (discussing § 1104 of Title XI, applicable to all sections of the Civil Rights Act, including Title VII, which indicates that Congress did not intend to occupy the field of state law if it existed). ERISA provides an example of field preemption, as the Supreme Court has held that the statutory remedial scheme in ERISA preempts state law remedies which are alternatives to ERISA's even where the state law in question is not "expressly" preempted by the statute. See *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 214 (2004) (holding that state court actions alleging an HMO's failure to cover certain services violated state laws are preempted by ERISA).

127. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (discussing preemption of state law by federal statute); see also *Drummonds*, *supra* note 125 (declaring that state laws will be preempted by federal laws if there is conflict). The three preemption categories overlap; for example, ERISA contains an express preemption provision, occupies the field, and also preempts statutes which actually conflict with it. See *Aetna Health*, 542 U.S. 200, 214 n.4 (discussing different ways in which ERISA can preempt state law).

128. In contrast to the lack of preemption concerns under Title VII, federal labor laws, specifically the NLRA and Section 301 of the LMRDA, pose significant preemption potential. Indeed, federal labor laws preempt state law claims based on employee actions which are arguably protected or prohibited by the NLRA. See *San Diego Bldg. Trades Council, Millman's Union Local 2020 v. Garmon*, 359 U.S. 236, 236 (1953).

129. As noted in *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992), states do not always have an interest in enforcing federal laws.

130. See, e.g., *Sedlacek*, 36 P.3d at 1020 (holding that the differences between the ADA and Washington state's antidiscrimination law preclude the use of the ADA as a source of public policy).

by states having the freedom to establish their own laws, recognizes this point. Nor is the contrary position tenable because it ignores the fact that, at times, there cannot be state law on the topic because only the federal government is authorized to enact law.¹³¹ In effect, to reach this conclusion, a court would be declaring that within those areas of law that are exclusively federal in nature, there are no important public policies that states should vindicate.

Given that the all-or-nothing positions outlined above are analytically unsound, what remains is to determine what inquiry a court should undertake to ascertain whether a particular federal law should serve as a state's public policy. In determining whether a federal law articulates a state's public policy such that it provides a proper basis for a wrongful discharge claim, courts should consider whether the state has an interest in promoting greater enforcement of that area of law.¹³² Where there is no or little state interest in the particular area of law, the court should not rely on federal law as a basis for the public policy claim. Returning to the Title VII example, states do have an interest in enforcing anti-discrimination laws.¹³³ In contrast, states may not have an interest in promoting greater enforcement of immigration laws if the state's economy depends heavily on immigrant labor and there are concerns about lack of workers to fill existing jobs.¹³⁴

If the state does have an interest in promoting greater enforcement of that area of law, the next step should be determining whether it is appropriate for the state to create a new remedy, in light of the federal law. Here, courts should be sensitive to the potential difficulties inherent in Congress and federal agencies responding to court decisions. As noted in

131. For example, only the federal government can regulate international trade. See Hal S. Shapiro, *Is There a Role for Sub-Federal Governments in International Trade Policy Formation?*, 9 *IUS GENTIUM* 73, 83 (2003) (noting that the Constitution seems to allow states even "less freedom to act with respect to foreign commerce than interstate commerce").

132. See, e.g., *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (holding Illinois state law does not have an interest in protecting whistleblowers under the Federal Aviation Act), *overruled on other grounds* by *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Rachford v. Evergreen Int'l Airlines, Inc.*, 596 F. Supp. 384, 385 (N.D. Ill. 1984) (declaring the lack of state interest in enforcing federal aviation law before dismissing the plaintiff's wrongful discharge action).

133. Evidence of this interest is seen in the state laws which mirror Title VII. If there is no state statute mirroring the federal law, this inquiry becomes more difficult.

134. The argument can be made that in the post-September 11, 2001 world, states do have an interest in greater enforcement of federal immigration laws; however, most of the focus has been on immigrants from parts of the world where anti-American sentiment and rhetoric run strong. See Matt Carreto, *Selective Enforcement of the Immigration Laws: Is There Any Possible External Constraint on the Exercise of Prosecutorial Discretion?*, 18 *GEO. J. LEGAL ETHICS* 639, 646, n.57 (2005) (describing the executive's use of immigration laws as a pretext to detain aliens with suspected terrorist ties).

