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Where You Stand Depends on Where You Sit: Bureaucratic Incorporation of Immigrants in Federal Workplace Agencies

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WHERE YOU STAND DEPENDS ON WHERE YOU SIT: BUREAUCRATIC INCORPORATION OF IMMIGRANTS IN FEDERAL WORKPLACE AGENCIES

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Abstract. This article integrates legal scholarship on immigrant workers with social science theory about the role of bureaucracies in the construction of rights. More specifically, it contends that immigrants’ rights can be protected when workplace agencies integrate immigrants into their law enforcement activities, in accordance with their professional ethos and without regard to personal politics. Building on the concept of bureaucratic incorporation, I argue that regulatory agencies will resist contractions of workers’ rights when their staff’s commitments as civil servants and lawyers clash with judicial interpretations of immigrants’ rights. The implication is that strongly pro-immigrant politics are not necessary for the recovery of immigrants’ rights. Instead, entrenched institutional commitments to the rule of law and legal ethics sometimes suffice. Empirical evidence of regulatory responses to immigrant workers after Hoffman Plastic v. NLRB in three federal agencies serve as comparative case studies: the U.S. Department of Labor, the U.S. Equal Employment Opportunity Commission, and the National Labor Relations Board. Characterizing the regulatory responses to Hoffman Plastic variously as “buffering,” “mitigating,” and “reconfiguring,” the article contends that social science theory and empirical data about bureaucracies illuminate opportunities for understanding and protecting immigrant workers’ rights missed by immigration scholars in the legal academy.

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I. Introduction

Immigration scholars in the legal academy have been exceedingly pessimistic about the federal government’s commitment to immigrant workers’ rights over the last decade. A majority of the criticisms focus on the need for comprehensive immigration reform in Congress. A considerable number focus on Hoffman as case law limiting the protective remedies of undocumented workers against employers who exploit the most vulnerable among their labor force. The minority of legal scholars who consider agency actions contend that it is insufficient and inadequate. Immigration scholars have especially expressed dismay about the deleterious effects of White House policies relying on the Department of Homeland Security (DHS) worksite enforcement actions as a strategy for immigration control and the inability of workplace agencies to counter these actions. The criticisms extend across Republican and Democratic administrations. While based on understandable disappointment, immigration scholars’ dismissals of agencies clash with the growing interest of social scientists in bureaucracies as vital sites for immigrant incorporation. These social scientists contend that immigrants can be well served by agencies in challenging legal climates. Indeed, bureaucracies can even accomplish more for immigrants than the political branches as a byproduct of their commitment to the rule of law and professional ethics.

2 Throughout the article, I use “noncitizen” and “immigrant” interchangeably. While technically accurate, I favor these terms over “alien” which still appears in legal language and some legal scholarship. Where the text refers expressly to undocumented immigrants as opposed to immigrants with lawful status, I specify “undocumented.”


6 Id.

7 For an elaboration of these concepts, see the social science literature on bureaucratic incorporation in Part III.
This article represents a first attempt to integrate legal scholarship on immigrant workers with social science theory about the role of bureaucracies in the construction of rights. The article draws on empirical evidence of regulatory responses to *Hoffman Plastic v. NLRB*, which limited the remedies available to undocumented workers in the face of workplace abuses. A comparison of three case studies – in the U.S. Department of Labor (DOL), the U.S. Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB) – uncovers a pattern of regulatory resistance to hostile immigrants’ rights laws. Characterizing these responses as buffering, mitigating, and reconfiguring respectively, the article contends that federal workplace agencies collectively resist the contraction of immigrants’ rights in courts. Contrary to legal intuition, the article attributes these acts of regulatory resistance to a professional ethos of protecting workers and a commitment to enforcing labor laws independent of the policy preferences of the workplace bureaucrats and political leadership.

Other explanations can also be offered for the acts of regulatory resistance described herein. The goal of this article is not to canvass every possible factor, nor to argue in favor of a single causal explanation. The phenomenon is, assuredly, multi-causal. My case studies show that the political leadership does make a difference to the robustness of regulatory resistance – in terms of allocating resources and prioritizing certain areas of enforcement over others – but they also show that political control is significantly constrained by considerations such as professional ethos and the perceived or actual mandate of the agency to enforce labor and employment laws. The article’s chief contribution is to empirically illustrate institutional dynamics that reinforce protections for immigrant workers. It does not necessarily claim that regulatory resistance is superior to other forms of immigrant or worker advocacy, which also contribute to effective resistance.

Part II introduces the legal and political environment of regulating immigrant workers and documents instances of regulatory resistance to *Hoffman*. Part III reviews emerging social science literature on bureaucratic incorporation and assesses its relevance to the regulation of immigrant workers. Part IV applies the concept of bureaucratic incorporation to case studies of labor and employment law enforcement in the DOL, EEOC, and the NLRB. Part V considers how far the argument extends to the regulation of immigrants in other policy arenas by comparing workforce agencies with the U.S. Department of Education (DOE). Part VI explores the implications of this theoretical argument and empirical evidence for legal scholarship on immigrants’ rights.

### II. Regulation of Immigrant Workers’ Rights

Few would dispute that the legal and political climate for immigrant workers, especially undocumented workers, has been forbidding over the last decade. Immigrant workers have always been vulnerable to abuse but ever since the passage of the Immigration Reform and Control Act of 1986 (IRCA) the workplace has become a site of contention and fear. The landmark Supreme Court decision *Hoffman Plastic v. NLRB* (2002) interpreted the employer sanctions provision of IRCA to limit remedies for undocumented workers subjected to unlawful discharge for reporting workplace abuses. The combined effect of *Hoffman* and IRCA was to create perverse economic incentives for employers to exploit

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immigrant workers suspected of lacking status and to cast a shadow over the prospects for immigrant workers to challenge those abuses. The Department of Homeland Security's aggressive use of workplace raids as a strategy for immigration control – first under President Bush and then continuing under President Obama (albeit to a lesser extent) – has exacerbated the situation, making credible employer threats to expose the status of immigrant workers lacking documentation in retaliation for their complaints. Tasked with enforcing employment laws in a climate entangling immigration control with employment, workplace agencies have been caught in the cross-fires: their statutory mandate to protect workers remains intact and yet the political and legal context blunts their tools for implementation of that mandate. Each of the federal agencies discussed in this article has struggled to reconcile the competing demands of their professional ethos with aggressive immigration enforcement and contracting immigrants’ rights.

This section provides an overview of the political and legal context of federal workplace agencies. The focus of this section is on the federal agencies that comprise the regulatory environment of immigrant workers and legal developments limiting the rights of undocumented workers. The section begins with a brief description of the institutional architecture of regulating immigrant workers. It then describes the Hoffman decision and the framework of laws and policies limiting the rights of undocumented workers. Thereafter, it details three case studies in which those agencies have used rulemaking, policy statements, and other forms of guidance to resist legal developments elsewhere in the federal government.9

A. Institutional Architecture of Regulating Immigrant Workers

Three important federal agencies engaged in the regulation of immigrant worker rights are the National Labor Relations Board, the U.S. Department of Labor, and the U.S. Equal Employment Opportunity Commission. Each regulates a different federal statute focused on workers in general and only secondarily on immigrant workers. With the exception of the DOL's enforcement of the Migrant and Seasonal Agricultural Worker Protection Act and select provisions of the Immigration and Nationality Act pertaining to work-related visa programs, the guiding statutes for the NLRB, the DOL, and the EEOC agencies do not even mention immigrants. The agencies rely almost entirely on informal policies or practices to discern their responsibilities to immigrant workers. In most cases, the agencies adopt a status-blind approach to law enforcement, making no distinctions between the formal legal status of documented and undocumented workers in protecting workers’ statutory rights.

