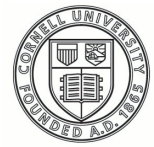

Winter 2008

A Supreme Stretch: The Supremacy Clause in The Wake of IRCA and *Hoffman Plastic Compounds*

Kati L. Griffith
Cornell University, kategriffith@cornell.edu

A Supreme Stretch: The Supremacy Clause in The Wake of IRCA and *Hoffman Plastic Compounds*

Abstract

[Excerpt] Recently, the issues of immigration and immigration policy have garnered intense debate in the United States. Much of what Americans have discussed relates to border security, sanctions against employers who knowingly hire undocumented workers, and temporary and permanent paths to legalization for undocumented workers. This debate often overshadows a meaningful discussion about the future of workplace rights for undocumented workers who, despite their undocumented status, currently work in the United States and at times suffer labor and employment law violations in their workplaces. Unfortunately, the national immigration debate has not incorporated this discussion. Moreover, the current proposed federal immigration bills neither address nor clarify what effect they will have on the workplace rights of undocumented workers.

Similar to Professor Cunningham-Parmeter's article, this article focuses on one aspect of the new legal landscape for undocumented workers in the United States since the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*. One central element of this new legal landscape is ongoing confusion about what effect, if any, immigration policy has on federal and state labor and employment law in the United States. Below, I take a first step toward clarifying the extent to which immigration policy affects the rights of states to extend the full protection of their state labor and employment laws to undocumented workers. Specifically, I address the following unresolved question currently before many lower courts: When, if ever, does federal immigration law preempt certain state labor and employment law remedies? First, I briefly describe why this question has emerged and has become important in U.S. courts. Next, I describe recent U.S. Supreme Court Supremacy Clause jurisprudence indicating that some lower courts' answers to the preemption question described above threaten to stretch the Supremacy Clause beyond its constitutionally-intended boundaries.

Keywords

immigration policy, undocumented workers, workplace rights, Supremacy Clause, labor law

Disciplines

Immigration Law | Labor and Employment Law | Labor Relations

A Supreme Stretch: The Supremacy Clause in The Wake of IRCA and *Hoffman Plastic Compounds*

Kati L. Griffith[†]

Introduction

Recently, the issues of immigration and immigration policy have garnered intense debate in the United States.[1] Much of what Americans have discussed relates to border security, sanctions against employers who knowingly hire undocumented workers,[2] and temporary and permanent paths to legalization for undocumented workers.[3] This debate often overshadows a meaningful discussion about the future of workplace rights for undocumented workers who, despite their undocumented status, currently work in the United States and at times suffer labor and employment law violations in their workplaces. Unfortunately, the national immigration debate has not incorporated this discussion.[4] Moreover, the current proposed federal immigration bills neither

---

† Assistant Professor of Employment and Labor Law, Industrial and Labor Relations School, Cornell University and 2005 Skadden Fellow. I would like to thank Leslie Gates for her comments on earlier drafts. I would also like to acknowledge Aaron Skrypski, Elizabeth Rabe, and the editorial staff of the Cornell International Law Journal for their thoughtful feedback and able editorial support.

1. *See, e.g.*, Carl Hulse, *Kennedy Plea Was Last Gasp for Immigration Bill*, N.Y. TIMES, June 9, 2007, at A1.

2. When I refer to "undocumented workers," I am referring to workers that do not currently have legal authorization from the U.S. government to be physically present in the United States.

3. *See* Raymond Hernandez, *Opinions, Far Apart, Underscore Immigration Bill's Obstacles*, N.Y. TIMES, June 5, 2007, at B1.

4. For a recent and rare news editorial addressing the issue of labor standards within the immigration debate, see Lawrence Downes, Editorial, *Worker Solidarity Doesn't Have to Stop at the Rio Grande*, N.Y. TIMES, Sept. 30, 2007, § 4, at 11.

address nor clarify what effect they will have on the workplace rights of undocumented workers.