Part III, the sheer volume of court decisions that Congress would need to remain abreast of to respond to is daunting. Perhaps more importantly, there is the possibility that Congress could not, in fact, revise federal law in a manner that would “correct” state court decisions that are seen as being at odds with the federal law. This is also an issue where the public policy is embodied in a federal regulation; any questions about the power of Congress to revise federal law in a manner that effectively overrules a state court’s decision is at least equally a concern when it is a federal agency that would be seeking to “correct” a decision.

Courts should also be sensitive to creating rights that are inconsistent with the federal law on which the wrongful discharge claim is based. Title VII provides an example of how allowing a state wrongful discharge action might undermine the intent of a federal statute. Taken together, the damages and coverage provisions of Title VII indicate an intent to limit a small employer’s exposure to damages under the statute.¹³⁵ Title VII only covers employers with 15 or more employees.¹³⁶ Small employers are expressly exempted from coverage. Title VII also contains a sliding scale regarding the amount of damages that can be awarded. There is a cap on the amount of compensatory and punitive damages that can be awarded to employees: employees of larger companies are limited to \$300,000, while employees of the smallest covered companies are limited to \$50,000.¹³⁷ This sliding scale reflects a desire to provide more protection against damages awards for smaller companies than larger ones.

If employees are allowed to base wrongful discharge claims on Title VII, employers can be liable for unlimited tort damages, regardless of the company’s size. This is inconsistent with the coverage provision and damages caps contained in Title VII. While Title VII does not expressly prohibit this result, it is still pertinent to inquire whether courts should allow this situation to occur. While the goals of preventing discrimination and providing recompense to victims of discrimination are obviously laudable, it is far from clear that this is the appropriate manner for reaching this goal. Congress made express decisions determining coverage and damages caps; should this legislative decision be made irrelevant by courts creating an alternative to the statute?

Clearly, Congress left room for states to add to the protections of Title VII. However, for states to do so, not by legislatively determining what to add, but rather by having courts cite Title VII but then ignore portions of its

135. See Caren Sencer, Comment, *When a Boss Isn’t an Employer: Limitations of Title VII Coverage*, 25 BERKELEY J. EMP. & LAB. L. 441, 477 (2004) (“The legislative history of Title VII’s definition of ‘employer’ shows that Congress wanted to avoid placing too many extra burdens on small employers . . .”).

136. 42 U.S.C. § 2000e(b) (2005).

137. 42 U.S.C. § 1981a(b)(3) (2005).

provisions, undercuts the federal legislative scheme. The results of the case depend upon the individual determinations of judges who may not even fully recognize or discuss the potential conflict between the federal law and state wrongful discharge remedy.¹³⁸ One wonders how legislators who craft federal law would respond to the idea that the legislative enactments, which are limited in scope, can become the basis for a claim which is not so limited. In other words, once Congress has declared an action to be unlawful, it does not matter what else is in the statute—a potential wrongful discharge claim has been created which may not be limited in the way Congress stated or intended.¹³⁹

Returning to the proposed model of analysis, if federal law does not preempt the wrongful discharge claim, the state has an interest in promoting greater enforcement of the federal law, and allowing the claim is not inconsistent with the federal statutory scheme then. The court should then proceed to determine whether the federal law fulfills the state's requirements for being the source of public policy for a wrongful discharge claim. The above process, then, is the precursor to the substantive analysis of whether there is a sufficiently important public policy to allow the claim for wrongful discharge to proceed.

V. CONCLUSION

To date, the bulk of wrongful discharge claims have relied on state, not federal law. However, given the sheer volume of federal statutes and regulations, it may not be long before creative plaintiffs' attorneys begin to realize the potentially vast expansion of the public policy doctrine available using federal law. The current lack of a uniform, analytically sound approach to determine whether federal law articulates the public policy of a state needs to be examined, and should be replaced with the approach outlined in this Article, which balances the interests of the state and the federal government and recognizes the nature of our federalist system.

138. A similar issue with providing state law remedies that conflict with Title VII was addressed in *Phillips v. St. Mary Regional Medical Center*, 116 Cal. Rptr. 2d 770, 785 (Cal. App. 2002), but was brushed aside by the court's comment that conflicting remedies "serve the purpose of maximizing plaintiff's opportunity to seek relief from discrimination." The court failed to note that this "purpose" of maximizing an employee's relief is not in fact a purpose of Title VII, which has limited remedies for discrimination, thus glossing over the true conflict.

139. If an increase in this type of litigation were to occur, a potential result of this may be an increase in express preemption provisions contained in federal laws as Congress attempts to limit the scope of federal law to what is articulated therein.