9 The Administrative Procedure Act makes a distinction between formal rulemaking and informal rulemaking that turns to a large extent on the process by which the regulatory outputs are derived. In formal rulemaking, such as decision-making in Immigration Courts, the agency holds an actual hearing and produces a record based on evidence presented. Informal rulemaking does not require an actual hearing, but usually the agency must publish a notice of proposed rulemaking and final rule prior to the rule becoming effective, if it wants the rule to carry the force of law. Exceptions are made for policy statements, which sometimes but do not always carry the force of law. Guidance can take many forms including internal memoranda, inter-agency Memorandum of Understanding, Dear Colleague or advisory letters, operating instructions, and compliance manuals; while influential, they are not legally binding. Most of the issuances in this article refer to policy statements and guidance. See Robert Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals and the Like, 41 DUKE L. J. 1311, 1319 (1992) (offering a taxonomical guide to the various forms of subregulatory guidance and their legal effect).
The NLRB is an independent agency charged with investigating and remedying unfair labor practices. It administers the National Labor Relations Act (NLRA).\(^{10}\) Congress enacted the NLRA in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.\(^{11}\) The statute itself does not include express provisions for immigrants. Case law reveals that immigrants are within its statutory purview and have long been recognized as a subject of regulation.\(^{12}\) The *Hoffman* decision, which will be discussed in Part II.B, grew out of this line of decisions about the scope of rights and remedies available to undocumented workers under the NLRA. Some of the offices most attentive to immigrants’ rights are situated within the Office of General Counsel. The General Counsel’s office is comprised of three units: Advice, Operations-Management, and Enforcement Litigation. All three encounter undocumented immigrants in the course of enforcing labor laws.

The DOL complements the work of the NLRB by administering laws concerning workplace conditions, wages, and other employment standards. Amid the patchwork of laws administered by the DOL, the Fair Labor Standards Act (FLSA)\(^{13}\) of 1938 prescribes standards for wages and overtime pay, which affect most private and public employment. The FLSA is administered by the DOL Wage and Hour Division. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. The Wage and Hour Division also enforces the labor standards provisions of the Immigration and Naturalization Act that apply to aliens authorized to work in the U.S. under certain nonimmigrant visa programs (H-1B, H-1B1, H-1C, H2A). Wage and Hour also administers the Migrant and Seasonal Agricultural Worker Protection Act, which regulates the hiring and employment activities of agricultural employers, farm labor contractors, and associations using migrant and seasonal agricultural workers. The FLSA prescribes wage protections, housing and transportation safety standards, farm labor contractor registration requirements, and disclosure requirements. Other branches of the DOL administer the Occupational Safety and Health Act and a panoply of laws that indirectly impact immigrant workers. The Office of the Solicitor formulates policies that touch on immigrants’ rights, which frequently present issues of first impression when interpreting ambiguities in the organic statutes.


\(^{11}\) For a history of the NLRB, see the series of books and articles by James Gross. See e.g. Gross, Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994 (2003); Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUSTRIAL AND LABOR RELATIONS REVIEW 7 (1985): Gross, The Making of the NLRB: A Study in Economics, Politics, and the Law (1974). In recent history, the board sunk into a state of near-paralysis beginning in 2008, when three of its five seats became vacant. In March 2010, President Obama appointed two union lawyers to the board using recess appointments. Labor unions argued that the appointments restored some balance after the board favored business under President George W. Bush. After Chair Liebman resigned in summer 2011 (bringing the board back to two members), President Obama one again used recess appointments to install replacements. Those appointments are the subject of controversy given that the Senate claims that it had a Constitutional duty to confirm the appointments. See Charlie Savage, *Justice Department Defends Obama’s Recess Appointments*, N.Y. TIMES (1/12/2012).

\(^{12}\) See e.g. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir.1988), and earlier FLSA cases involving immigrants extending the “covered employee” logic of landmark decisions such as *Sure-Tan v. NLRB*, 467 U.S. 883 (1984).

\(^{13}\) 29 U.S.C. §8
The EEOC was created for a different purpose than the NLRB and the DOL: it was created by and is charged with eradicating employment discrimination under Title VII of the Civil Rights Act of 1964.\textsuperscript{14} Title VII of the Civil Rights Act makes it illegal to discriminate against someone on the basis of race, color, religion, sex or national origin. Title VII also makes it illegal to retaliate against a worker because the worker complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. While citizenship status is not coterminous with national origin discrimination, discrimination on the basis of national origin sometimes provides a statutory basis for interventions on behalf of immigrant workers. National origin discrimination involves treating people employees unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background. Although the EEOC does not directly enforce the Immigration Reform and Control Act,\textsuperscript{15} the EEOC works closely with the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Labor Practices (within the Civil Rights Division) to ensure that its provisions forbidding discrimination against lawful immigrants are implemented fairly.\textsuperscript{16} These special provisions were enacted to ensure that sanctions placed on employers for hiring undocumented workers would not lead to racial profiling or discourage the hiring of workers perceived to be immigrants for jobs that need not require U.S. citizenship as a basis for employment. It further specifies that employers may not refuse to accept lawful documentation that establishes the employment eligibility of an employee, or demand additional documentation beyond the I-9 form that is legally required when verifying employment eligibility, based on the employee's national origin or citizenship status. The EEOC's work is largely complaint-driven, with staff handling routine enforcement matters and litigation in field offices. A headquarters staff in the Office of General Counsel handles appellate litigation and other affairs requiring coordination and the Office of Legal Counsel consults with the politically-appointed Commissioners on developing policy guidance.

Although the Department of Homeland Security is not the express focus of this paper on workplace agencies engaging in regulatory resistance, its actions constitute an important part of the regulatory environment in which the focal agencies act. The DHS Immigration and Customs Enforcement (ICE) regulates immigrant workers through interior enforcement strategies that target workplaces to uncover unlawful hiring of noncitizen workers in violation of the Immigration and Naturalization Act and the Immigration Reform and Control Act. Acting out Congress' belief that prospects for economic gain motivate migration, the DHS executes laws prohibiting employers from hiring of workers without first verifying their immigration status in an effort to “disable the magnet” that attracts migrant workers.\textsuperscript{17} These laws have teeth: IRCA's employer sanctions state that

\begin{itemize}
  \item 42 U.S.C. §2000e
  \item 8 U.S.C. §1324
  \item The Office of Special Counsel was created by IRCA to ensure that the imposition of employer sanctions for hiring undocumented workers would not result in national origin discrimination, harassment or other unfair practices against those perceived to be immigrants. The jurisdiction of OSC and EEOC largely turns on the size of the employer, coverage of undocumented immigrants, and available remedies. INA § 274B, 8 U.S.C. § 1324b.
  \item Through IRCA Congress endeavored to simultaneously deter unlawful migration and protect U.S. workers from depressed wages and conditions generated by the fulfillment of jobs by immigrant workers willing to work for less. Preventing employers from hiring those workers would dry up job opportunities, which in turn would eliminate incentives for economically-motivated migration from places with even more depressed wages and work conditions.
\end{itemize}
neglecting to verify status leads to civil penalties for employers and knowingly hiring undocumented workers can trigger criminal penalties.\textsuperscript{18} They also have serious consequences for undocumented workers whose lack of status is discovered. The use of worksite “raids” as a tactic for immigration control led to a boom in deportations during the Bush Administration but receives decreasing emphasis in the Obama Administration’s immigration enforcement strategy.\textsuperscript{19} Despite political differences and personnel changes within the immigration bureaucracy, the workplace agencies they confront remain resolute about their commitment to protecting immigrant workers’ rights without regard to status.

B. \textit{Hoffman Plastic} and Regulatory Resistance in Workplace Agencies

While all three workplace agencies administer distinct federal statutes, they have been either directly or indirectly impacted by IRCA and related case law that limits undocumented workers’ rights. Key among these decisions is \textit{Hoffman Plastic Compounds, Inc. v. NLRB}.\textsuperscript{20} In \textit{Hoffman}, the Supreme Court ruled that undocumented workers are not eligible for back pay under the NLRA because granting back pay would conflict with the mandate of IRCA to prevent the hiring of undocumented workers. The case arose when an undocumented worker, Juan Castro, sued Hoffman Plastic Compounds for unfair labor practices under the National Labor Relations Act when the company fired him for organizing activities. The National Labor Relations Board was sympathetic to Castro and his coworkers. It awarded the workers damages to deter the company from taking advantage of its leverage over undocumented workers, including back pay for work that would have been performed were it not for the unlawful firing. The Supreme Court disagreed with the remedial portion of the NLRB decision, concluding that undocumented workers could not avail themselves of some of the remedies in labor law if they were in the country illegally. The majority’s rationale was that providing back pay would pose conflicts with U.S. immigration policies requiring (1) employees to present documents establishing their identity and authorization to work at the time they are hired, and (2) employers to check those documents and to refrain from knowingly hiring someone who is not authorized to work. The Supreme Court sought to deny pay “for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.”\textsuperscript{21}

\textsuperscript{18} IRCA makes it illegal for employers to “hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien” and to continue “to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.” Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 at §1324a(1). If an employer violates the IRCA, he will be fined $3000 for each unauthorized alien or be imprisoned for up to six months. \textit{Id} at (0(1). An employer is allowed a “good faith” defense if it “establishes that it has complied in good faith with the requirements…with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.” \textit{Id} at (a)(3).