Similar to Professor Cunningham-Parmeter's article,[5] this article focuses on one aspect of the new legal landscape for undocumented workers in the United States since the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[6] One central element of this new legal landscape is ongoing confusion about what effect, if any, immigration policy has on federal and state labor and employment law[7] in the United States. Below, I take a first step toward clarifying the extent to which immigration policy affects the rights of states to extend the full protection of their state labor and employment laws[8] to undocumented workers. Specifically, I address the following unresolved question currently before many lower courts: When, if ever, does federal immigration law preempt certain state labor and employment law remedies? First, I briefly describe why this question has emerged and has become important in U.S. courts. Next, I describe recent U.S. Supreme Court Supremacy Clause jurisprudence indicating that some lower courts' answers to the preemption question described above threaten to stretch the Supremacy Clause beyond its constitutionally-intended boundaries.

I. Emergence of the Question

A. Immigration Reform and Control Act of 1986

Before 1986, U.S. immigration policy did not contain workplace-specific restrictions.[9] For instance, immigration law did not directly restrict employers from hiring undocumented workers, and there were no immigration laws that specifically restricted undocumented workers from working or accepting work.[10] That is not to say, however, that immigration authorities stayed out of the workplace before 1986.[11] The key distinction is that an undocumented worker's act of working and an employer's act of knowingly hiring an undocumented worker were not illegal acts under U.S. immigration law before 1986.[12] In 1986, much of this changed when Congress enacted the Immigration

5. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27.

6. 535 U.S. 137 (2002).

7. When I refer to labor and employment law, I am speaking of laws enacted by the U.S. government, the District of Columbia, or the fifty U.S. states.

8. I refer broadly to labor and employment law statutes and common law that provide some form of workplace right and remedy.

9. *See* H.R. REP. NO. 99–682(I), at 51–56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5655–60.

10. *See generally id.*

11. *See, e.g.*, Gerald M. Boyd, *Jackson Describes the Reagan Administration As 'Warmongering,'* N.Y. TIMES, Apr. 26, 1984, at B8 (referring to U.S. immigration officials' raids of workplaces); Linda Greenhouse, *High Court Backs Factory Searches for Illegal Aliens,* N.Y. TIMES, Apr. 18, 1984, at A1 (referring to immigration raids of two Los Angeles factories).

12. *See generally* H. R. REP. No. 99-682(I), at 51-56.

Reform and Control Act of 1986 (IRCA).[13] Along with amnesty for over one million undocumented immigrants,[14] the IRCA brought workplace-specific restrictions into U.S. immigration policy.[15] The way in which the IRCA moved immigration enforcement more intimately into the workplace created mixed messages and, therefore, confusion about whether the IRCA intended to combat illegal immigration by restricting undocumented workers' access to specific labor and employment law remedies in the event that employers violated their workplace rights.

The IRCA contained a number of mixed messages regarding the role of workplace restrictions in immigration enforcement. First, by both mandating an employee verification system and establishing civil and criminal sanctions for employers who knowingly hire undocumented workers,[16] the IRCA made it unlawful for employers to knowingly hire undocumented workers.[17] Next, in 1990, the IRCA made it unlawful for undocumented workers to knowingly use fraudulent documents to obtain employment.[18] Notably, however, the IRCA specifically did not make it unlawful for an undocumented worker who did not use fraudulent documents to work or accept employment. Also, the IRCA did not indicate explicitly whether it would have any effect on the legal remedies available to undocumented workers who suffered violations of state and federal labor and employment laws in the workplace. The IRCA's express preemption provision dealt only with its preemptive effect on state laws sanctioning employers for hiring undocumented immigrant workers.[19]

B. Hoffman Plastic Compounds, Inc. v. NLRB

Given the IRCA's increased restrictions on the actions of undocumented workers in 1990, courts increasingly have faced the question of whether Congress intended to place additional workplace restrictions on undocumented workers by reducing their access to certain labor and employment law remedies that were available to them as a result of their employers' workplace rights

13. 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.).

14. *See, e.g.*, Michael H. LeRoy & Wallace Hendricks, *Should 'Agricultural Laborers' Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 498 n.42 (1999) ("The IRCA permitted the granting of temporary resident status to as many as 350,000 aliens who could prove they performed agricultural services for at least 90 days between May 1, 1985 and May 1, 1986."); Editorial, *Give Illegal Aliens More Time*, N.Y. TIMES, Apr. 24, 1988, at A24 ("The 1986 Immigration Reform and Control Act provided amnesty for the estimated 1.4 million to 2 million undocumented aliens who have been in the United States since before 1982.").

