The Anti-Subordination Principle of Labor and Employment Law Preemption

*Catherine L. Fisk**

Cities and states today confront major legal, economic, and political challenges in attracting good jobs—jobs that pay middle-class wages and benefits. For state and local governments (which I refer to collectively as "local"), good jobs are essential because they provide tax revenues to fund schools and infrastructure. Good jobs anchor communities by attracting workers with high levels of human, economic, and social capital. Good jobs pay wages that enable workers to pay for their own healthcare and their own retirement and to save enough money to tide themselves over periods of unemployment. Conversely, bad jobs—dangerous or unpleasant jobs that pay low wages and offer no benefits—are a problem for local governments. They provide no reason for educated or skilled people to move to or stay in a region, causing an outmigration of human capital. The loss of human capital creates a vicious cycle of good job loss, as companies hesitate to locate in regions that lack and will not attract an educated and skilled labor force. Bad jobs leave the workforce—and the government's social welfare system—responsible for paying healthcare and retirement costs. Bad jobs do not provide sufficient revenue from income, property, or sales taxes to offset social welfare costs. Labor economists see good jobs as the kind of jobs where companies pay the full costs of labor, including the costs of health care, retirement, injury, and unemployment, and bad jobs as those that externalize labor costs, forcing local governments to pick up the tab. As legislators cast their eye on the manifold problems of the working poor, it is no wonder that they look for ways to require or assist employers to turn bad jobs into good ones.

Local legislatures seeking to help employers to create good jobs encounter a major problem with preemption, a branch of federal-state relations law that governs when a federal statute removes the power of states and localities to regulate on topics already covered by federal law. Preemption has proved remarkably resistant to the adoption of generally accepted policy theories, what I call theories of regulatory federalism. Nowhere is this more true than in the case of regulating working conditions. While at one point many progressives believed that the best regulation on labor-management relations, civil rights, and occupational safety would come from Congress, recent experience in many states suggests otherwise. Worker activists have been able to secure protective legislation from state and local governments, even while modest changes to federal law are blocked in Congress. Moreo-

* Chancellor's Professor of Law, University of California, Irvine. Thanks to Erwin Chemerinsky, Kim Kisabeth, David Koch, Samrah Mahmoud, Michael Wishnie, and the editors of the *Harvard Law & Policy Review*.

ver, to the extent that mid-twentieth-century arguments about the desirability of federal regulation were based on the idea that municipal governments were too politically disorganized and too much at risk of capital flight to regulate effectively to protect labor or redistribute wealth, scholars have lately begun to doubt the received wisdom and have found resurgent regulatory localism.[1] Particularly in litigation—and to some extent in scholarship, as well—one finds arguments from political progressives and their allies extolling the benefits of local regulation and, predictably, arguments from employer advocates about the benefits of national uniformity. But when the regulation of labor turns from wage and safety issues to measures restricting the employment of unauthorized migrants, the arguments are often reversed: progressives tend to argue that authority to regulate immigration is exclusively federal[2] and conservatives argue the opposite.[3]

Part of what has made the law of preemption in the area of working conditions so resistant to consensus theories is that it, like the federalism debate of which it is a part, is heir to the long-standing American conflict over race and regional divides. When states' rights was code for the perpetuation of a racial caste system throughout the South, progressives believed that on civil rights and labor issues national power and preemption of local law were generally good. But whatever stability existed in the alignment of positions with respect to local variation in labor regulation did not survive the end of the civil rights era. And the situation today is complicated by the number of hot-button social policy issues that can be framed in federalism terms, whether it is local variation in regulation of immigration and migrant labor, in eligibility to marry, or in the permissibility of race-conscious city hiring practices or pupil assignment programs in public schools. Thus, scholars as well as labor and business advocates struggle to articulate a theory of regulatory federalism that explains whether, when, and why local governments should be empowered to regulate working conditions in the shadow of federal statutes that impose minimum pay and safety standards and that regulate the hiring of immigrants.

When we move from general theories about regulatory federalism to the specific doctrines that guide preemption analysis in different fields of law, the picture does not become clearer. Under the law of preemption, when federal and local law conflict or, in some cases, when they are consistent but cover the same field, federal law applies and the local law is invalidated.[4] While the law is both clear and stable that Congress can preempt local laws when it exercises its regulatory powers and that the preemptive

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[1] *See* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 539 (2009) (arguing that a "newly emergent regulatory localism is a product of the urban resurgence and the local leveraging of sticky capital, translocal networks, and an emerging decentralist ideology.").

[2] *See, e.g.*, Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 566–67 (2001).

[3] *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–201 (2006).

[4] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (1963).

scope of a federal statute is a matter of congressional intent or purpose,[5] little else is really clear or settled about preemption. The conclusions that judges reach about whether a statute expressly or impliedly preempts local law tend to be influenced not only by the language, intent, purpose, or structure of the federal statute but also by the judges' views of the desirable scope of federal and local policy in a particular field. So, although the legal doctrine appears to be determinative and immune to policy debate, in fact there is room for quite a bit of policy flexibility in the application of the doctrine. And we lack robust theories and rigorous empirical study about the grounds on which that policy flexibility should be exercised.

After describing some of the most significant recent local labor and employment reforms and the good-jobs organizing campaigns that led to them, this Essay analyzes the legal challenges mounted against them—most of which argue that local lawmaking is preempted by federal law. The Essay offers an anti-subordination theory of preemption based on the fact that most of the federal laws regulating work allow for local regulations that are more protective than the federal law. What complicates the analysis is that many local laws are aimed at protecting some of the most vulnerable workers, including a substantial number of migrant workers. This Essay argues that the employee-protective purpose of most federal labor and employment statutes should restrain courts from deciding that federal law preempts local laws granting greater protection to individual workers than does federal law.

Part I of this Essay examines a small sample of the variety of local labor initiatives recently enacted in Southern California and the organizing that led to them. After briefly explaining the law of preemption in the labor and employment field, the section provides the factual context to understand the need for a new approach to labor and employment law preemption. In particular, it shows that local governments in California trying to legislate bad jobs into good ones have found a need for greater employee protection in the low-wage labor market than is offered by federal law. It examines some of the many local labor initiatives that federal courts have held to be preempted, as well as some that have either not been challenged or have survived preemption challenges. Part II describes the preemption challenges to these initiatives in more detail and critiques the legal doctrine of preemption in cases where courts have found federal law to preempt local labor-protection laws aimed at improving the plight of low-wage workers. Part III offers an anti-subordination theory of regulatory federalism that strikes a better balance than current law between the values of local regulation and the values of national uniformity. The anti-subordination principle of labor preemption means that federal protective labor laws almost invariably contemplate local laws that provide greater protection, better enforcement, or better remedies. The anti-subordination principle also means that federal immigration regulation does preempt local legislation that has the purpose of regulating migration by making unauthorized migrant workers a perma-

[5] *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009).

nently extralegal underclass. Thus, when local laws regulate immigrant labor *qua* labor, they are valid on the same terms as local regulation of any other type of labor: there is no preemption of local laws that treat workers better than federal law. But when local laws regulate immigrant labor as a means of deterring or punishing cross-border migration, they are preempted by federal laws imposing minimum labor standards or regulating the employment of unauthorized migrants. This anti-subordination theory draws support from the fact that the overwhelming purpose of federal labor standards regulation is to protect employees from exploitation, not to protect employers from the costs of complying with local laws. Immigration law should not become the basis for undermining labor standards by allowing employers to exploit an already vulnerable segment of the American labor force.

I. Local Good-Jobs Initiatives and the Federal Preemption Threat

Across the country, the quantity and variety of local labor initiatives that have been enacted or nearly enacted in the last several years are truly staggering. Cities all over the country have enacted ordinances regulating wages, safety, and working conditions in particular sectors, including restaurants, day labor, nursing homes and hospitals, trucking, car washes, and hotels. Ordinances address perceived problems such as the availability of health benefits, protection for whistleblowers, and safety of agricultural and construction work. These new laws usually are the result of prolonged campaigns by unions, workers' rights groups, and community organizations focusing on the protection of vulnerable workers and the need to ensure that jobs pay adequate wages and benefits. Generally, their goals are to require employers to create good jobs by providing decent pay, safe conditions, comfort, benefits, and by preserving the right of employees to bargain collectively. Local activism does not always lead to morally good outcomes or to desirable policy, but local initiatives are often responsive to local values and local problems and are often consistent with the anti-subordination and worker-protecting policies underlying federal labor legislation. After a brief summary of the law of preemption, this Part discusses a sample of the many recent local California efforts to improve pay and working conditions in low-wage work.