\textsuperscript{19} The Obama administration has shifted away from worksites as interior enforcement strategies and toward criminal and security-related enforcement strategies. \textit{DHS FAQs on the Administration’s Announcement Regarding a New Process to Further Focus Immigration Enforcement}, http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf. These shifted priorities are borne out by data on enforcement outcomes, e.g. since President Obama took office, the overall number of worksite raids has diminished and in FY 2009 alone they dropped 70%. Crackdowns on employers have doubled in the same period. Data is reported in a March 2010 Washington Post news article cited by Stephen Lee: TRAC Reports.

\textsuperscript{20} 535 U.S. 137 (2002).

\textsuperscript{21} Id. at 137 note 8 (2002).
The Hoffman decision triggered a rapid regulatory response from all three workplace agencies. 22 Within months of Hoffman, the NLRB, the DOL, and the EEOC promulgated informal guidance and internal memoranda that attempted to blunt the impact of the Supreme Court’s decision. 23 Each agency reaffirmed that immigration status is not relevant to the labor and employment rights they protect and emphasized that they do not inquire into immigration status in the course of investigating rights violations. If a workplace violation is found and a lack of status is revealed, the agencies read Hoffman narrowly to minimize the impact of immigration status on the remedies they provide, to the extent permitted by law. Over time, they have also expanded remedies for workplace abuse such as protective orders, deferred action (on deportation), and granting of U-visas. These remedies provide temporary work authorization, facilitate workers’ vital participation in labor enforcement actions, and restore workers’ ability to collect the wages to which they are entitled. 24 For example, an individual who qualifies for a U-visa can remain in the United States for up to four years and will receive authorization to work. 25 For an immigrant to qualify for U-visa classification, the Secretary of the Department of Homeland Security must make determinations regarding the eligibility of immigrants for U-visa protection on the basis of a statutorily-provided showing. 26 In addition to information provided by the victim to address the factors listed above, the victim must include with his petition a certification form from the law enforcement agency he is assisting. 27 Neither the U-visa nor the other remedies establish affirmative rights for undocumented workers or directly challenge Hoffman. Still, these regulatory responses act as a bulwark against further judicial contraction of rights. While it is difficult to generalize from an array of uncoordinated agency actions, this article characterizes this responses in the DOL, EEOC, and NLRB as forms of regulatory resistance that help to incorporate immigrant workers.

22 Fiske, Cooper, and Wishnie, supra note 4, lists cases that followed in the aftermath of Hoffman and describe policy-level attempts to limit the reach of the holding at 332-333.


24 Congress created the U nonimmigrant classification in the Battered Immigrant Women Protection Act of 2000. The stated purpose of the U visa was “to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act [(INA)] committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.” See Battered Immigrant Women Protection Act of 2000, Sec. 1513(a)(2)(A), 114 Stat. 1464,1533.


These regulatory responses counter the judicial harms visited upon immigrant workers. The *Hoffman* decision damages immigrant and nonimmigrant workers by insulating employees from the consequences of workplace abuses waged against undocumented workers; this creates perverse incentives and a double harm for the immigrant workers and the nonimmigrant workers who became more burdensome to hire by comparison. Limitations on worker remedies undermine workplace agencies’ enforcement efforts because they discourage immigrant workers from coming forward to report labor violations to the responsible agencies and send a signal that the agencies devalue immigrant workers’ rights. *Hoffman* is also indicative of a broader political climate hostile to immigrants and workers, as well as to the regulatory enterprise. Scholars who have overlooked these regulatory responses place little stock in the willingness or ability of federal agencies to overcome these challenges. While I do not dispute the characterization of *Hoffman* as a damaging decision for immigrant workers on multiple fronts, I hold out more hope regarding the meaningfulness of workplace agencies’ efforts to mitigate these harms. The regulatory practices I uncover protect immigrant workers as an incident to civil servants’ broader commitment to enforcing labor and employment laws and protecting workers generally. To paraphrase Miles’ Law, this suggests that where you stand on policy issues depends on where you sit in the government. The next section describes the social science theory of bureaucratic incorporation as prelude to its application in three case studies of workplace agencies. These case studies of regulatory intervention have been overlooked elsewhere in the legal literature and demonstrate empirically that regulatory behavior turns more on professional ethos and fidelity to the rule of law than political control.

### III. Drawing on Social Science Theories of Immigrant Incorporation to Understand Bureaucratic Protection of Immigrant Workers’ Rights

28 See *e.g.* Donald Kerwin and Kristen McCable, *Labor Standards Enforcement and Low-Wage Immigrants,* MIGRATION POLICY INSTITUTE LABOR MARKETS INITIATIVE (2011).

29 The sentiment resonates with longstanding case law in the NLRB. *See e.g.* Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) (“Section 10(c) of the NLRA permits the Board to require an employer who has committed an unfair labor practice to take ‘such affirmative action, including reinstatement of employees, as will effectuate the policies of the Act.’ This authorization is of considerable breadth, and the courts may not lightly disturb the Board’s choice of remedies. But it is also true that this discretion has its limits ... [T]he Board has not been commissioned to effectuate the policies of the NLRA so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.”).


Immigrant incorporation refers to the inclusion of noncitizens into society and can occur along economic, social, political, and cultural dimensions. It speaks to the mechanisms that bring someone into full membership in a community, a topic of growing interest among immigration scholars across academic disciplines. The social science literature on immigrant incorporation focuses on institutions as a key component of the immigrant-receiving context and attempts to unpack the processes by which incorporation occurs. While scholars studying immigrant incorporation traditionally focused on non-state institutions such as civic organizations, unions and worker groups, interest groups, and social movement organizations, increasing interdisciplinary attention is being paid to government institutions as sites of immigrant incorporation. Of the scholarship on government interventions, emphasis is traditionally placed on political institutions such as Congress. This is because political scientists traditionally presume that political incorporation necessarily precedes social and economic incorporation – that is, citizenship in the sense of acquiring formal legal status serves as a threshold for immigrants participating in other spheres of life – and because they presume that political considerations motivate bureaucratic behaviors. That is, civil servants within agencies strive to satisfy the political principals under whom they serve, whether within the agency’s own leadership, in Congress, or in the White House. The levers of political control can take many forms, ranging from appropriations funding and direct oversight to informal threats or pressure to elicit cooperation.

33 The terms inclusion and incorporation used in this paper are drawn from the social science literature and meant to be descriptive. They are to be distinguished from the term “assimilation” used in literature assessing the normative implications of cultural absorption. For more examples of the social science research employing the terminology of incorporation, see Alejandro Portes and József Böröcz, Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation, 23 INT’L MIGRATION REV. 606 (1989); Mary Waters and Tomas Jimenez, Assessing Immigrant Integration: New Empirical and Theoretical Challenges, 31 ANN. REV. SOC. (2005).


36 Dara Strovitch, Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics (2007); Dara Strovitch, Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender, 68 J. POL. 893 (2006).

Sites of Immigrant Incorporation. An emerging body of scholarship turns to bureaucracies as sites of immigrant incorporation. Partly the attention to bureaucracies reflects recognition that citizenship has become more nuanced. Under current U.S. immigration law, formal legal status is disaggregated into a bundle of rights. The rights within that bundle can also be reordered: the grant of formal legal status that accompanies political incorporation of immigrants need not precede social or economic rights for immigrants. In some circumstances, economic rights or social rights provide the foundation for subsequent belonging and so the rights of membership for noncitizens can follow the extension of social and economic rights. Rights in the workplace have proved to be an important precursor to full membership in the broader community for immigrants. At least on the books, workplace protections protect all workers from unsafe conditions, unfair wages, and discrimination on the basis of statutorily enumerated classes. But as Part II explained, Congress severely limited or stripped many economic rights from undocumented workers (in IRCA and progeny) and the Supreme Court interpreted at least one important labor law to provide narrowly for immigrants (in Hoffman). Theorists of bureaucratic incorporation suggest that one alternative to relying on Congress or Courts to protect immigrant workers is to look to regulatory agencies charged with enforcing labor and employment laws. More specifically, bureaucrat scholars seek to explain the behaviors of civil servants working to enforce statutes and case law and to implement administrative policies in their daily work.