15. Immigration Reform and Control Act of 1986 § 274A(a)–(d).

16. 8 U.S.C. § 1324a(b), (e)(4)–(5), (f) (2000).

17. 8 U.S.C. § 1324a(a)(1)(A).

18. *See* 8 U.S.C. § 1324c (2000).

19. *See* 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."); Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 232 (2d Cir. 2006) ("The statute is silent . . . as to its preemptive effect on any other state or local laws.").

violations.[20] The Supreme Court addressed whether the IRCA affected the remedies available to undocumented workers pursuant to the National Labor Relations Act (NLRA)[21] in *Hoffman*, a decision that generated additional confusion about the effect of the IRCA on labor and employment law enforcement in cases involving undocumented workers.

The *Hoffman* Court held that the National Labor Relations Board could not grant back pay (lost future earnings) to a worker who had violated the IRCA by submitting fraudulent documents as a remedy for his employer's NLRA violation.[22] This decision created confusion in lower courts about whether the IRCA similarly affected lost future earnings and other remedies available to undocumented workers pursuant to both state laws and federal laws beyond the NLRA.[23] Much scholarship has been dedicated to addressing these perplexing questions.[24] Lower courts grappling with the relationship between immigration enforcement through the IRCA and labor and employment enforcement at the federal and state level have arrived at varied results.[25]

Here I touch on a subset of the post-IRCA and post-*Hoffman* questions: Does the IRCA preempt any state labor and employment remedies of lost future earnings[26] for undocumented workers and if so, when? It is well-established that the preemption analysis is fundamentally a question of congressional intent.[27] Therefore, the underlying question is whether Congress intended the IRCA's workplace restrictions to limit undocumented workers' access to labor

20. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142 n.2 (2002).

21. 29 U.S.C. §§ 151–169 (2006) (regulating collective bargaining and organizing rights of covered private sector employees).

22. *Hoffman Plastic Compounds*, 535 U.S. at 140–41. It is important to note that *Hoffman* is not a case about whether undocumented workers are covered by the National Labor Relations Act. There is little doubt that undocumented workers are "employees" according to the NLRA and therefore have all of the same *rights* as documented workers. Instead, *Hoffman* concerns itself with the *remedies* available to undocumented workers once a court has determined that the undocumented workers have suffered an NLRA violation of their rights. *See id.* at 142-49.

23. *See, e.g.*, María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After* Hoffman Plastic Compounds*: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 307–14 (2005).

24. *See id.;* Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 513–17 (2004).

25. *See, e.g.*, Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 239 n.21 (2d Cir. 2006); Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004).

26. I focus on the remedy of lost future earnings, rather than the remedy of reinstatement, because the lost future earnings remedy is most relevant to the Supreme Court's *Hoffman* decision and more often addressed by lower courts facing a preemption analysis. The reinstatement remedy is much more likely to be preempted by the IRCA, because a court-ordered reinstatement of an undocumented worker would require an employer to violate the IRCA by knowingly hiring someone without proper identification. *See* Wishnie, *supra* note 24, at 505 (finding lost future earnings remedy to be less "troublesome" in the preemption context and stating that "courts have approved only those reinstatement orders that are conditioned on an undocumented worker securing INS work authorization within a reasonable period of time.").

27. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

and employment law remedies of lost future earnings at the state level.

In answering this IRCA preemption question, some lower courts following the *Hoffman* decision have broadened the reach of the Supremacy Clause. For instance, a Florida district court in *Veliz v. Rental Service Corp. USA, Inc.* relied on *Hoffman* to hold that the IRCA preempted a state tort law remedy of lost future earnings to an undocumented worker who had violated the IRCA. [28] In arriving at this conclusion, the *Veliz* court went so far as to say that "[i]n addition to trenching upon the immigration policy of the United States in condoning prior violations of immigration laws awarding lost wages would be tantamount to violating the IRCA."[29] The court appears to have reasoned that awarding these types of damages to undocumented workers would be a violation of the IRCA.[30] The court, however, did not cite to a particular provision of the IRCA in making its determination.[31]