A. Preemption

Well-settled law treats the question whether a federal law preempts local law as one of congressional intent, although discerning the legislative intent regarding the scope of preemption is notoriously difficult. To resolve the interpretive doubts that arise in identifying the scope of preemption, the Supreme Court has adopted a number of rules of construction, each of which

has its adherents, detractors, advantages, and problems. The Court sometimes invokes a presumption against preemption, especially where the federal statute regulates in fields of traditional state regulation such as health and safety,[6] and even more especially when federal law offers no remedies to replace the state remedies that would be preempted.[7] Controversy often ensues about whether the congressional intent is sufficiently unclear that the presumption comes into play and whether the law sought to be preempted is within the "field" of traditional state regulation.[8] The Court sometimes invokes the importance of national uniformity and at other times invokes the importance of federalism.[9] For every general policy principle underlying preemption jurisprudence, there is an opposite principle.

Some federal labor statutes contain provisions attempting to define their preemptive scope. Most allow state and local law so long as it is more employee-protective than federal law. Among the statutes in this category is the Fair Labor Standards Act, which imposes the minimum wage, requires overtime pay, prohibits child labor, preempts only those laws inconsistent with its own provisions, and allows states to impose more employee-protective laws.[10] Similarly, the federal employment discrimination laws preempt only those laws inconsistent with their own express protections and allow states and localities to provide additional protections and remedies.[11] A slightly different approach to preemption is reflected in the federal Occupational Safety and Health Act (OSH Act), which allows states to adopt safety and health laws governing the workplace so long as they are part of a regime that, overall, is at least as effective as the federal OSH Act regime and is certified by the federal Department of Labor (which enforces the federal OSH Act) as being as effective. The OSH Act also explicitly does not preempt state laws that provide individual remedies and private rights of action for injuries that result from safety violations since there are no individual compensatory remedies or private rights of action under the OSH Act.[12]

Other statutes expressly preempt more than just those state statutes that conflict with federal protections. The Employee Retirement Income Security Act (ERISA), which regulates employer-provided pension, health, and

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[6] De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 813–14 (1997); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995); *see also* Boggs v. Boggs, 520 U.S. 833, 840 (1997) (recognizing that policies and values "within the traditional domain of the States" inform a preemption analysis).

[7] *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).

[8] *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 334–37 (2008) (Ginsburg, J., dissenting) (asserting that tort liability of medical manufacturers is within the field of traditional state regulation and that the majority erred in finding preemption because the preemptive scope of federal Medical Device Amendments to the Food Drug & Cosmetic Act was unclear).

[9] *Compare Lohr*, 518 U.S. at 485 (federalism), *with* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 373 (2008) (national uniformity), *and* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350 (2001) (national uniformity).

[10] 29 U.S.C. § 218 (2006).

[11] Civil Rights Act of 1964, 42 U.S.C. § 2000e-7 (2006).

[12] 29 U.S.C. §§ 653(b), 667 (2006).

other benefit plans, preempts state laws that "relate to" employee benefit plans regulated by ERISA.[13] Another federal statute with an express preemption provision is the Immigration Reform and Control Act (IRCA), which prohibits hiring unauthorized workers and expressly preempts "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."[14]

A few federal labor statutes do not contain provisions defining the scope of their preemptive intent. When a federal statute does not expressly address its preemptive effect, courts attempt to discern whether the statute is intended only to preempt laws that actually conflict with its requirements ("conflict" preemption), whether it more broadly preempts state laws that are an obstacle to its general regulatory aims even if they do not actually conflict ("obstacle" preemption), or whether it even more broadly preempts all state and local regulation in the field in which the federal statute regulates even when the state regulation is consistent with the federal regulation ("field" preemption).[15] The National Labor Relations Act, which regulates the process of union organizing and collective bargaining, preempts all state laws within its field.[16] It has been held to preempt even where it does not regulate, on the theory that Congress intended to leave some conduct unregulated. The Supreme Court has not fully explained the justification for the deregulation of bargaining or the scope of the unregulated zone, leaving the scope of implied preemption confused.[17]

B. Local Good-Jobs Initiatives at Risk of Preemption Challenges

1. *Pay*

A number of recent labor and employment laws in Southern California mandate payment of a living wage and penalize the nonpayment of earned wages (the latter is often known as "wage theft"). Several Southern California cities have enacted or expanded living-wage laws, enacted ordinances that would protect against wage theft, or used the zoning power to restrict expansion of companies notorious for paying low wages. Each of these local legislative actions was the product of intensive local organizing by labor, civil rights groups, and other community organizations, and often the local campaign was part of a larger national movement to improve wages and working conditions of the most vulnerable workers by pressing for change at

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[13] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 (2006).

[14] 8 U.S.C. § 1324a(h)(2) (2006).

[15] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) ("obstacle" preemption); Gade v. Nat'l Solid Wastes Mgt. Ass'n, 505 U.S. 88, 98 (1992) ("field" preemption); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) ("conflict" preemption).

[16] Chamber of Commerce v. Brown, 554 U.S. 60, 65–66 (2008).

[17] *See* Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).

the local level.[18] For example, in the face of evidence of dismal working conditions at the hotels and restaurants serving the Los Angeles International Airport, and at the urging of labor groups, the Los Angeles City Council enacted a series of ordinances extending the city's living wage to workers near the airport in 2006, 2007, and 2009.[19] The pervasiveness and severity of violations of labor standards and the absence of effective federal enforcement have pushed worker advocates to demand local regulation in the hopes that local enforcement will be more responsive to the needs of the working poor.

Federal law requires employers to pay the minimum wage,[20] and California law further requires not only payment of the (higher) California minimum wage but also that employers pay employees the wages they have earned at regular intervals (no less often than every two weeks or month and within seventy-two hours after resignation).[21] Yet in low-wage industries, employers often flout these laws and federal and state enforcement is anemic.[22] Los Angeles enacted an ordinance prohibiting the failure to pay earned wages to increase the possibility of enforcement (effectively enlisting local criminal justice machinery to supplement to the under-enforced state and federal laws) and to provide a greater deterrent for scofflaw employers. The Los Angeles ordinance is the tip of a large iceberg of community activism around wage theft and minimum wage violations in service industries

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[18] One example was a series of local actions against the Cintas Corporation as part of a nationwide campaign against Cintas. Press Release, UNITE HERE!, Decision Expands Living Wage Coverage for Southern California Service Workers (Jan. 23, 2009), *available at* http://www.unitehere.org/presscenter/release.php?ID=3706; Press Release, Workers United, Workers United/SEIU Announces Victory for Laundry Workers as Cintas Settles Class Action Suit Alleging Violations of Los Angeles Living Wage Law For Record-Breaking $6.5 Million (Dec. 17, 2009), *available at* http://www.workers-united.org/content/wuseiu-announces-victory-laundry-workers-cintas-settles-class-action-suit-alleging-violation.

[19] Joe Mathews and Steve Hymon, *'Living Wage' for LAX Hotel Staffs Blocked*, L.A. TIMES, May 5, 2007, at A1; Joe Mathews, *'Living Wage' Law Blocked*, L.A. TIMES, Mar. 1, 2007, at B4; Joe Mathews, *Council OKs 'living wage' for LAX Hotels*, L.A. TIMES, Feb. 22, 2007, at B5. Several hotels challenged the 2007 law, but a California Court of Appeal in 2008 reversed a lower court's ruling overturning the law. David Zahniser, *Hotel Workers Get a Major Court Win*, L.A. TIMES, Apr. 11, 2008, at B4. Other Southern California cities also enacted or expanded their living wage ordinances in response to efforts by community organizations. For example, the city of Irvine expanded its living wage ordinance in 2007 to all workers contracting with the city and all workers hired by contractors working for the city. Sonya Smith, *Irvine Expands 'Living Wage' Law*, ORANGE COUNTY REG., Mar. 14, 2007, http://www.ocregister.com/articles/wage-61265-living-city.html (on file with the Harvard Law School Library); Sonya Smith, *Irvine Approves 'Living Wage,'* ORANGE COUNTY REG., May 23, 2007, http://www.ocregister.com/articles/city-67647-wage-law.html (on file with the Harvard Law School Library).

[20] Fair Minimum Wage Act of 2007, 29 U.S.C.A § 206 (West 2010).

[21] CAL. LAB. CODE §§ 202, 204, 1182.12 (2003).