Accounting for Bureaucratic Discretion. Many everyday tasks of law enforcement occur in agencies vested with responsibility to implement statutes that call on exercises of “bureaucratic discretion” and expertise. In the open spaces and ambiguities within these laws, agencies must often set their own priorities. Scholars have long written about the central place of discretion in policy implementation, in the tradition of political science.

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41 Although she was not writing in the context of immigration, feminist scholar Judith Schklar wrote that work was the basis of citizenship in AMERICAN CITIZENSHIP: QUESTION FOR INCLUSION (1991). Similar notions underlay a vast legal scholarship on the intersection of immigration law, labor law, and employment law that includes Jennifer Gordon, Juliet Schor, Michael Wishnie, and many others. Supra notes 4 and 5.

42 A prominent example of a bureaucracy scholar writing at the intersection of law and political science is JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 49 (1985) (characterizing bureaucratic rationality as searching the good within the constraints of the possible). Other political scientists include Ken Meier, Joseph Stewart, Robert England, Politics of Bureaucratic Discretion: Educational Access as Urban Service, 35 AMERICAN J. OF POL. SCI. 155 (1991); Lael Keiser, State Bureaucratic Discretion and the Administration of Social Welfare Programs, 9 J. PUBLIC ADMINISTRATION RESEARCH & THEORY 87 (1999); Terry Moe, Control and Feedback in Economic Regulation: The Case of the NLRB, 79 AMERICAN POL. SCI. REV. 1094 (1985) (using qualitative analysis to determine factors driving agency behavior and concluding that politics is significant); Barry Weingast and Mark Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 JOURNAL OF POLITICAL ECONOMY 765 (1983) (testing competing models of agency behavior and finding systemic Congressional influence); Gary Bryner, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES (1987).
and administrative law. Bureaucratic discretion results from a confluence of factors, including public spiritedness, an ethic of professionalism, rational self-interest, and political control exerted by elected leadership. While most scholars ultimately adopt hybrid views of bureaucratic motivation, those writing from a public choice perspective tend to emphasize political and economic factors, whereas bureaucratic incorporation theorists emphasize an ethic of professionalism that takes into account the overlapping roles of bureaucrats as civil servants within a political system, experts within a substantive policy domain, and members of a dominant profession.

In the context of law enforcement agencies, the tension between politics and legal professionalism provides a focal point for understanding the motivations of career civil servants. The “political control” perspective suggests that political controversies about immigration in the post-\textit{Hoffman} era, for example, will lead toward relatively punitive law enforcement practices and a lack of support in service delivery from governmental agencies, given immigrants’ powerlessness in electoral politics and the power of interest groups such as employers within corporations and trade associations prone to capturing agencies. Political control thereby defrays a mission-focused professional ethos that includes fidelity to substantive laws such as labor standards or antidiscrimination or inclusiveness. Bureaucracy scholars writing about the exercise of discretion within agencies that encounter immigrants as a subset of their constituency, in contrast, allege that politics are constrained, countered and sometimes overcome by the “norms and ethos of civil servants” within those agencies. Examples of such “inner checks” include role perception, the idea that most government officials are influenced by a sense of duty to the public they serve, and the closely-related idea that civil servants are “socialized into understanding their role as unelected officials in a democratic political system where Congress dictates their agency mission.” Although the findings across her four case studies vary, Melissa Golden demonstrates civil servants’ bureaucratic accountability to the rule of law where law enforcement agencies are concerned. Her case study of the U.S. Department of Justice, Civil Rights Division (DOJ) during the Reagan administration contrasts DOJ attorneys with civil servants in other agencies: the DOJ attorneys felt a strong sense of duty to voice opposition to Reagan’s appointees when their orders departed from the purpose of the Civil Rights Act of 1965 or compromised its primary beneficiaries, rather than unquestioningly go along with their political leadership. Their loyalty was to legal principle over politics

\textsuperscript{43} A recent article by Jill Family summarizes writing in administrative law relevant to immigration law. Jill Family, \textit{Administrative Law Through the Lens of Immigration Law} (forthcoming in \textendash{}). Her piece triggered lengthy discussion among important immigration scholars such as David Martin, Shoba Wadhia, and Margaret Stock on a widely-subscribed list-serve for immigration professors.

\textsuperscript{44} On public choice as it relates to public interest law specifically, see \textit{Steven Croley, \textit{Regulation and Public Interests: The Possibility of Good Regulatory Government}} (2008).


\textsuperscript{46} \textit{Golden, supra} note 32, at 101-106 (DOJ case study and analysis). Reagan reversed the direction of the civil rights policy agenda taken by three decades of Republican and Democratic administrations. Norman Amaker says: “The record of none of them, including that of Richard Nixon, manifested a tendency to subvert in any fundamental way the protective goals of the civil rights laws.” In comparison, Reagan rolled back the protective goals of civil rights laws “in a fundamental sense” by seeking to eliminate affirmative action, to eliminate school busing, and even to limit the long-standing policy of redressing discriminatory practices to cases of proven intent. \textit{Norman Amaker, \textit{Civil Rights and the Reagan Administration}} (1988). Golden finds that the
and to vigorous representation of their client: the law enforcement agency for whom they worked. This professional code of conduct influenced their desire to “do the right thing” as well as their definition of the “right thing.” Whereas the civil servants in agencies with few lawyers tended to be more responsive to their political leadership, the DOJ attorneys exhibited qualities indicative of the legal carrier’s training and emphasis on presenting arguments in their daily work and in the midst of conflict.47 These qualities lend themselves to regulatory resistance. Golden memorably recites Miles’ law as an explanation for her case study comparisons: “where you stand (bureaucrats’ attitudes and behavior) depends on where you sit” (organizational context or situation within profession).48 Her findings echo more general findings from organizational sociologists who study agency culture49 and the bureaucracy scholars who cite the dominant professional ethos as vital to understanding the motivations of bureaucrats.

Several recent empirical studies of immigrant-serving law enforcement agencies specifically demonstrate that the motivation to serve immigrants stem from a similar range of professional commitments. Building on foundational work studying social service delivery to immigrants despite restrictive government policies,50 these bureaucratic incorporation scholars find that moments when restrictive government policies collided with their beliefs

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47 Id. at 27 (describing findings in a subsequent chapter titled “lawyers who love to argue”). The other case studies included scientists in the National Highway Traffic Safety Administration, Food and Nutrition Service, and the Environmental Protection Agency.

48 Id. at 25 (quoting Rufus Miles, Origin and Meaning of Miles’ Law, 38 PUBLIC ADMINISTRATION REVIEW 399 (1978). JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989)) attributes the distinctive way that civil servants see and respond to the world to a mix of self-selection and socialization.

49 Literature examining the role of agency culture demonstrates that the norms, beliefs, practices, and values shared by members of organizations shape both their behavior and their decisions. Organizational sociologists such as Walter Powell and Paul DiMaggio claim that the forces animating private organizations, including competition for resources and perceptions of legitimacy, present themselves in a wide array of institutions, see e.g. the New Institutionalism in Organizational Analysis (1991). Cf. Lauren Edelman, Christopher Uggen, Howard Erlanger, The Endogeneity of Legal Regulation: Grievance Procedure as Rational Myth, 105 AM. J. OF SOCIOLOGY 406 (1999) (suggesting that organizations and professions strive to construct rational responses to law that are themselves modeled after public legal order or reflective of market values such as reducing costs); Lauren Edelman, Linda Krieger, Scott Eliason, Catherine Albiston, Virginia Mellema, When Organizations Rule: Judicial Deference to Institutionalized Employment Structures (unpublished manuscript) (arguing that organizational structures and practices serve symbolic functions to signal organizational compliance and that those symbols feed back into judicial conceptions of legal compliance). A prominent political scientist who emphasizes organizational reputation as a factor in bureaucratic autonomy is Daniel Carpenter, who provides in-depth studies of policy innovation in New Deal executive agencies and the Food and Drug Administration. See DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REPUTATION AT THE DFA (2010): FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (2006).