The confusion about the IRCA's effect on undocumented workers' access to state labor and employment law remedies is also demonstrated by courts that have a difficult time determining whether a state law remedy of lost future earnings is preempted (and therefore cannot be provided to an undocumented worker) in the absence of an IRCA violation. For instance, in *Affordable Housing Foundation, Inc. v. Silva*, the U.S. Court of Appeals for the Second Circuit, noting the difficulty of the determination, found that the IRCA did not preempt New York State's scaffolding law remedy where the undocumented worker did not violate the IRCA.[32]

II. Supreme Stretch

As I will describe below, a brief review of general Supremacy Clause principles and recent Supremacy Clause cases indicates that courts may be going beyond currently-established Supremacy Clause borders when they determine that federal immigration policy preempts undocumented workers' access to state labor and employment law remedies of lost future earnings.

28. 313 F. Supp. 2d 1317, 1336–37 (M.D. Fla. 2003).

29. *Id.* at 1336.

30. *Id.*

31. *See generally id.*

32. 469 F.3d 219, 249 (2d Cir. 2006). In a recent New York district court case, however, the court declined to dismiss plaintiff's lost future earnings claim even though it appeared that the plaintiff violated the IRCA. *See* Reis v. Vannatta Realty, 515 F. Supp. 2d 441, 446 (S.D.N.Y. 2007). For another very recent example, see Contreras v. KV Trucking, Inc., No. 4:04-CV-398, 2007 WL 2777518, at 5–6 (E.D. Tex. Sept. 21, 2007) ("Even if the Defendants did not waive the defense, their motion would still be denied. 'Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.'") (citation omitted).

A. Principles Weighing Against Preemption

It would be a "supreme stretch" for courts to find that the IRCA preempts state labor and employment law remedies of lost future earnings for undocumented workers because Supremacy Clause principles, established by Supreme Court case law, weigh against finding preemption in these cases. First, courts may be less inclined to find preemption because, given the delicate balance between state and federal sovereignty, there is a well-established presumption that Congress does not intend to supplant a state's police power to regulate the workplace[33] unless it does so explicitly.[34] With the IRCA, Congress did not expressly state that it intended to preempt state labor and employment law remedies.[35]

Second, courts may be less apt to find preemption in these cases because legislative history indicates that Congress did not intend to preempt state labor and employment law enforcement in any way. The U.S. House of Representatives committee report issued in conjunction with the IRCA indicates that the legislation was not meant "to undermine or diminish in any way labor protections in existing law . . . or . . . limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees."[36] Even though legislative history is not explicit evidence of congressional intent, it suggests that courts may be less inclined to find that the IRCA preempts state law remedies of lost future earnings in these cases.

Third, courts may be less willing to find preemption in these cases because it is possible to enforce simultaneously both the state labor and employment law remedy of lost future earnings and the IRCA. Courts in general are less inclined to find preemption when state and federal law can be interpreted in such a way to allow for simultaneous enforcement. If an employee violates immigration law, the immigration authorities have the power to bring charges against that

33. It is well established that when states regulate workplaces, they act according to their traditional police powers. *See, e.g.*, DeCanas v. Bica, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.").

34. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("In all pre-emption cases . . . 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.'") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

35. *See Affordable Hous. Found.*, 469 F.3d at 231–32 ("From its initial enactment, IRCA has contained an express preemption clause, stating that '[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.' 8 U.S.C. § 1324a(h)(2). The statute is silent, however, as to its preemptive effect on any other state or local laws.").

36. *See* H.R. REP. NO. 99–682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

employee even if that employee has received certain remedies according to state labor and employment law.[37] In other words, an undocumented worker's receipt of lost future earnings should not prohibit or deter immigration authorities from enforcing the IRCA. Despite the IRCA, the immigration and labor enforcement regimes are still separate with respect to which laws govern and who has standing to bring charges against whom.[38] As long as these separate enforcement regimes are not in conflict, the courts will be less likely to find that the IRCA preempts state law remedies of lost future earnings.