[22] *See* RUTH MILKMAN ET AL., INST. FOR RESEARCH ON LABOR AND EMPLOYMENT, UNIV. OF CAL., L.A.,WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS (2010), *available at* http://www.irle.ucla.edu/publications/pdf/LAwagetheft.pdf; ANNETTE BERNHART ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf.

and in light manufacturing. The activism that catalyzed the enactment of the ordinance addressed the exploitation of car wash workers, who faced long hours, payment below the minimum wage or based on tips alone, and exposure to hazardous chemicals without protective gear. A coalition of nonprofit organizations and the Car Wash Organizing Committee of the United Steelworkers ultimately persuaded the Los Angeles city government that local regulation was necessary because state and federal regulation had failed.[23] Newly empowered by the ordinance, the Los Angeles City Attorney filed 172 criminal and civil charges against the owners and managers of four Los Angles car washes,[24] and the California Labor Commissioner filed suit against six car wash businesses in Los Angeles for violating employment laws.[25]

A second major example of local efforts to ensure that jobs are adequately paid is the use of zoning power to prevent Wal-Mart and other low-wage big box retailers from building new stores. These ordinances, typically the product of months or years of organizing by labor and community groups, are aimed at protecting unionized grocers and small retailers from ruinous low-wage competition.[26] Cities including Redlands, Long Beach, San Diego, and Santa Ana considered or enacted bans, although some were later repealed.[27] In 2007, after the mayor of San Diego vetoed an ordinance banning supercenters, the San Diego City Council required retail stores larger than 50,000 square feet to obtain a neighborhood development permit and retail stores greater than 100,000 square feet to obtain a site development permit.[28] Similarly, the Santa Ana City Council passed an ordinance

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[23] Steven Greenhouse, *Labor Tries to Organize Carwashes in Los Angeles*, N.Y. TIMES, Sept. 6, 2010, at B1; *Workers Picket Local Car Wash*, L.A. INDEPENDENT, Dec. 24, 2009, http://www.laindependent.com/news/local/west-hollywood/80071562.html (on file with the Harvard Law School Library).

[24] *Criminal Charges Filed Against Car Wash Owners*, L.A. TIMES, (Feb. 10, 2009), http://latimesblogs.latimes.com/lanow/2009/02/los-angeles-cit.html (on file with the Harvard Law School Library).

[25] Ann M. Simmons, *California Labor Commission Sues 9 Carwash Businesses*, L.A. TIMES, June 6, 2009, at A9.

[26] For a general description of anti-Wal-Mart organizing, see NELSON LICHTENSTEIN, THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS (2009); Scott Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927 (2007).

[27] For a discussion on Redlands, see Jesse. B. Gill, *Measure O Targets Wal-Mart*, SAN BERNARDINO COUNTY SUN, May 2, 2010; Jan Sears, *Measure O, if Approved, Would Ban Supercenters from Redlands*, PRESS-ENTERPRISE, May 9, 2010, at A4; Karen Aho, *The Price of Wal-Mart Coming to Town*, MSN MONEY (July 28, 2009), http://articles.moneycentral.msn.com/SavingandDebt/SaveMoney/the-price-of-wal-mart-coming-to-town.aspx (on file with the Harvard Law School Library). For a discussion on Long Beach, which enacted a ban but then repealed it under pressure from Wal-Mart, see Mira Jang, *Wal-Mart Fights Grocery Ruling*, ALL BUSINESS (Nov. 2, 2006), http://www.allbusiness.com/government/elections-politics-campaigns-elections/14331057-1.html (on file with the Harvard Law School Library); Hector Becerra & Nancy Wride, *Wal-Mart Faces Higher Hurdles in Long Beach*, L.A. TIMES, Sept. 21, 2006, at B1.

[28] *See* Mathew T. Hall, *Putting a Lid on the Big Box*, SAN DIEGO UNION-TRIBUNE, June 5, 2007; Kevin Reisch & Karen Zobell, *The Battle Over Big-Box Retail in California*, SAN DIEGO NEWS ROOM, Oct.8, 2008, http://sandiegonewsroom.com/news/index.php?option=com_con-

that requires big-box discount and grocery stores to conduct an analysis of the impact of the store on local businesses within a three-mile radius as a requirement to obtain a conditional use permit necessary to open a supercenter.[29] The effort to require more extensive review of permits to build large enterprises in a city is not limited to big-box retailers; San Diego considered an ordinance requiring city council review of proposals to build large hotels at the urging of unions concerned about the low wages paid by some of the city's hotels.[30]

2. *Health and Safety*

A second major front in the battle for good jobs is the effort to regulate working conditions to protect the safety and health of low-wage workers and the communities in which they live and work. The goal is to require employers to internalize the full costs of labor and provide a safe and healthful workplace. Achieving this regulatory goal has been especially challenging because legal and economic changes have allowed employers to treat workers as independent contractors responsible for maintaining the physical infrastructure of the places where they work.

One manifestation of this phenomenon is day labor. Construction contractors reduce their labor costs when they hire by the day. This casual labor business strategy shifts the costs of idle time from employers to labor. Moreover, construction contractors also secure lower labor costs by relying on the practice of day laborers congregating along public streets and in parking lots of home improvement stores, paint stores, and lumber yards. They can find a pool of available labor without advertising and at a moment's notice simply by driving to the location where available workers congregate. This hiring practice places almost all job search costs on workers. Workers have to find the day-labor market, and they have to endure the physical and psychological discomfort of waiting outside and scrambling to be the one who is chosen for a job—either based on their willingness to work for less or their ability to convince the prospective employer that they are stronger, harder working, better skilled, or more compliant than the other workers waiting at the same site. Decades ago, unions battled to substitute the union-run hiring hall for the physical day-labor market (it was called the "shape-

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tent&view=article&id=772:the-battle-over-big-box-retail-in-california&catid=46:san-diego-business&Itemid=54 (on file with the Harvard Law School Library); Editorial, *Frye to the Rescue*, SAN DIEGO UNION-TRIBUNE, July 12, 2007, at B10; Editorial, *Loyal To Whom? Council May Back Unions Over Public Good*, SAN DIEGO UNION-TRIBUNE, Nov. 28, 2006, at B6.

[29] *See* Dave McKibben, *Santa Ana Prepares to Ban Supercenters*, L.A. TIMES, Jan. 18, 2007, at B5; Editorial, *Santa Ana: Low Prices Not Welcome Here*, ORANGE COUNTY REG., Jan. 29, 2007, http://www.ocregister.com/opinion/mart-53382-wal-santa.html (on file with the Harvard Law School Library).

[30] *See* David King, *CCDC Reports on "Ray Charles" Proposal*, SAN DIEGO NEWS ROOM, Mar. 16, 2010, http://sandiegonewsroom.com/news/index.php?option=com_content&view=article&id=42058 (on file with the Harvard Law School Library); Lori Weisberg, *Plan to Change Hotel Review Process OK'd by S.D. Panel*, SAN DIEGO UNION-TRIBUNE, May 20, 2010, at C1.

up" in the longshore industry) because it was brutal, physically dangerous, humiliating, and encouraged workers to underbid each other in their desperation to find a day's work. Moreover, day-labor markets also shift some costs of maintaining the physical-labor market from employers to the neighborhoods where day-labor markets form: the roadside hiring can block traffic, increase the risk of accidents, and generate litter when the workers have no place to dispose of trash or human waste.

Labor advocates—especially the National Day Laborers Organizing Network—in coalition with community groups in neighborhoods that host day-labor markets, seek ways to shift the costs of the labor market to the entities that profit from them. Many localities have used zoning power to require large home improvement stores to provide facilities to make day-labor markets safer, more comfortable, and more hygienic. In 2008 the Los Angeles City Council unanimously approved an ordinance that required certain home improvement stores to obtain conditional-use permits and to create operating standards for dealing with day laborers that congregate outside in search of work. The ordinance applies to home improvement stores that are over 100,000 square feet and that have a significant amount of day laborers in the area who are expected to generate increased noise, traffic, or safety hazards. Though the ordinance does not dictate operating standards, the main remedy outlined in the ordinance is the creation of day-labor centers with shelter, drinking water, bathrooms, trash collection, and a safe place to discuss hiring without creating a traffic hazard by standing in the middle of a street or parking lot.[31] Not surprisingly, businesses that benefit from day labor resist the efforts to internalize the costs to them. In 2007, for example, Home Depot unsuccessfully pushed an amendment to a federal immigration bill that would have prohibited state and local laws requiring that big home-improvement stores provide day laborer shelters.[32] Other employer strategies have focused on pushing the costs of day-labor markets from one community to another by simply banning the solicitation of employment by the day within the city limits.[33]

A second manifestation of the struggle to internalize the costs of cheap labor has to do with whether employers can treat workers as independent contractors and require them to provide and maintain the tools of their trade. It is one thing to require workers to buy and maintain hand tools or uniforms; it is quite another to require workers to buy and maintain heavy equipment such as trucks. Extensive organizing created a labor and environmental alliance on the issue of truckers serving the Ports of Los Angeles and Long Beach. As explained by Scott Cummings, labor activists were thwarted in their efforts to raise wages of the truck drivers for major ship-

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[31] Anna Gorman, *Day Laborer Rule OKd*, L.A. TIMES, Aug. 14, 2008, at B3; Editorial, *Home Depot Amendment*, N.Y. TIMES, June 22, 2007, at A20; Editorial, *The Shelter Storm*, L.A. TIMES, Aug. 10, 2008, at A31.

[32] Editorial, *supra* note 31, at A20.