50 Michael Jones-Correa, supra, studies suburban school districts that have dealt with substantial immigration, developed the concept of “bureaucratic incorporation” of new groups into the political system. He argued that under certain circumstances, administrators—whether acting out of a sense of mission, professional norms, or personal ethos—may adopt de facto policies that advance the interests of groups that are otherwise marginalized in public affairs. Jones-Correa argued that such patterns defy the predictions of political control theory. Electoral considerations were far less relevant than the egalitarian sense of mission of school superintendents, who viewed their districts’ success in a communitarian fashion that linked the fate of the less fortunate with the majority. and Helen Marrow writes about bureaucrats engaged in the delivery of health care services and finds that policy preferences are trumped by “service-oriented professional norms.” Marrow, supra, at 758-759.
about fairness and appropriate action toward their clients most vividly reveal bureaucrats’ professional norms. Paul Lewis and Karthick Ramakrishnan study inclusive policing practices in cities with many immigrants. They contend that local law enforcement departments increasingly are professional agencies that use discretion to engage in a search for practices that will help them to serve the local community in defending itself, rather than merely taking political cues from elected leadership who may view immigration control as an electoral prerogative in the down economy. The law enforcement officials view themselves as public servants and professionals who follow an ideal of service and recognize the importance of the public they serve in order to do their job well: insofar as immigrants are part of that constituency, law enforcement relies upon them to accomplish their core tasks of keeping the peace, gaining trust in the community, and maintaining quality of life for all concerned.

Shannon Gleeson extends the bureaucratic incorporation argument to higher levels of law enforcement, where partisan politics are potentially more salient and immigration policies more fractured. Based on a study of state-level employment agencies, she shows that political ideology remains an insignificant part of bureaucrats’ motivation to serve immigrants. When asked to reflect on the moral worthiness of immigrants who receive their services, state-level officials in the EEOC and Department of Labor said that the moral worthiness of their immigrant clients is irrelevant to their rendering of services, regardless of the immigrants’ official eligibility for those services. “Doing the right thing,” Gleeson argues, “can sometimes have little to do with a bureaucrat’s personal sense of conviction towards a client.” She suggests that staff in workplace bureaucracies can be institutionally inclined to help immigrant workers, regardless of the personal convictions of the personnel staffing them. Although agency staff were sometimes sympathetic to immigrants, overwhelmingly they articulated their commitment to immigrants as a means to the end of labor enforcement. Gleeson’s research design, comparing law enforcement in liberal California with conservative Texas, also shows that political pressure from the regulatory environment had little to do with it: her findings were consistent across agencies in both jurisdictions and did not depend on heroic actions or pro-immigrant advocacy on the part of bureaucrats. Countering the intuition that individual policy preferences matter most, Gleeson offers an institutionalized account for why bureaucrats promote immigrants’ rights: “in addition to exercising discretion and pursuing creative solutions,” bureaucratic actions are contingent on “predictable and institutionalized practices” such as the allocation of scarce resources and the negotiation of competing directives encompassed by law enforcement.

Application to Federal Workplace Agencies. My study builds directly on the work of Gleeson, Lewis, and Ramakrishnan to investigate decision-making in the federal regulation of immigrant workers. I focus on the workplace because this policy domain presents an

52 Shannon Gleeson, To Protect One, We Must Protect All: Bureaucratic Scripts for Protecting Undocumented Workers. Presented at UC Irvine Law Conference: Persistent Puzzles in Immigration (February 2011). See also Shannon Gleeson, Means to An End: An Assessment of the Status-Blind Approach to Protecting Undocumented Worker Rights (unpublished manuscript).
53 Gleeson, Bureaucratic Scripts, supra note 52 at 1.
54 Gleeson, Status-Blind Approach, supra note 52, at 3.
important instance of two vulnerable, highly interconnected populations – immigrants and low-wage workers – being bisected by politics, clashing laws, and agency missions. Consistent with the bureaucratic incorporation theorists and counter to the political control theorists, I expect that civil servants will resist restrictive policies epitomized by *Hoffman* and its anti-immigrant context in favor of a more inclusive professional ethos governed by the protection of workers and the enforcement of labor and employment laws. In order to separate the confounding influence of state laws and state policy contexts, I focus on *federal* workplace agencies administering parallel federal labor and employment statutes. My focus on the federal brings methodological advantages, but it does overly simplify the regulatory environment during a time when states have been assertive about their interventions into immigrants’ rights: I leave the consideration of state regulation to future study.\(^{55}\) In the meantime, I expect to find similar patterns of bureaucratic thinking and behavior in state and federal workplace agencies: so long as it is not decisively prohibited by federal statute or case law, organizational imperatives to enforce labor and employment laws should support a favorable exercise of discretion on behalf of immigrant workers. This finding ought to hold true even in the face of changing presidential administrations if the organizational ethos and professional mission determine agency decision-making more than partisan politics.

Unlike many immigration scholars, I study institutional dynamics across three similarly-situated workplace agencies – the DOL, NLRB, and EEOC – rather than a solitary workplace agency-DHS pairing or the internal dynamics of the DHS.\(^{56}\) This allows me to observe variation across agencies confronting the same conundrum of reconciling their statutorily-mandate labor enforcement charge with immigration enforcement strategies that originate elsewhere in the administration but enter into a shared zone of regulation. Also, in order to gain further traction on the influence of political leadership on career staff and the insulation of bureaucratic discretion from political considerations, I study civil servants in two independent agencies led by bipartisan commissions and one executive agency headed by a cabinet-level secretary. Based on my theory that politics is not paramount, I would expect less influence from politics on career staff than politically-appointed leadership, particularly those who have remained in their positions across Republican and Democratic administrations. To the extent that there is political influence on enforcement activities, I would expect little difference in the degree of influence on bureaucratic attitudes toward immigrant workers despite variation in institutional design, if politics is not the motivating factor.

While my research design does not directly counter the hypothesis that regulatory resistance is at least partly conditioned on political preferences with regard to immigration, the period of time studied covers two presidential administrations with markedly different approaches to immigration enforcement during a politically divisive time. Since *Hoffman* came down in 2002, a Republican and Democratic president have had opportunities to

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\(^{55}\) One limitation of Gleeson’s very well-considered research design is that state legislation and case law can confound the regulatory environment of the workplace agencies. That is, it is difficult to parse the extent to which the California EEOC is motivated by its own organizational ethos independent of highly-protective state employment laws such as FEHA that demand more than the federal minimum. *Id.*

\(^{56}\) The workplace agency-DHS pairing has been previously studied by Stephen Lee: the DHS internal dynamics have been studied by Katie Griffith. *See* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ L REV 1089 (2011) (arguing that the Department of Labor has struggled to protect unauthorized workers) and Kitty Calavita, *INSIDE THE STATE* (1992); Katie Griffith, *ICE Was Not Meant to Be Cold*, 53 ARIZ L REV 1137.
directly and indirectly respond to tensions between immigration and labor enforcement. Presidents appoint the top leadership in the workplace agencies who will conduct their activities mindful of presidential policy. They will inevitably have some influence on the federal career staff who work below them, even if they are insulated to some extent by civil servant protections. The bureaucratic incorporation thesis that I advance is not mutually exclusive with all political influence, although I would expect to find evidence of regulatory resistance that constrains politics across administrations and across workplace agencies, if organizational factors and professional ethos are also at work.

IV. Case Studies of Federal Workplace Agencies Incorporating Immigrants

Part IV draws on three case studies of federal workplace enforcement agencies – the DOL, the EEOC, and the NLRB – to show how civil servants can work from within their professional and statutory mandate to advance immigrant worker rights, despite the Hoffman precedent and changing presidential administrations. To obtain accurate perspectives on the exercise of discretion, I interviewed two or more high-level agency officials in the Washington, DC headquarters for each federal agency with sufficient authority to make decisions and who participated in the formation of regulatory responses to Hoffman. In each agency, I interviewed two or three career staff in the policy-making and enforcement arms (usually in subdivisions of the General Counsel’s office) and reviewed extensive documentation of the agency’s internal practices and perspectives. While the interviews were conducted in 2011 and 2012, the staffers held their career positions throughout multiple administrations – often 15 years or more – and were familiar with the political climate immediately preceding and following Hoffman. Documents from 1986 (passage of IRCA) to the present were reviewed. I also interviewed immigration attorneys in national advocacy groups who were familiar with the work of these agencies for their external perceptions of the agencies’ motivations, their openness to policy change, and their reputations for pro- or anti-immigrant leanings.