B. Case Law Weighing Against Preemption

The IRCA preemption cases are cases of *implied conflict preemption*.[39] Courts find implied conflict preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[40] Therefore, the relevant question in an IRCA implied conflict preemption case is whether the state labor and employment law remedy of lost future earnings stands as an obstacle to the accomplishment of the IRCA's purpose to decrease employment opportunities for undocumented workers.[41] To begin to answer this question, I review recent Supreme Court jurisprudence where the Court applied implied conflict preemption analysis, identify the boundaries that these cases have set on the Supremacy Clause, and then map

37. It is important to note here, as mentioned above, that the state labor and employment law remedy of reinstatement is preempted to the extent that it would force employers to knowingly hire or rehire undocumented workers in violation of the IRCA. Here I am referring only to state labor and employment law remedies of lost future earnings.

38. For instance, the government brings IRCA cases against allegedly undocumented persons in immigration court but employees bring state labor and employment law cases against their employers in state court.

39. The Supreme Court has identified three main types of preemption: (1) express preemption, (2) field preemption, and (3) implied conflict preemption. *See* Gade v. Nat'l Solid Wastes Mgmt., 505 U.S. 88, 98 (1992). As noted above, the situation described here is not a case of express preemption because the IRCA does not contain any express language preempting state labor and employment law. *See supra* note 35 and accompanying text. Moreover, this is not a case of field preemption because it cannot be said that the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" with state labor and employment laws that provide lost future earnings remedies regardless of immigration status. *See Gade*, 505 U.S. at 98.

40. Geier v. Am. Honda Motor Co., 529 U.S. 861, 899 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

41. For statutory language suggesting that this is the IRCA's purpose, see 8 U.S.C. § 1324a (2000) and 8 U.S.C. § 1324c(a)(1)–(3) (2000). For further support from language in the IRCA's legislative history, see Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 231 (2d Cir. 2006) (quoting, in part, legislative history, the court stated that "confronting a 'large-scale influx of undocumented aliens,' Congress concluded that 'the most humane, credible and effective way to respond' to the problem was to penalize those employers who hired illegal aliens . . . . 'Employment is the magnet that attracts aliens here illegally . . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.'") (citations omitted).

these boundaries onto the IRCA preemption context. My review of the IRCA cases reveals three types of implied preemption cases, which indicate that a finding of preemption in IRCA cases would stretch the Supremacy Clause beyond the current boundaries set forth by the Supreme Court.

1. Supreme Stretch Number 1

A finding that the IRCA preempts state labor and employment law remedies of lost future earnings would stretch the current boundaries of the Supremacy Clause because these remedies do not *directly* and *substantially* affect employment opportunities for undocumented workers. In the absence of federal government findings indicating a link, it is too indirect and speculative to state that granting an undocumented worker lost future earnings under state labor and employment law increases employment opportunities for undocumented workers. Although it is possible that a foreign worker might be inspired to immigrate to the United States based on the possibility of receiving lost future earnings if they successfully sue their employer, nothing indicates that the likelihood is substantial enough to imply a congressional intent to preempt state labor and employment law. There is no indication that Congress intended to reduce incentives for foreign workers to come to the United States by reducing workers' access to labor and employment law remedies.[42] Instead, the IRCA's focus is on reducing employment opportunities by making it more difficult for employers to hire undocumented workers. For those undocumented workers who are already in the United States, there are no apparent findings that access to state labor and employment law remedies of lost future earnings would create substantial incentives for them to stay in the United States or facilitate their access to future employment in the United States.

The case most often cited for the "direct" and "substantial" requirement is *English v. General Electric Co*.[43] in which the Supreme Court rejected a similar incentive-based argument: that the availability of a state tort remedy, which was similar to the federal remedy, would reduce incentives for people to use the federal procedure because federal law had stricter time limits than state law.[44] In *English*, a federal nuclear safety whistle blower law set up remedies for employees who experience retaliation as a result of whistle blowing about safety violations.[45] An employee sued under state tort theory for intentional infliction of emotional distress and for retaliation resulting from her whistle blowing.[46] The company argued that allowing her to pursue a state tort remedy, which was available after the time deadline for a similar federal law remedy

42. *See* 8 U.S.C. 1324a; 8 U.S.C. 1324c(a)(1)–(3); H.R. REP. NO. 99–682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal meaning of closing the back door, or curtailing future illegal immigration, is through employer sanctions.").