[33] *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1182 (9th Cir. 2010).

ping companies serving the port because the companies deemed the drivers to be independent contractors. Environmental activists were concerned that the aging and badly maintained trucks polluted the neighborhoods surrounding the port, but efforts to replace the trucks with newer, non-polluting fleets were unrealistic because the owner-operators of the trucks could not pay to replace or maintain the trucks. The obvious solution to both the labor and the environmental problem was to force the trucking companies to make the drivers employees so that the companies would internalize the cost of maintaining their fleets. Together, the labor and environmental activists persuaded the City of Los Angeles to condition the trucking companies' privilege to use the port on restructuring their employment relations with the drivers so that the companies rather than the drivers would be responsible for maintaining the trucks.[34] As explained below, the trucking companies challenged this innovative strategy as preempted by a federal law, but the court of appeals ultimately rejected the challenge.

3. *Benefits*

Reasonable minds differ on the question whether health care should be funded by employers and employees through payroll taxes or through direct payments. But in the context of the long-term American system linking health care finance to employment—and in the absence of a political commitment to change that system by taxation sufficient to fund government coverage of health care costs for all citizens—we live in a world in which local governments will continue to struggle with health care funding for the unemployed, the working poor, and the middle-class uninsured. The 2010 health care reform legislation largely continues our longstanding reliance on private sector and employment-linked health insurance and state and local programs for covering the uninsured.[35]

Because of the wide scope of federal preemption under ERISA,[36] local regulation in the area of private sector pensions and benefits is far less common than regulation of wages. ERISA regulates virtually all health and pension plans maintained by private sector employers, but does not regulate government plans. Most local activity regulating pensions concerns public sector employees whose pension plans are not covered by ERISA.[37] Local

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[34] *See* Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low Wage Workers*, 1 U. CHI. LEGAL F. 187, 199–203 (2009).

[35] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see generally* HINDA CHAIKIND ET AL., CONG. RESEARCH SERV., R40942, PRIVATE HEALTH INSURANCE PROVISIONS IN PPACA (2010), *available at* http://bingaman.senate.gov/policy/crs_privhins.pdf.

[36] ERISA governs "'employee benefits plans,' including 'employee welfare benefit plans'" provided by private sector employers, and preempts "any and all State laws insofar as they . . . relate to any employee benefit plan" that is governed by ERISA. Golden Gate Rest. Ass'n v. City and Cnty. of S.F., 546 F.3d 639, 648 (9th Cir. 2008) (citing 29 U.S.C. §§ 1002(3), 1144(a)).

[37] For example, in 2008, Orange County voters passed a measure requiring voter approval on any government labor contract that would increase the retirement benefits of public em-

activism on benefits paid by private-sector companies has focused on improving access to health benefits and on discrimination against same-sex partners. Both Maryland and San Francisco enacted laws providing that employers that paid less than a specified amount toward the health care of their employees were obligated to pay the government a tax, which would be used to provide health care for uninsured or underinsured residents. These are known as "fair share" laws because they require employers to pay their fair share of the costs governments incur in providing health care to the working poor. Employers that have higher labor costs because they provide health coverage should not get an unfair advantage over employers who have lower labor costs because they shift to the public the cost of providing health care for the working poor. San Francisco's innovative Health Care Security Ordinance, which required covered employers to meet certain spending requirements in order to expand access to health care, was upheld in the Ninth Circuit against an ERISA preemption challenge in 2008, while a similar Maryland statute was found by the Fourth Circuit to be preempted in 2007.[38] In 2009, LGBT and labor advocates lobbied for the city of Long Beach to pass an Equal Benefits Ordinance that would require companies contracting with the city for $100,000 or more to provide the same benefits to registered domestic partners as they do to spouses of employees.[39]

4. *The Right to Bargain Collectively*

Major campaigns have sought to regulate the working conditions of home-based care providers, resulting in the recognition of their right to organize and bargain in fourteen states.[40] As Benjamin Sachs has noted, a number of local governments have, by a combination of ordinances and private agreements, expanded collective bargaining rights on government-

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ployees or elected officials. Norberto Santana Jr., *Do You Want to OK County Pensions?*, ORANGE COUNTY REG., Oct. 23, 2008, http://www.ocregister.com/articles/county-11401-measure-pension.html (on file with the Harvard Law School Library); *Measure J Wants Voter Approval for Pension Spikes*, ORANGE COUNTY REG., Nov. 4, 2008, http://totalbuzz.ocregister.com/2008/11/04/measure-j-wants-voter-approval-for-pension-spikes/7036/ (on file with the Harvard Law School Library). In 2010 the Riverside Sheriff's Association gathered enough signatures to qualify a measure for the November ballot that would secure pension benefits for sheriff's deputies and other public safety employees by preventing reductions of benefits without voter approval. Duane W. Gang, *Pension Proposal Causes Concern*, PRESS-ENTERPRISE, May 19, 2010, at A4. In contrast, Los Angeles city officials supported a measure for the June 8, 2010, city ballot that would decrease pension benefits given to newly employed city officials. David Zahniser & Phil Willon, *L.A. Seeks to Scale Back Pensions*, L.A. TIMES, Jan. 6, 2010, at A3.

[38] *Golden Gate Rest. Ass'n*, 546 F.3d at 661; Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 183 (4th Cir. 2007).

[39] Press Release, City of Long Beach, Cal., City Council Unanimously Passes Equal Benefits Ordinance; Historic Law Maintains City's Tradition of Support for LBGT Equality, (Nov. 19, 2009), *available at* http://www.longbeach.gov/news/displaynews.asp?NewsID=4242&targetid=54.

[40] HELEN BLANK ET AL., NAT'L WOMEN'S LAW CTR., GETTING ORGANIZED: UNIONIZING HOME-BASED CHILD CARE PROVIDERS 5 (2010), *available at* http://www.nwlc.org/sites/default/files/pdfs/gettingorganizedupdate2010.pdf.

funded projects.[41] As Sachs argues, these local initiatives and contracts give workers rights to unionize in ways that labor allies have tried and failed to get Congress to enact for decades.[42] Thus, although the broad scope of labor law preemption invalidates direct local regulation of unionization and collective bargaining, government-sponsored private agreements survive preemption challenges.[43] California governments have adopted an array of measures indirectly regulating the union rights of private-sector employees and employers. Project labor agreements (PLAs) set minimum standards for publicly financed construction projects and exchange a union's no-strike promise for the employer's promise to pay union-scale wages. While both union and non-union contractors can bid on these types of contracts, non-union contractors oppose them because they stipulate a minimum wage at the higher union scale. Local governments sometimes condition payment of subsidies or tax incentives for private construction projects upon the recipients' agreement to PLAs.[44] As with everything else, labor successes with particular legal devices at the local level tend to produce a reaction to ban the labor-friendly arrangements. Some Southern California cities and counties, including Orange County, have adopted measures banning government-mandated PLAs on construction projects funded by the city or county.[45]

Another local ordinance that regulates labor conditions is a 2005 Los Angeles city ordinance that barred large supermarkets from immediately firing workers after taking over a store.[46] The ordinance was passed after a union campaign against a number of Los Angeles grocery chains. It required the new owner of a supermarket to hire from the employees of the previous owners based on seniority. The new owner was further required to retain the employees for ninety days after the store was open and operational, provide each employee with a written performance evaluation after ninety days, and

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[41] Benjamin Sachs, *Despite Preemption: Labor Lawmaking in the Cities and States*, 124 HARV. L. REV. (forthcoming 2011).

[42] *Id.*

[43] *Id.*

[44] *See* S. Bay Boston Mgmt., Inc. v. UNITE HERE Local 26, 587 F.3d 35, 38 (1st Cir. 2009); N. Ill. Chapter of Associated Builders and Contractors, Inc. v. Lavin, 431 F.3d 1004, 1005 (7th Cir. 2005) (holding that Illinois subsidy for private company's construction project conditioned upon recipient's adherence to a PLA was not a "regulation" and therefore not preempted by NLRA); Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 207 (3d Cir. 2004) (finding that local subsidy for construction of hotel conditioned on adherence to PLA not preempted).

[45] Editorial, *Unions' Public-Works Loss Is Taxpayers' Gain*, ORANGE COUNTY REG., Oct. 28, 2009, http://www.ocregister.com/articles/ordinance-216827-county-plas.html (on file with the Harvard Law School Library); *Orange County Ordinance Prohibiting Project Labor Agreements on County Projects Passes*, THE TRUTH ABOUT PROJECT LABOR AGREEMENTS, ASSOCIATED BUILDERS AND CONTRACTORS, Nov. 4, 2009, http://www.thetruthaboutplas.com/2009/11/04/orange-county-ordinance-prohibiting-project-labor-agreements-on-county-projects-passesprojects-becomes-law/ (on file with the Harvard Law School Library).