The case studies show that the specific forms, the direction, and the degree of regulatory response vary with the agency’s statutory mandate and institutional design. This is to be expected. However, across variation, the institutional dynamics of influence remain roughly the same and support bureaucratic incorporation theory. To foreshadow the pattern discerned in these in-depth case studies – that is, highlighting the forest for the trees – the organizational behaviors of the three workplace agencies can be arrayed along a spectrum of regulatory resistance that ranges from near refusals to enforce the law to reluctant acquiescence, with all three agencies arguing against the spirit of Hoffman from within the letter of the law. I label these responses buffering (DOL), mitigating (NLRB), and reconfiguring (EEOC) respectively. Table 1 summarizes the strategies of resistance undertaken by regulatory agencies. Details of the regulatory responses are elaborated in the in-depth case studies occupying the remainder of this section.57

57 Jed Barnes and Tom Burke coin the concept of organizational “rights practices” that could be used to describe the regulatory responses described in this article, although they are primarily concerned with private organizations. As the authors explain, the consequences of law depend on the extent to which law filters into the “nooks and crannies” of social life.” See Jed Barnes & Thomas Burke, The Diffusion of Rights: From Law on the Books to Organizational Rights Practices, 40 LAW AND SOCIETY REVIEW 493, 494 (2006). In Barnes and Burke’s schema, rights practices vary along two dimensions: the degree to which the organizations are proactive
A. The DOL pursues policies of “deconfliction” to buffer potential conflicts between immigration enforcement and labor enforcement priorities after Hoffman

The first case study shows that the ever-present need for federal workplace agencies to allocate their resources toward industries marked by the most vulnerable workers often puts them in contact with immigrant workers. Their motivations for helping immigrants are quite independent from their policy preferences. If anything, civil servants in the U.S. Department of Labor, Solicitor’s Office and Wage and Hour Division emphatically distinguish their agency mandate – ensuring maximal compliance with wage and hour laws under the Fair Labor Standards Act – from Hoffman’s limitations on back pay remedies for unlawful firing of undocumented workers. In this way, they buffer the effects of Hoffman for a subset of workers within their regulatory purview. The case study begins with public statements of DOL political leadership; it then considers the informal policy guidance and litigation stances taken up by civil servants in the enforcement divisions of the DOL.

Of all three agencies, the DOL civil servants whom I interviewed most often resorted to citing public statements from their agency leadership as explanations for their labor enforcement policies. Both preceding and following Hoffman, the DOL leadership has consistently affirmed its duty to protect vulnerable classes of workers. The definition of a vulnerable worker is not statutorily defined under the FLSA, but it has been held to include immigrants in both Republican and Democratic administrations. As President Obama’s Labor Secretary Hilda Solis explained, “I have a vested interest in protecting all workers that work here in the U.S. Period.”58 She elaborated, “the government is quite clear in terms of protecting all workers here in the U.S. regardless of origins. Under Republican and Democratic administrations, that’s the law.”59 Immediately after the Hoffman decision was announced, President Bush’s Secretary of Labor Elaine Chao held a press briefing with representatives of the Spanish-language press, in which she emphasized that Hoffman would not prevent the Department from enforcing immigrant workers’ rights to be compensated for work already performed under the FLSA.60 Shortly thereafter, Secretary Chao issued a Joint Statement with the Mexican Secretary of Labor and Social Welfare “reaffirm[ing DOL’s] commitment to fully enforce the applicable labor laws administered by our department to protect workers - all workers, regardless of status.”61 The overt references to consistency across administrations strongly suggest that the agency’s policies emanate from law, rather than partisan politics.

(anticipating problems) versus reactive, and the degree to which the organizations are minimalist (seeking only to meet basic legal requirements.) Id. at 505-514 & Table 3.


59 Id.

60 See Transcript of press conference April 8, 2002 (on file with the Department), reprinted in In Re Josendis advice letter to the DOJ.

In keeping with this rule-bound stance, civil servants in the enforcement divisions of the DOL explained that they do not inquire into the legal status of the workers during investigations of workplace violations as a matter of agency policy. Rather than justifying this stance in terms of their own opinions, they repeatedly referred me to official agency documents and public statements for the agency’s rationale. The Wage and Hour Division’s headquarters office, which provides guidance to the field offices most directly responsible for laws pertaining to immigrant workers’ wages, issued a “Fact Sheet” reaffirming its pre-
\textit{Hoffman} legal positions while clarifying the scope of the \textit{Hoffman} decision on the FLSA.\footnote{DOL Fact Sheet, \textit{supra} note 31. The fact sheet was released under President Bush’s Secretary of Labor Elaine Chao within months of \textit{Hoffman Plastic}.} In the fact sheet, the agency states that the \textit{Hoffman} decision is limited to back pay for work that would have been performed without the unlawful firing under the NLRA, which is not within the jurisdiction of the DOL. This kind of fact sheet constitutes sub-regulatory guidance, a type of informal policy guidance in the parlance of the Administrative Procedure Act; it is meant to assist in the interpretation of agency regulations that themselves must be consistent with the agency’s organic statute, the FLSA, in order to be legally valid. In this way, the fact sheet bridges the policy agenda of the political leadership and established laws.

The DOL position taken up in its public statements and policy guidance is also maintained in litigation, the agency arena most closely tied to legal precedent. One attorney in the Solicitor’s Office joined the DOL around the time the DOJ requested advice from the DOL Solicitor’s Office on an Eleventh Circuit case questioning the impact of \textit{Hoffman} on the coverage of undocumented immigrants under the FLSA.\footnote{In re Josendis v. Wall to Wall Residence Repairs, Inc., No. 09-12266 (11th Cir 2010), \textit{available at} \url{http://www.dol.gov/sol/media/briefs/josendis%28A%29-26-2010.pdf}.} In her letter on behalf of the DOL, she stated that FLSA minimum wage and overtime compensation for hours worked remain viable because recovering unpaid wages for work already performed does not present the same perceived conflict with IRCA policies as do back pay awards for wage losses resulting from unlawful job deprivation under the NLRA. The DOL letter states:

\begin{quote}
A suit for wages for \textit{hours worked} under the FLSA seeks payment for work actually performed, rather than for work employees claim they \textit{would} have performed but for their illegal layoff or termination. Accordingly, a suit for FLSA back wages does not implicate the Supreme Court’s concern in \textit{Hoffman} that Congress did not intend to permit recovery for work not performed and for wages that could not lawfully have been earned. It also does not implicate the Supreme Court’s concern that an NLRA back pay award, which is contingent on an undocumented worker's continued presence in the United States, could encourage such workers to remain in the United States in order to obtain a recovery. And there is no duty to mitigate damages in an FLSA suit for hours worked; thus, there is no tension with the rule that employees who seek back pay for illegal discharge must mitigate their damages.\footnote{\textit{Id.} at 3-4.}
\end{quote}
The Eleventh Circuit overruled the district court’s summary judgment in favor of Wall to Wall and remanded for retrial. The majority panel (Judges Tjoflat and Cox) did not expressly discuss the relevance of Josendis’ immigration status, but merely stated that “the limited discovery the district court afforded Josendis after the time for discovery had closed” did not constitute an abuse of discretion. The lone dissenter, Judge Korman, reached the status issue in the last paragraph of his decision: “I recognize that the result for which I have argued would require us to reach the issue whether Josendis, an illegal alien, is entitled to the protection of the FLSA. I agree with the position expressed in the letter brief submitted by the Solicitor of the United States Department of Labor, which we requested, that ‘undocumented workers are entitled to recover minimum wages and overtime pay for hours worked under the FLSA’ as another panel of the Eleventh Circuit recently held in an unpublished opinion, Galdames v. N & D Inv. Corp., The concern about awarding back pay to immigrant workers not eligible to be reinstated that was raised in Hoffman was not presented in the facts of Josendis. The DOL’s longstanding position articulated in Patel v. Quality Inn South maintained that the plain meaning and history of FLSA covered undocumented immigrants and the longstanding interpretation of the Secretary was granted deference. Based on the continuity of these positions over several administrations, the DOL’s status-blind application of labor laws to immigrants is not easily explained by shifting politics alone.