43. 496 U.S. 72, 85 (1990).

44. *Id.* at 89–90.

45. *Id.* at 75–76.

46. *Id.* at 77.

under the federal nuclear safety whistle blower law, would reduce the incentives for the whistle blower to bring federal charges and therefore would decrease timely reports of nuclear safety.[47] The *English* Court found these comments about what motivates people to make a complaint to be too speculative, too much of a stretch, in this context.[48] The Court stated that "[s]uch a prospect is simply too speculative a basis on which to rest a finding of pre-emption."[49]

Similarly, when considering the IRCA preemption cases, in the absence of any discernable congressional intent or findings, it is too speculative to base a finding of preemption on the assumption that future undocumented workers will be motivated to immigrate to the United States because of the potential availability of state labor and employment law remedies if they successfully sue their employers for workplace rights violations. For undocumented workers who already live in the United States, it is likewise too speculative to say that their access to labor and employment law remedies of lost future earnings will affect their access to employment opportunities in some way.[50] In light of *English*, these scenarios are simply too speculative, too much of a stretch, to support a finding of an IRCA preemption. The connection is simply not direct or substantial enough to find an IRCA preemption.

2. Supreme Stretch Number 2

The Supreme Court's decision in *Hillsborough County v. Automated Medical Laboratories, Inc.*[51] exemplifies a second type of case indicating that a finding of an IRCA preemption would stretch the Supremacy Clause beyond its constitutional boundaries. *Hillsborough* held that federal law does not preempt state law when the effects are too speculative, the state law has an effect on an area where there are competing federal goals, and the federal government has not provided guidance about how to "strike a balance" between those competing goals.[52] Therefore, the *Hillsborough* case indicates that the IRCA does not preempt state labor and employment law remedies of lost future earnings because of the amount of speculation involved and because Congress has not indicated how to address the possible conflict between its goal in enacting the IRCA, to reduce employment opportunities to undocumented workers, and its goal to allow states to promote minimum labor and employment standards through labor and employment law enforcement.[53]

47. *See id.* at 89.

48. *See id.* at 90.

49. *Id.*

50. *See, e.g.*, Patel v. Quality Inn S., 846 F.2d 700, 704–705 (11th Cir. 1988) ("We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job-at any wage-that prompts most illegal aliens to cross our borders.").

51. 471 U.S. 707 (1985).

52. *See id.* at 721.

53. *See, e.g.*, Gary v. Air Group, Inc., 397 F.3d 183, 190 (3d Cir. 2005) (stating that its holding was strengthened by "the well-established principle that 'courts should not lightly infer preemption.' This is particularly apt in the employment law context which falls 'squarely within the traditional police powers of the states, and as such should not

The *Hillsborough* Court faced the question of whether federal law—which had an identifiable goal to increase safety *and* to increase the amount of blood plasma available nationally—preempted a local law imposing blood plasma collection requirements that went beyond the safety requirements established by the federal law.[54] In an attempt to convince the Court to find preemption of the local law, the plaintiff, Automated Medical Laboratories, argued that the requirements of the local law would reduce the number of blood plasma donors nationally, because the local law's requirements would make it harder for people to donate blood.[55] Therefore, Automated Medical Laboratories reasoned that the reduction in the number of plasma donors would conflict with the Congressional goal to ensure an adequate supply of plasma nationally.[56]

The *Hillsborough* Court considered this argument but was not persuaded that the local law would result in a reduction of the blood plasma supply. Thus, the Court held that the local law was not preempted.[57] Specifically, the Court held that Automated Medical Laboratories' concern that more stringent local regulation would lead to a decrease in donors was too speculative and therefore did not call for preemption.[58] The court reasoned, for instance, that more stringent safety regulation might lead to an increase in donors because potential donors would have less fear about donating.[59] Similar to *English*, *Hillsborough* demonstrates that it is too speculative to base a finding of preemption on the assumption that future undocumented workers will be motivated to immigrate to the United States because of the potential availability of state labor and employment law.