[46] Howard Fine, *Grocery Owners Win Ruling on L.A. Labor Ordinance*, L.A. BUS. J., Mar. 10, 2008, http://www.labusinessjournal.com/news/2008/mar/10/grocery-owners-win-ruling-on-la-labor-ordinance/ (on file with the Harvard Law School Library); David Zahniser, *Los Angeles Labor Ordinance Voided*, L.A. TIMES, Mar. 5, 2008, at C3.

consider offering them full-time employment if they had received satisfactory evaluations. Workers could also sue for violations under the ordinance.

The preceding survey of California reforms is but a sample of the efforts of local governments across the country to improve wages and working conditions in their local economy. These and other laws aimed at raising wages, protecting local businesses from low-wage competition by big-box retailers, improving workplace health and safety, regulating day labor markets, expanding the availability of health care for the working poor, and facilitating collective bargaining. They responded to pressing needs in local labor markets that federal law did not address effectively or, in some cases, did not address at all.

II. Preemption Challenges

Although the labor reforms described above address problems that federal law fails to resolve or, in some cases, even to address, many have faced federal preemption challenges from employers or business groups. As explained below, courts should find none of them to be preempted by federal law.

A. Preemption of Wage Regulation

The FLSA imposes a minimum wage, requires premium pay for hours worked in a week in excess of forty, and prohibits child labor. It expressly states that "No provision of this chapter . . . shall excuse noncompliance with any . . . State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week [sic] lower than the maximum workweek established under this chapter . . . ."[47]

Nevertheless, questions arise about aspects of FLSA preemption not covered by this express provision. For example, can employees recover state common law remedies for fraud, unfair business practices, or other claims based on an employer's deceptive refusal to compensate employees for working time? The Fourth Circuit has held that the FLSA is the exclusive source of remedies for enforcement of its mandates and that, although its express preemption provision does not address the issue, it impliedly preempts state law claims premised on a violation of the FLSA.[48] As explained below, the Fourth Circuit was wrong. The FLSA is expressly intended to protect employees and to allow more generous local laws, so the Fourth Circuit had no basis for concluding that it *eliminated* state common law remedies for fraud, breach of contract, and negligence.[49] The court

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[47] 29 U.S.C. § 218(a) (2006).

[48] Anderson v. Sara Lee Corp., 508 F.3d 181, 194 (4th Cir. 2007).

[49] *See id.* ("[C]ontract, negligence, and fraud claims are precluded under a theory of obstacle preemption.").

noted that "the FLSA does not explicitly authorize states to create alternative remedies" and that the FLSA has an "unusually elaborate enforcement scheme."[50] It then concluded that allowing state law remedies to enforce FLSA rights, and allowing state law remedies to duplicate FLSA rights created an obstacle to the accomplishment of the FLSA's policies and purposes.[51] What remains unclear from the court's opinion is whether the state claims were an effort to enforce wage claims that arose solely under the FLSA or whether the right to payment and the right to challenge a fraudulent refusal to pay wages owed were based on independent grounds, such as state contract law. This, of course, is simply a matter of pleading: the law of individual employment contracts creates the obligation of an employer to pay for work performed; the FLSA simply stipulates the minimum permissible amount for the compensation term of the contract otherwise created and governed by state law. Thus, the court characterized the plaintiffs' claims as arising under the FLSA, but in fact the right to payment and the fraudulent refusal to pay were premised on state law, and thus the state claims were not solely an effort to enforce FLSA rights.

The Fourth Circuit's approach to FLSA preemption is exactly backwards. As the court noted, the purpose of the FLSA was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[52] As the court further noted, the FLSA contains an express provision allowing for local laws that are more employee-protective than the federal law. That preemption provision does not determine whether a state may provide more generous remedies for breach of an employment contract's term on compensation nor does it state whether states may provide more generous remedies for a breach of the FLSA's own wage rules. There is no reason to read the FLSA to preempt state common law claims to enforce wage payment obligations. As the court noted, there was no explicit conflict between the federal remedial scheme and the state one: it was theoretically possible for the employer to comply with both state and federal law and for a court to require similar proof for both state and federal claims.[53] Yet in concluding that the federal statute's remedial provisions were exclusive even though its substantive provisions were not, the court implied broader preemption than the FLSA required.

Preemption challenges to local minimum pay standards have occasionally been brought under other federal statutes besides the FLSA. One particularly surprising challenge was brought against Illinois's Hotel Room Attendant Amendment, which amended the Illinois One Day Rest in Seven Act to require every hotel room attendant in Cook County to receive paid

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[50] *Id.*, 508 F.3d at 192–93 (citing Kendall v. City of Chesapeake, 174 F.3d 437, 443 (4th Cir. 1999) (holding that plaintiffs cannot enforce FLSA rights by suing under 42 U.S.C. § 1983)).

[51] *Id.* at 194.

[52] *Id.* at 192 (quoting 29 U.S.C. § 202(a)).

[53] *Id.* at 193.

rest and meal breaks.[54] The One Day Rest in Seven Act, as the name suggests, required employers to give employees one day off for every six days worked.[55] The amendment required rest breaks and meal breaks, which is also a common area of state law; California, for example, requires some employers to provide paid rest and meal breaks.[56] The Supreme Court has rejected an argument that such minimum labor standards laws are preempted by the National Labor Relations Act (NLRA), even though they affect the processes and results of collective bargaining by imposing minimum standards that the collective bargaining agreement cannot waive.[57] Yet the Seventh Circuit held that because the meal and rest break amendment to the Illinois statute applied only to a single occupation in a single county it was preempted by the NLRA on the ground that it was not a minimum labor standard but instead was a union effort to legislate that which it was unable to secure through collective bargaining.[58] This conclusion is wrong. Wage and hour laws at both the state and federal level are full of special provisions and exemptions targeted at a single industry, including those industries that are limited to a single geographical area. The Seventh Circuit had to distinguish its result from a number of cases in the Supreme Court and in other circuits holding that minimum labor standards applying only to particular occupations are not preempted.[59] There is simply no principle of state or federal law, or federal preemption law, that prevents activists from seeking special protection from a legislature even though they were thwarted in efforts to obtain such protections through a contract. Nothing in the Supreme Court's line of labor law preemption cases suggests that Congress intended to divest local governments of their power to legislate minimum labor standards for a particular city, county, region, or for a particular industry within that limited geographic area.

B. Preemption of Safety Measures and Other Efforts to Internalize Labor Costs

As described above, some local regulations can be understood as an effort by local governments to force employers to internalize the full cost of labor by preventing them from shifting to employees or to others certain fixed costs (like the cost of purchasing and maintaining a fleet of trucks) or labor market search costs (like the cost of matching available construction workers and prospective employers each day). The American Trucking Association challenged the novel effort of the City of Los Angeles to force

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[54] 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1122 (7th Cir. 2008).

[55] *Id.*

[56] CAL. LAB. CODE § 226.7 (2001).

[57] *See* Livadas v. Bradshaw, 512 U.S. 107, 124 n.17 (1994) (noting that "Congress is understood to have legislated against a backdrop of generally applicable labor standards"); *see also* Metro. Life Ins. Co. v. Mass., 471 U.S. 724 (1985); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987).

[58] *520 S. Mich. Ave. Assocs.*, 549 F.3d at 1139.

[59] *See id.* at 1131.

trucking companies to hire truckers only as employees so as to force the companies to pay the cost of the truck fleet. The ATA's theory was that the Los Angeles port licensing provision—a city rule allowing only trucking companies with control over their employees and their truck fleets to obtain the valuable concession to do business at the port—was preempted by the Federal Aviation Administration Authorization Act, which regulates interstate motor carriers. The Ninth Circuit upheld the city's action, reasoning that the city concession rules fell within the express statutory exemption from preemption allowing states to enforce safety regulations and highway route controls.[60]

Other local regulations of workplace safety have not survived preemption challenges. For example, a Seattle ordinance enacted in the wake of a deadly liquid gas pipeline explosion was held preempted by the federal Pipeline Safety Improvement Act, which provides safety standards for pipelines and delegates enforcement authority to the federal Department of Transportation.[61] A Miami ordinance regulating the installation and operation of tower cranes and hoists was held preempted by the OSH Act.[62] Miami-Dade County enacted the ordinance requiring tower cranes to withstand winds of 140 miles per hour because of the risk of toppling cranes during a hurricane. A group of construction contractors challenged the ordinance, and the court struck it down. The court noted that the Supreme Court had held that the federal OSH Act preempts state occupational safety and health standards on any issue where a federal OSH Act standard is in effect unless a state has obtained federal approval for state promulgation and enforcement of state standards at least as effective as the federal standards.[63] Florida had not obtained approval for a state plan. A federal standard requires tower cranes to withstand ninety-mile-an-hour winds—a standard set in Europe—but Miami-Dade County had concluded that the standards were insufficient to protect those near construction sites during the higher winds of a hurricane. The court rejected the County's argument that it should be able to set a higher standard. The case illustrates the pitfalls of reading federal legislation as a ceiling of protection rather than a floor. It may be that in most regions of the country, or the world, it is unnecessary to require cranes to withstand hurricane-force winds because such winds never occur. But in South Florida, hurricanes are not unusual. The result of the court's reasoning is to read a federal statute intended to raise the level of workplace safety as preventing local governments from enacting laws responsive to local problems.