To say that the DOL is not primarily political motivated, however, is not to say that its regulatory activities do not involve exercises of discretion. The most straightforward discretion concerns the ever-present need for workplace agencies – or any agencies – to allocate their limited resources wisely so as to achieve maximum effect. At least anecdotally, the changing administration ushered in more departmental resources for labor enforcement. These increased resources bolstered the capacity of the DOL to engage in more aggressive enforcement in general. A long time administrator in the Department of Labor Migration: Protecting Undocumented Workers after Sure-Tan, the IRCA, and Patel, 63 NYU L. Rev. 1342, 1361 (1988). Blum demonstrates that President Carter’s immigration agenda included a legislative effort to eliminate wage and hour abuse against undocumented workers. While Carter’s comprehensive immigration reform bill did not pass, Congress incorporated into an appropriations bill 260 provisions in the Wage and Hour Division of the DOL “to strengthen enforcement of the FLSA” including targeted investigations into industries with high incidence of undocumented workers.” S. Rep. No. 564, 95th Cong., 1st Sess. 35 (1977); H.R. Rep. No. 644, 95th Cong., 1st Sess. 26 (1977). The targeted enforcement became known as the Employers of Undocumented Workers Program. See 65 United States Dep’t Labor Ann. Rep. Fiscal Year 1977, at 60. It was renamed the Special Targeted Enforcement Program under the Reagan Administration. See 71 United States Dep’t Labor Ann. Rep. Fiscal Year 1983 at 45.

66 662 F.3d 1292 (11th Cir. 2011).
68 The Josendis dissent continued: “Nor would a contrary result deter illegal aliens seeking employment in the United States. Instead, denying them the protection of the FLSA would only encourage employers to hire illegal aliens, as opposed to citizens, because in so doing employers could avoid the expense of complying with the FLSA. Such a result is contrary to public policy and, for that reason alone, we should reject Acosta’s suggestion that we decline to follow binding precedent on this issue.” Id.
69 See also Patel v. Quality Inn South, 846 F.2d 700, 703-06 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). The panel that decided Patel took notice of the DOL’s position and the legislative record for both IRCA and FLSA. Id. at 7, 20-25.
70 Richard Blum sets out a convincing legislative history in Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers after Sure-Tan, the IRCA, and Patel, 63 NYU L. Rev. 1342, 1361 (1988).
Labor, Wage and Hour Division maintains the DOL priorities are developed through self-initiated enforcement work, rather than the complaints of individual workers. Choices about where to focus enforcement efforts, thus, are driven by organizational concerns such as achieving maximum impact with minimal funds. Typically, “decisions about resource allocation are geared toward industries where the most vulnerable workers are employed and those industries undergoing dynamic change. Many of those industries include low-wage, low-skilled, and immigrant workers.” On the broad context of industry changes, the administrator said it was not merely, or even mostly about politics. “We’ve seen over the years industries changing how they do business... it’s not just a business owner and his employees anymore. They contract out their labor, they use staffing companies, and they use more franchising. Those practices attenuate the traditional relationship between employers and employees and create openings for abuse.”

An independent report from the esteemed Migration Policy Institute confirms industry changes often lead to higher violation rates. In addition, there is often a “bump up” of enforcement during the recession: as people lose jobs, the fear of retaliation no longer keeps them from filing. While this does not disprove that politics matter – indeed, they mattered for funding levels – the take away is that pro-immigrant politics were not the motivating force. Concerns for effective law enforcement and agency stewardship predominated.

More substantively, although attorneys in the current DOL headquarters divisions assert an approach toward labor enforcement that harmonizes the purposes of the FLSA and IRCA, history shows that the DOL attorneys have experienced friction between labor remedies and immigration remedies in the past. In the years preceding Hoffman, the DOL drafted a Memorandum of Understanding (MOU) with DHS’ predecessor (the Immigration and Naturalization Service) in 1998 that attempted to address some of the tensions inherently raised by IRCA. The 1998 MOU stipulated that DOL investigators would no longer conduct inspections of employee’s immigration-related documents in any investigation based on a complaint alleging labor standards violations because knowledge of a worker’s undocumented status could chill individual complaints from workers who feared that complaining could result in their apprehension and deportation. The memo also stated that DOL investigators would no longer issue warning notices to employers found to be violating documentation obligations under IRCA given that doing so blurred...

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73 Phone interview, Department of Labor, Wage and Hour Division (1/13/2012).
74 Id.
76 Memorandum of Understanding Between the Immigration and Naturalization Services, Department of Justice and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), available at http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm. The 1998 MOU replaced a 1992 MOU that required DOL investigators to examine workers’ documentation and expeditiously communicate irregularities to INS in the course of their own labor standards investigations. Id. As Miriam Wells explains, although the memo specified that DOL would “take no action which will compromise it ability to carry out its fundamental mission regardless of workers’ immigration status,” in practice the agreement made DOL field investigators into INS enforcement agents. Wells, supra, at 1332. While its influence on the rescission of the 1992 MOU is contested, concerns that the 1992 MOU damped the enforcement of wage and overtime protections were documented by the Yale Law School Workers’ Rights Project and the ACLU Immigrant Rights Project and filed in a petition before the tribunal for the North American Agreement on Labor Cooperation and later reviewed by Maria Echaveste, a former DOL wage and hour labor administrator who was promoted to Deputy Chief of Staff to President Clinton. Id.
enforcement functions. These stances contradict the picture of harmony between agencies described by the current administration; the vantage point of current staff seems to sincerely perceive no conflict, but it is worthwhile to pause and recognize that theirs is not the only possible interpretation.

DOL career staff’s concerns about instances of retaliation against immigrant workers, in which employer or third party tips lead to DHS investigation following workers’ legitimate complaints about workplace conditions, further illustrate the exercise of bureaucratic discretion following Hoffman. In December 2011, the DOL strengthened the 1998 MOU in a “Revised Memorandum of Understanding between the DHS and DOL Concerning Enforcement Activities at Worksites.” The stated purpose of the 2011 document is “to ensure that respective civil worksite enforcement activities do not conflict.” It reads in part: “The parties... recognize that the enforcement process of both labor and immigration related worksite laws requires that the enforcement process be insulated from manipulation by other parties.” Although similar in spirit to the 1998 MOU, the new MOU is more explicit about its strategy of “deconfliction” between agency enforcement activities. For example, there is a general presumption against ICE entering into worksites to investigate immigration status once a DOL investigation into abuses of wage and hour laws has already begun. This lessens the possibility that an aggrieved employer will call in ICE officials to punish the workers who reported them to DOL. It also lessens the possibility that a DOL investigation will be thwarted by clashing directives from ICE, such as when key witnesses become unavailable for interviews because they are being detailed or deported prior to giving testimony. This ensures that abusive employers are not able to manipulate the investigation process to their own advantage. In instances when ICE decides to engage in worksite enforcement notwithstanding the general presumption against doing so, ICE agrees to provide DOL notice of their activities so that DOL can take appropriate measures to ensure the integrity of enforcement efforts.

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77 This approach mirrors what was found in the most in-depth studies of inter-agency conflict between the DOL and the INS (the predecessor agency to the DHS). In that study, Kitty Calavita describes elaborate efforts to “dodge” the contradictions confronting each agency as a resolution to “wrangling” inherent in the overlapping jurisdiction of the two agencies and the tensions between employment and immigration enforcement. Kitty Calavita, INSIDE THE STATE 126-131 (1992). Calavita spent two years analyzing internal documents in the INS and DOL surrounding the Bracero Program. She concludes in a chapter on “wrangling” between the DOL and INS, “the steady stream of central office memos and reports from the field left little doubt that the INS places priority on ensuring a generous supply of low-wage braceros that this supply was considered integral to their ‘enforcement problem,’ and that the DOL was perceived as their antagonist in this endeavor.” Id. at 130.


79 Id.

80 Id.

81 Lee states contends that “anecdotal evidence suggests that ICE has alerted the DOL only after a workplace has already been investigated” and that the wording is “ambiguous.” Id. at 1121. He does not discuss the 2011 revision and dismisses the U-visa certifications as being limited to benefits at the “ex post” stage. Id. at 1126, 1129.