Moreover, the *Hillsborough* Court determined that even if the local law did reduce the blood plasma supply nationally there was no preemption because neither Congress nor the FDA had affirmatively, "struck a particular balance between safety and quantity" of blood plasma.[60] Similarly, under the IRCA, Congress has not struck a balance between the potentially competing goals of labor and employment law enforcement and immigration law enforcement. In the absence of clear Congressional intent in the IRCA context, *Hillsborough* indicates that courts should not make their own policy judgments in the IRCA preemption cases.

3. Supreme Stretch Number 3

The third type of Supremacy Clause case demonstrates that a finding that the IRCA preempts state labor and employment law remedies of lost future earnings would stretch the Supremacy Clause beyond its constitutional boundaries. Courts hesitate to find preemption in the absence of an affirmative

be disturbed lightly.'") (citations omitted).

54. *Hillsborough*, 471 U.S. at 709-10.
55. *See id.* at 720.
56. *See id.*
57. *See id.* at 720–23.
58. *Id.* at 720–21.
59. *Id.*
60. *Id.* at 721.

federal policy statement that federal law dominates a particular area. In two recent Supreme Court Supremacy Clause cases, for instance, the difference between finding preemption in one case and finding no preemption in the other was that the circumstances of the latter case lacked any indication of an affirmative federal policy judgment indicating preemption.[61]

In *Geier v. American Honda Motor Co.*, the Supreme Court found that the federal law's detailed and gradual phase-in of varied passive restraint requirements for car manufacturers, including air bags, seat belts, and other passive restraints, embodied an affirmative congressional policy judgment that, at that time, the existence of air bags in every car was not desirable. [62] The detailed and gradual phase-in contained in the federal regulations demonstrated enough of an affirmative federal policy judgment to convince the Court to find preemption.[63] Because allowing their state tort law claim would present an actual conflict with this affirmative federal policy judgment, the Court found that the federal regulations preempted the common law tort action alleging that Honda was negligent in failing to install air bags in all of its cars.[64]

In contrast, in *Sprietsma v. Mercury Marine*, the Supreme Court found that federal law did not foreclose a state tort action based on a claim that boat motor manufacturers had a common law duty to install a propeller guard on all boat motors.[65] The *Sprietsma* Court pointed out that the federal government had previously considered whether to require propeller guards on boat motors through federal legislation and had decided not to regulate in this area.[66] According to the Court, the federal government's silence, even after having considered the propeller guard issue, did not express an affirmative policy statement one way or another about propeller guards.[67] As a result, the state tort law claim was not preempted and was allowed to move forward.[68] Viewed together, these two cases indicate that courts engaging in an IRCA preemption analysis should not speculate or create policy in the absence of any indication that Congress intended to make an affirmative policy statement to forego labor and employment law remedies of lost future earnings for undocumented workers in order to achieve some of its immigration law goals.

Conclusion

Recent Supreme Court Supremacy Clause cases indicate that some lower courts may be stretching the Supremacy Clause beyond its constitutionally-intended boundaries because of the guesswork necessary to decide the IRCA

61. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 67–68 (2002); Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000).
62. 529 U.S. at 879–881.
63. *See id.* at 886.
64. *See id.*
65. *See* 537 U.S. at 65–66.
66. *Id.* at 60–62.
67. *See id.* at 65.
68. *See id.* at 70.

preemption cases in the absence of any discernible congressional intent. In finding that the IRCA preempts state labor and employment law remedies of lost future earnings, these lower courts also threaten to undermine the foundation of the labor and employment law enforcement regime. Judge Walker's statement in his concurring opinion in the Second Circuit's *Silva* decision, "Courts should not have to guess how often and to what extent employers and their illegal alien employees will break the law in order to decide a case," expresses the difficulty and perhaps impropriety of asking and answering the types of IRCA Supremacy Clause questions discussed above.[69] This poignant statement, together with this brief review of Supremacy Clause jurisprudence, demonstrates the merit of and need for a more extensive review of the Supreme Court's Supremacy Clause jurisprudence to understand fully the relationship between federal immigration policy and state labor and employment law in the IRCA preemption context.

69. Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 254 (2d Cir. 2006) (Walker, J., concurring).