There may be some cases in which national uniformity of workplace safety regulation is desirable. The Seattle pipeline case might be an exam-

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[60] Am. Trucking Ass'n v. City of Los Angeles, 596 F.3d 602, 605–06 (9th Cir. 2010); Cummings & Boutcher, *supra* note 34, at 203.

[61] Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872 (9th Cir. 2006).

[62] Assoc'd. Builders and Contractors of Fla. v. Miami-Dade Cnty., 594 F.3d 1321, 1325 (11th Cir. 2005).

[63] *See id.* at 1324 (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 102 (1992)).

ple, as the pipeline that exploded ran through two different states, and one could make a plausible argument that uniform standards for the construction and maintenance of interstate pipelines is desirable. But, as explained below, many preemption cases—like the Miami-Dade County case—do not analyze whether national uniformity is important or even really intended by Congress, with the result that federal courts invalidate local legislation even when Congress did not intend protective legislation to be a ceiling rather than a floor in the regulatory field.

C. Preemption of Benefits Regulation

As noted above, in the area of health and other benefits, a number of local governments have attempted to regulate without running afoul of ERISA preemption. Notwithstanding the breadth and specificity of the ERISA preemption provision, many of the hard cases find the preemption provision indeterminate on the precise issue raised by local laws. The recent pair of cases from the Ninth and Fourth Circuits on ERISA preemption of so-called "fair share laws" is illustrative.[64] A divided panel of the Fourth Circuit found the Maryland law to be preempted on the grounds that it effectively compelled covered employers to establish or improve ERISA-covered health benefit programs.[65] The Ninth Circuit distinguished the Fourth Circuit decision and found that ERISA did not preempt the San Francisco ordinance because covered employers had a meaningful option about whether to pay the tax or to pay more to employees for health care.[66] Both courts emphasized that ERISA reflects a compromise between employee protection (the regulation of employer-provided benefits to ensure transparency and fairness in the administration of employer-provided benefits programs) and employer protection (national uniformity in regulation and exemption from local laws mandating the establishment or content of benefits plans).[67] As explained in Part III, a correct reading of the scope of ERISA preemption would find employers entitled only to national uniformity in the content of their plans and in their decision whether to establish a plan at all. Congress did not intend uniformity in state or local payroll taxes used to fund social welfare programs even when those programs are necessary wholly or partly because some employers do not provide ERISA benefits.

D. Preemption of Local Efforts to Protect Workers Through Collective Bargaining

The law of preemption in the area of unions and collective bargaining has been thoroughly analyzed by Professor Sachs, who argues that federal

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[64] *See generally*, Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180 (4th Cir. 2007); Golden Gate Rest. Ass'n v. City and Cnty. of S.F., 546 F.3d 639 (9th Cir. 2008).

[65] *Retail Indus. Leaders Ass'n*, 475 F.3d at 197.

[66] *Golden Gate Rest. Ass'n*, 546 F.3d at 660.

[67] *Id.* at 647; *see also Retail Indus. Leaders Ass'n*, 475 F.3d at 197.

labor law does not preempt local government ordinances and contracts that condition financial support for development projects upon compliance with contractual standards including recognition of the right of employees to unionize and bargain collectively.[68] Professor Sachs calls these local initiatives a tripartite model of labor relations because they involve a three-way cooperative relationship between local government, business organizations, and labor organizations.[69] Direct efforts to regulate organizing have generally been found to be preempted, as in the case of AB 1889, a 2000 California measure that barred companies from using state funds to "assist, promote or deter union organizing,"[70] which the Supreme Court held preempted in *Chamber of Commerce v. Brown*.[71] Indirect efforts to allow employees to unionize, such as through the adoption of project labor agreements, have proliferated throughout Southern California and have survived preemption challenges.[72] A Los Angeles ordinance that attempted to protect the wage gains secured by past unions when a grocery store is sold to a nonunion company by preventing the new owner from firing the workers and replacing them with low-wage workers was found to be preempted by the California Court of Appeals.[73]

The Supreme Court held in *Local 76, International Association of Machinists v. Wisconsin Employment Relations Board* that Congress intended that the uses of some tactics to resolve labor-management disputes be left "to the free play of economic forces" and remain unregulated by either federal or local law.[74] Although a full-scale evaluation of *Machinists* preemption is beyond the scope of this essay, for present purposes it will suffice to say that courts should be reluctant to find preemption of minimum labor

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[68] *See generally* Sachs, *supra* note 41.

[69] *Id.*

[70] David G. Savage, *Justices Void State Labor Law: Employers Can't Be Barred From Using State Funds to Speak Out Against Unions, the Supreme Court Rules*, L.A. TIMES, June 20, 2008, at A10.

[71] 554 U.S. 60 (2008). Other measures were enacted by the legislature but vetoed by the governor, including S.B. 789 in 2007, which would have allowed unionization via a card check process. Hannah Beth Jackson, *While California Dreams: A Weekly Update on the Goings-on in Sacramento*, CAL. PROGRESS REPORT (Oct. 28, 2007), http://www.californiaprogressreport.com/site/?q=node/6896 (on file with Harvard Law School Library); *see also* Darrell Steinberg, BILL ANALYSIS, SENATE COMM. ON LABOR AND INDUST. RELATIONS (Cal. 2009), http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0751-0800/sb_789_cfa_20090331_171727_sen_comm.html, (on file with Harvard Law School Library).

[72] In January 2009, the San Diego Unified School Board approved a resolution to negotiate an agreement with the Buildings and Constructions Trade Council for a $2.1 billion facilities bond. *See* Helen Gao, *Labor's Deals Stir Dust-Up in Construction,* THE SAN DIEGO UNION-TRIBUNE, January 25, 2010, at A1, *available at* http://www.signonsandiego.com/news/2010/jan/25/labors-deals-stir-dust-construction; Emily Alpert, *Unions to Have Key Seat at $2.1 B Bond Table,* VOICE OF SAN DIEGO.ORG, (Jan. 14, 2009), http://www.voiceofsandiego.org/education/article_6cabcbc3-3136-5227-a43e-10c641f9427c.html (on file with the Harvard Law School Library).

[73] Anderson B. Scott, *Sanity Prevails in California,* MARTINDALE.COM, (Dec. 10, 2009), http://www.martindale.com/labor-employment-law/article_Fisher-Phillips-LLP_862160.htm (on file with the Harvard Law School Library).

[74] 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

standards or laws such as California's law that restricted the use of government funds to run anti-union campaigns. As Justice Thomas stated in a 2009 case, the Court should abandon its practice of finding state laws preempted as an obstacle to a federal policy or in finding implied federal preemption within an entire field, and thus should reject implied preemption except where a federal and state law conflict.[75] Under Justice Thomas's reasoning, *Chamber of Commerce v. Brown*[76] was wrongly decided because there is no evidence that Congress intended its own regulation of employer and union speech in the organizing context to limit how states can limit the use of public money. For example, that Congress regulates union organizing has never been thought to immunize employees from tort or criminal liability when they engage in tortious or illegal activity as part of an organizing campaign or a strike.[77]

As noted above, the recent experience in California shows the variation of opinions among local governments as to whether the city is better off supporting or restricting the efforts of unions to create the kind of tripartite agreements between labor, business, and government that enhance labor rights. A number of cities have adopted such agreements, but other cities have attempted to prevent the use of project labor agreements. This suggests that local labor lawmaking is not always in a union-friendly direction and that employer organizations have spotted opportunities in sympathetic local governments to seek laws restricting unionization and also have used the ballot initiative process in California to restructure local government authority to rein in the ability of local governments to raise labor standards. Most of these activities escape preemption challenge.[78]

Preemption has emerged as a major weapon for employers seeking an escape from regulation and a major threat to the ability of local governments to protect workers. The irony is that many of the federal statutes that are described as preempting local regulation were enacted to protect workers. As I explain below, courts should reorient their analysis of the preemptive scope of federal labor and employment legislation to return the statutes to their true purpose: to protect workers. This anti-subordination principle of federal labor and employment legislation should guide preemption analysis.

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[75] Wyeth v. Levine, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring). Justice Thomas spent much of his opinion criticizing Hines v. Davidovitz, 312 U.S. 52 (1941), a decision opponents of local anti-immigrant laws place great weight on when arguing that federal immigration law preempts state laws banning hiring or renting to undocumented immigrants.

[76] 554 U.S. 60, 62 (2008).

[77] Notwithstanding his rejection of implied preemption in other contexts, Justice Thomas inexplicably joined the majority opinion in *Chamber of Commerce v. Brown* finding implied preemption of the California law.

[78] *See generally* Sachs, *supra* note 41.

III. The Anti-Subordination Principle of Preemption

Preemption analysis needs a theory of regulatory federalism in each field in order to produce sensible policy and logically satisfying doctrine. Here I sketch out such a theory for preemption in the labor and employment field. My argument is that, since most labor and employment laws were enacted for the purpose of protecting employees from the terms and conditions of employment that would prevail in the absence of any regulation, courts should read the congressional intent or purpose regarding preemption as being one of anti-subordination, prioritizing employee protection over national uniformity. After detailing the theory and the recognition it has already found in a few illustrative cases, I explain how an anti-subordination approach to preemption would apply to two controversial examples of local regulation: health benefits for the working poor and regulation of migration and migrant labor.

A. The Anti-Subordination Principle

Once upon a time, labor scholars advocated broad preemption of local law as necessary to avoid a race to the bottom as states and localities competed with each other to attract industry by enacting legal regimes that deterred union organizing and invalidated collective bargaining agreements.[79] Given the history of labor in the United States, particularly the flight of textile and other manufacturing from the unionized Northeast to the nonunion South, preemption was thought to prevent states with lower labor standards from gaining a competitive advantage. The political economy has changed as the competition for industry through low wages has become an international rather than a national phenomenon and as unionization increasingly occurs primarily in industries where the jobs cannot be exported outside the U.S. In many low wage sectors, job flight is unlikely, and the problem is finding ways to force higher standards on jobs that cannot be moved in the face of a huge surplus of desperate workers willing to work for very low wages and vulnerable to exploitation through threats of deportation. In this new economic climate, many labor scholars embrace relaxing labor law preemption doctrines and encouraging local variation, in the hope that that local variation will result in more employee-protective laws.[80] Relaxing preemption may also enhance the transparency of local labor lawmak-

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[79] *See, e.g.*, Archibald Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1315 (1954).

[80] *See generally* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption to Allow States to Make More Labor Relations Policy*, 70 La. L. Rev. 97 (2009); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 Yale J. on Reg. 355 (1990); Eileen Silverstein, *Against Preemption in Labor Law*, 24 Conn. L. Rev. 1 (1991).

ing. At a minimum more study is needed of the advantages and disadvantages of local regulation of unionization and bargaining.

As described above, many local labor initiatives require employers to pay wages above the minimum established by the federal Fair Labor Standards Act (FLSA) and to provide remedies for wage theft.[81] The FLSA explicitly allows state and municipal wage laws and has never been construed to preempt state law claims that cover some of the same territory as an FLSA claim. For example, the FLSA does not preempt state laws punishing an employer's refusal to pay wages in a timely fashion or state contract claims to pay overtime or to pay promised wages.[82] It does not preempt state criminal laws prohibiting theft of earned wages when a statute is intended to protect employees and explicitly allows for more employee-protective local laws.

A model approach to whether federal wage laws preempt local laws is that of the Seventh Circuit in *Frank Brothers, Inc. v. Wisconsin Department of Transportation*. That case addressed the question whether the federal Davis-Bacon Act, which requires payment of a prevailing wage on public works projects, preempted state prevailing wage laws as applied to a category of employee—truck drivers—specifically excluded from the coverage of the federal law by federal regulations implementing the law.[83] The Davis-Bacon Act contains no express preemption provision. Although the employer argued that it was intended to occupy the field of wage regulation for federally-funded public works projects, the court noted that the statute stipulates only the minimum to be paid and it was "not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects."[84] The court rejected the contention that the Davis-Bacon Act was intended to be comprehensive and that wages of those employees excluded from coverage were intended to be set by employers rather than by state prevailing wage regulation.[85] Similar reasoning should be applied to claims that the FLSA preempts local laws: a statute intended to improve labor standards should not be read to prohibit local efforts to do so because there is no evidence that Congress intended deregulation.

A crucial premise of the foregoing analysis is that the FLSA and other federal labor standards statutes were intended to protect employees. Employers argue that preemption is appropriate because the federal statute was instead intended as a legislative compromise, giving some protection for employees and limiting the liability of employers by eliminating other claims or giving some protections and leaving other areas free from regulation and

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[81] 29 U.S.C. §§ 206, 207 (2006).

[82] 29 U.S.C. § 218; *see* Biggs v. Wilson, 1 F.3d 1537, 1539 (9th Cir. 1993) (failure of state legislature and governor to agree on a budget does not excuse late payment of wages to state employees).

[83] *See* Frank Bros., Inc. v. Wis. Dep't of Transp., 409 F.3d 880 (7th Cir. 2005).

[84] *Id.* at 889 (quoting United States v. Binghamton Const. Co., 347 U.S. 171, 177 (1954)) (internal punctuation omitted).

[85] *See id.* at 895.

subject to market pressures. The Seventh Circuit, in an opinion by Judge Posner, recently outlined a sensible approach to this contention.[86]

The case had to do with preemption of state law whistleblower protections for ship workers. The Seaman's Protection Act, which protects ship workers from retaliatory discharge for reporting maritime safety violations, and which contains no express preemption provision, was said to preempt state whistleblower law. Judge Posner's opinion observed that neither the structure nor the legislative history of the statute showed it was intended "to occupy the entire field of retaliatory discharge of seamen."[87] Noting that the statute was enacted in the wake of a court decision finding no federal protection for ship employee whistleblowers, the court continued: "Of course it is *possible* that shipping interests persuaded Congress" to give seamen "a limited federal right to sue in respect of retaliatory discharge but in exchange [to] give up all such rights under state law," but the court found nothing in the statutory language or history to suggest that Congress in fact made such a change.[88] The statute was not part of a comprehensive remedial regime or a major overhaul of the law of employment relations of sailors.

As the court then discussed, the statute is a part of a large body of federal statutory and common law in admiralty and maritime matters that extensively regulates the liability of vessels to seamen and that, in many cases, supplants contrary state law.[89] On that point, the court illustrated a sensible approach to implied preemption in employment cases: even a comprehensive regulatory regime intended generally to protect employees should not be construed to preempt state law claims except where they actually conflict with federal requirements. As the court noted, because the application of admiralty law to the navigable waters almost always involves conduct touching multiple states, the arguments for national uniformity are strong.[90] Whenever federal laws regulate conduct, it is possible to argue that state law stands as an obstacle to some part of the federal regime. Yet the court rejected the employer's arguments about the benefits of national uniformity and the dangers of mutiny caused by employees feeling emboldened by the availability of state whistleblower claims for retaliatory discharge.[91] The court surmised that the existence of state claims might increase the safety of shipping by emboldening employees to report unsafe practices rather than making it harder for ships' captains to fire incompetent employees.[92] The court thus rejected conflict, obstacle, and field preemption.

These cases illustrate the two key principles of the anti-subordination theory of preemption. One: only express provisions preempt state employee protection law. Two: where the scope of preemption is unclear, courts

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[86] *See* Robinson v. Alter Barge Line, Inc., 513 F.3d 668 (7th Cir. 2008).
[87] *Id.* at 671.
[88] *Id.*
[89] *Id.* at 672.
[90] *Id.*
[91] *Id.* at 673–74.
[92] *Id.* at 674.

should not conclude that an employee-protective law was intended to occupy the field because it is rarely the case that Congress intends a piece of protective legislation to be a legislative compromise giving employees only the protection expressly stated by federal law and giving employers the huge advantage of wiping out state and local protections and remedies.

B. The Anti-Subordination Principle and Health Insurance for the Working Poor

As noted above, ERISA does not expressly preempt local health care finance regimes that do not mandate the establishment or content of employer-provided plans. Thus, the best argument for federal preemption of fair share laws is that ERISA is the result of a legislative compromise freeing employers from local regulation, for it clearly did exchange extensive regulation of pension plans and modest regulation of other plans for freedom from state mandates that employers provide such benefits. Yet the anti-subordination principle is helpful even with the legislative compromise view of ERISA. As I have explained elsewhere and as a number of courts have found, although uncertainty exists about how far states can regulate at the margins of what ERISA covers,[93] ERISA clearly leaves localities free to impose taxes to pay for health care for the uninsured or the under-insured. Although such payroll tax regimes provide some obvious incentives for employers to provide health benefits (because usually employers that provide benefits are exempt from the payroll tax), that form of indirect incentive is not to be the basis for preemption.[94]

Both the Maryland and the San Francisco healthcare regimes are payroll taxes attempting to solve the problem that local governments face in trying to create good jobs—that is, jobs that pay employees enough directly or pay local governments enough to cover the cost of healthcare for the labor force. The core policy of ERISA preemption, as the Ninth Circuit explained, offers employers the benefits of uniform national regulation of their plans while still allowing states and localities to raise revenue to fulfill their traditional role in providing health care to persons of low and moderate income.[95] The Fourth Circuit was wrong both in finding the core policy of ERISA preemption to be protection of covered employers through deregulation and in finding a violation of that policy implicit in a payroll tax.

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[93] *See* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996).

[94] *See* Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1519–20 (2008).

[95] Golden Gate Rest. Ass'n v. City and Cnty. of S.F., 546 F.3d 639, 648 (discussing history of state and local government providing health care to the poor through charity hospitals, public hospitals, and almshouses).

C. *The Anti-Subordination Principle and Regulation of Labor of Unauthorized Workers*

The anti-subordination principle of labor preemption law sketched above also addresses the question whether federal immigration law preempts local laws targeting unauthorized migrant workers, of which the most notorious recent examples are the Legal Arizona Workers Act and its recent addition, S.B. 1070. This section of this Essay explains the federal statutory framework governing immigration and the employment of immigrants. I explain that federal law does not preempt local laws that protect migrants as workers but does preempt local laws that attempt to regulate migration by preventing the hiring or housing of unauthorized migrants.

The Immigration Reform and Control Act (IRCA) was a comprehensive immigration law reform enacted in 1986 that provided a path to citizenship for many migrants in the United States and, for the first time, made employment unlawful for persons without an immigration status authorizing work. IRCA preempts "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."[96] The Ninth Circuit rejected a preemption challenge to the Legal Arizona Workers Act, which bans the employment of unauthorized aliens, on the ground that the Arizona law is a licensing or similar law.[97] The Third Circuit found preempted a Hazleton, Pennsylvania ordinance that prohibits employment and renting apartments to unauthorized aliens,[98] and the Tenth Circuit found that an Oklahoma statute restricting employment of unauthorized migrants was likely preempted.[99] The Supreme Court will review the Ninth Circuit's decision on preemption of the Legal Arizona Workers Act in the 2010–11 Term, and readers are cautioned to read what follows in light of what the Court will decide after this essay is published. Nevertheless, the following analysis of the underlying policy is unlikely to be overtaken by whatever the Court may say.

It has long been relatively settled that only the federal government can decide who can legally immigrate into the United States and on what terms, although at one point states did exercise regulatory power over certain aspects of immigration.[100] In *Hines v. Davidovitz*, the Supreme Court held that local labor regulations designed to control immigration rather than to regulate work are preempted because they interfere with the federal government's exclusive power to regulate immigration.[101] In *DeCanas v. Bica*, the Court

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[96] 8 U.S.C. § 1324a(h)(2) (2006).

[97] Chicanos Por la Causa, Inc. v. Napolitano, 558 F.3d 856, 860–61 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010).

[98] Lozano v. City of Hazleton, 620 F.3d 170, 219, 224 (3d Cir. 2010).

[99] Chamber of Commerce v. Edmondson, 594 F.3d 742, 765 (10th Cir. 2010).

[100] *See generally* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

[101] 312 U.S. 52 (1941).

rejected a preemption challenge to a local law prohibiting the knowing employment of unauthorized migrants.[102] In *DeCanas*, the Court noted that federal immigration law did not regulate eligibility for employment,[103] which was true in 1976 when the case was decided. Now, of course, IRCA regulates employment of immigrants by requiring verification of employment eligibility. As amended, it creates voluntary alternative regimes to check eligibility,[104] prohibits employment of persons without an immigration status authorizing work,[105] imposes sanctions for violations,[106] and prohibits discrimination on the basis of suspected immigration status.[107] IRCA thus protects against hiring discrimination all persons except those whose employment is prohibited. In finding that IRCA preempts state regulation of employment eligibility, some courts have found that *DeCanas* no longer controls because federal law now regulates what it left unregulated when *DeCanas* was decided and IRCA creates a comprehensive regime balancing protection for authorized workers, prohibition on employment of unauthorized workers, and the need for clarity and to minimize the burdens of compliance for employers.[108] Other courts have found that IRCA seemingly does not preempt because it saves "licensing and similar laws."[109] The Court will presumably decide that issue.

What the Court may not definitively address, however, are the underlying policies reconciling the federal and local protective labor legislation, which protect workers regardless of immigration status, with federal and local laws prohibiting employment of unauthorized migrants. Unauthorized migrants are generally protected by labor legislation, including the NLRA, the FLSA, Title VII and the other antidiscrimination laws, and workers' compensation laws.[110] Courts have concluded that it advances federal labor policy to avoid creating a legally unprotected underclass of the twelve million or so unauthorized migrants in this country, many or most of whom are in the labor market. As a number of courts have noted, to deprive unauthorized workers of the protection of federal labor law would create undesirable incentives for employers to hire and exploit them.[111] However awkward it is as a conceptual matter for the FLSA to require payment of the minimum wage to workers for whom IRCA prohibits employment, it makes perfect sense as a matter of labor policy because if they are not protected by wage regulation, employers will have a better reason to hire them than to hire others whom the employer must pay more. IRCA's purpose of protecting

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[102] 424 U.S. 351 (1976).

[103] *Id.* at 359–62. .

[104] 8 U.S.C. § 1324a(b) (2006).

[105] *Id. at* § 1324a(a).

[106] *Id. at* § 1324a(e)–(f).

[107] *Id. at* § 1324b(a).

[108] *See* Lozano v. City of Hazleton, 620 F.3d 170, 206 (3d. Cir. 2010); Chamber of Commerce v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010).

[109] *See* Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219, 227 (2d Cir. 2006).

[110] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

[111] *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984).

authorized workers from unfair competition from unauthorized workers would be subverted by creating an incentive for employers to hire them. Given this balance of federal policies—IRCA prohibits hiring unauthorized migrants, but every other piece of federal labor legislation says that, once hired, they must have protection from abusive and substandard conditions—it would make no sense to allow states and localities to encourage the very form of exploitation that federal law prohibits.

The question is the relationship between the main preemption provision of IRCA and the savings clause allowing licensing "and similar laws." A state or local law that flatly prohibited the employment of unauthorized aliens would seem to be preempted. A state or local law that issued an occupational license, such as a license to practice law or to engage in the business of cosmetology, would seem to be within the savings clause. To uphold a law that revokes the business license of any person or entity that employs an unauthorized alien would require reading the savings clause to swallow the general preemption rule. IRCA prohibits employment and seeking employment and provides punishments for both employers who hire and unauthorized migrants who work. But it also reflects a compromise respecting the rights of some migrants: IRCA prohibits discrimination on the basis of immigration status except against those prohibited by federal law from working.

State and local government regulation designed to declare people to be noncitizens not entitled to basic work protections is a dismal prospect. That invidious purpose, after all, was the foundation of slavery and Jim Crow: local governments declared that a substantial segment of the population—a group that provided the low-wage labor force, along with their children and dependents—were beyond the pale of the law and its protections. They existed in the community and labored but were declared by local law to be without rights and to be non-persons in fundamental ways. Local law punished those who assisted them, even as the entire local economy depended upon their labor. We had a civil war over the legitimacy of that regime (among other things). As part of the massive legal change following that war, the post-Civil War constitutional amendments attempted to prevent local governments from depriving persons within their jurisdiction from the status of legal persons. Of course, the language used in those amendments was that of "citizen," and, doctrinally, unauthorized migrants are not protected by the Fourteenth Amendment because they are not "citizens." But the concept was the same: a local polity ought not allow a labor force to exist within its borders while declaring that population to be outside the protection of its law. The federal government has the power to do this as a part of its power to regulate the borders and to declare that some people who are here physically are not here legally. But it has proved enormously destructive to our political, social, and legal culture in the past to allow local governments to declare portions of their population effectively not to be there. And a few Supreme Court cases have recognized the necessity of subnational governments to avoid discrimination against those persons who

exist in the jurisdiction even if they do not possess a federal immigration status entitling them to exist.[112]

Conclusion

In the face of massive changes in the American and global economy and labor markets, state and local governments are experimenting with a variety of strategies to promote the good jobs on which strong communities depend. Those dissatisfied with the legislation that results from these lively local debates over how government should regulate jobs and the economy often challenge them on the basis of federal preemption. Courts confronting preemption challenges should interpret the laws in light of the employee protection policies that generally animate labor and employment law. Underlying every federal preemption challenge is a policy debate over the proper balance between federal, state, and local regulation in the field in question. When it comes to labor regulation, the dominant federal policy is protecting workers against exploitation of labor while promoting economic health. This is true for unauthorized migrant workers as well as for citizens and authorized immigrants. Localities must have the ability to attract good jobs and to prevent employers from shifting the costs of unsafe, low-wage work to government social welfare programs. Yet immigration status cannot become a reason for local governments to declare that a substantial segment of the low-wage labor force is outside the protection of the law. The anti-subordination principle of federal preemption shows that local governments can enact employee-protective measures and can fund social welfare programs through payroll taxes on low-wage employers but cannot deprive unauthorized migrant labor of the protections of labor laws and other laws.

[112] *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982).