82 Exceptions include situations where the Director or Deputy Director of ICE determines that the enforcement activity is independently necessary to advance an investigation relating to national security –type concerns or the enforcement activity is directed by the Secretary of Homeland Security, Secretary of Labor, Solicitor of Labor, or other DOL designee. In those cases, ICE agrees to provide DOL notice and to make available for interview to DOL any person ICE detains for removal through a worksite enforcement activity. Id.
Distinct from guarding against unlawful retaliation or the unjust enrichment of abusive employers, DOL staff explain the rationale for the enhanced MOU in terms of the needs of labor enforcement. ICE agrees to consider deferred action against undocumented immigrants or temporary law enforcement parole to keep undocumented workers available to the DOL for investigation of labor law violations. This type of discretionary boundary-keeping enhances agency effectiveness and promotes the rule of law. When key witnesses in labor enforcement actions are threatened with or actually deported before providing critical testimony about working conditions or other employer abuses, the labor investigations are effectively shut down. A DOL administrator explained that the MOU improves the agency’s ability to do their job: “[In DOL enforcement activities], many times there are no paper records of alleged abuses. So DOL relies on interview statements to reconstruct what happened. If the employee is fearful of talking to us – or otherwise taken out of the investigation process by virtue of their status - we do not get information that will help.”

A corresponding operating instruction from ICE instructs its enforcement staff to exercise favorable discretion for workers engaged in protected activity, including union organizing and complaints to authorities about employment discrimination or workplace conditions. In return, DOL promises the workers will not flee pending a suspended ICE investigation. Notably, DOL staff did not speak about their particular feelings about DHS immigrant enforcement activities, unlawful retaliation, or the fairness of allowing undocumented immigrants to remain in the country during their interviews about the MOU. They merely spoke about the implications of the MOU for labor enforcement.

DOL staff firmly state that while their actions may benefit immigrants, they are not purposefully advocating for those outcomes. One staff member who had previously worked for an advocacy group said that the agency was not the place to advocate: coworkers of hers with advocacy backgrounds sometimes had difficulty shifting their perspective she recognized, but the expectations that they make the adjustment were always very clear. Further evidencing the distinctness of DOL staff incidentally benefitting immigrants from the staff of advocacy groups purposefully doing so is the dissatisfaction of advocates with the DOL-DHS agreement. In interviews, advocates tended to highlight the deficiencies of the MOU rather than express gratitude for its existence. Many emphasized that they had sought more ambitious revisions and felt the result was comparatively modest.

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83 Id.
84 Special Agent Field Manual 33.14(h) was formerly designated INS Operations Instruction 287.3a, reprinted in 74 Interpreter Releases 199 (1977) and available at www.uscis.gov/ilink/docView/SLB. Operating Instruction 287.3a (since renamed Special Agent Field Manual 33.14(h)) advises, but does not require, the immigration officer to consult with the NLRB and DOL as to whether the employer under investigation has a history of labor violations. Some critics are dubious about the value of the instruction since the immigration agency retains the ultimate authority to enforce immigration laws even if doing so would undermine labor protection, but the spirit of the instruction is to regulate the information that ICE can rely upon in order to minimize opportunities for thwarting labor enforcement. Michael Wishnie, The Border Crossed Us: Current Issues in Immigrant Labor, 28 NYU REVIEW OF LAW AND SOCIAL CHANGE 389 (2003-2004): National Employment Law Project, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS (2009).
85 Notably, prominent advocacy organizations and unions have not released any statements praising the 2011 MOU. This may be partly strategic given a political environment dubious about government generally and specifically critical of Secretary of Labor Hilda Solis, who comes from an advocacy background. Some advocates maintained that they recognize the DOL’s revision is a step forward, but that they are honoring the DOL’s wish to remain quiet about it. Interview with immigrants’ rights advocate (1/23/2012). The difficulty that I had obtaining interviews with the DOL on the subject of the MOU suggest this advocate’s perception is accurate. 86 Interviews with immigrants’ rights advocates (1/23/2010; 2/6/2012; 2/22/2012).
the MOU a “four corners” document with which the DOL and DHS are unlikely to comply if, for example, employers retaliated against the families of workers rather than the workers themselves. Another expressed skepticism about the commitment to training line attorneys in its implementation. During a conference call among advocates, he recounted speaking with a director of a wage hour office who, when asked about the MOU, said that it “above his pay grade” and that he knew nothing about it. The DOL protocols recount that “guidance and initial training...has already been provided to certain key Wage and Hour Division and Regional Solicitor of Labor staff” and that “further training is planned for the future.” It remains too soon to tell how vigorously the MOU will ultimately be used.

In summary, the Wage and Hour Division’s explanations attribute strengthening immigrant worker protections to effective labor enforcement protecting all workers, not out of a concern for immigrant workers per se or out of reverence for the political leadership’s changing priorities. Thus, from an organizational standpoint, protecting immigrants is merely a limited means to a broader end of the agency protecting workers generally. This is particularly true in light of a changing workforce more prone to relying on vulnerable immigrant workers. To the extent that DOL’s professional commitments seemingly conflict with their obligation to stand by Hoffman’s legal ruling, the DOL buffers the potential clash by distinguishing the rights of immigrant workers under the FLSA and the NLRA. Insofar as the DOL tangles with ICE over the regulation of immigrant workers and the remedies available for worksite violation, the DOL forges policies of deconfliction with ICE to maintain a respectful distance – in essence, “to leave one another alone” – within their overlapping regulation of immigrant workers.

B. The EEOC uses its mission of eradicating employment discrimination for protected classes of workers to mitigate workplace abuse against immigrants

If the DOL distinguishes its legal obligations and organizational goals from Hoffman in order to defend its protective stances, this second case study shows that the EEOC goes a step further: it asserts its statutory obligations to mitigate workplace abuses damaging to immigrant workers. More specifically, the EEOC calls upon its obligation under Title VII of the Civil Rights Act to eliminate discrimination on the basis of membership in several protected categories. This case study begins with the politically-appointed Commissioners who direct the policy of the EEOC; it then moves to the implementation of these directives through guidance issued by the Office of Legal Counsel and the litigation undertaken by the Office of General Counsel and field offices.

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87 Interview with immigrants’ rights advocate (1/23/2012).
88 Interview with immigrants’ rights advocate (2/22/2012).
89 Department of Labor U Visa Process and Protocols – Question & Answer (April 29, 2011). The same protocol explains that final authority for certification has been delegated to a select group of senior-level Wage and Hour Division’s Regional Administrators located in five cities. These senior officials will have specialized resources and training to facilitate ultimate decisions about certification. They will also be assisted by a regional coordinator with additional training to ensure that certification is handled efficiently and effectively. This type of centralized decision-making is not uncommon for new or sensitive protocols among agencies.
90 Gleeson, Status-Blind Approach, supra note 51.
91 As explained in the interviews with NLRB Office of General Counsel, Hoffman does not address ICE activities thereby leaving open the possibility for this kind of policy entrepreneurship. Interview with NLRB (1/11/2012.)
Politics invariably plays into EEOC decisions at the level of the Commissioners, but as a bipartisan independent agency politics matters less it would in an executive agency under the leadership of a cabinet-level secretary. The five EEOC Commissioners are politically appointed, but Congress circumscribes their ability to make policy by statute. Title VII of the Civil Rights Act, which created the EEOC, specifies that the agency’s core mission is to eradicate employment discrimination on the basis of several protected categories, including race, sex, and national origin. Protection of immigrants on the basis of citizenship status is not directly provided for under Title VII, but it can arise in the course of investigating allegations of discrimination on the basis of national origin. Within this statutory mandate, individual EEOC Commissioners have championed their commitment to immigrant workers. President Obama’s EEOC Chairwoman Ida Castro focused on undocumented immigrant workers when explaining the need for the 1999 Guidance that would later be rescinded. Chair Castro wrote that “unauthorized workers are especially vulnerable to abuse and exploitation,” making it “imperative for employers to fully understand that discrimination against this class of employees will not be tolerated and that they will be responsible for appropriate remedies (under Title VII, ADEA, ADA, and the Equal Pay Act) if they violate the civil rights laws.”

Chair Cari Dominguez, a President Bush appointee, made similar statements in 2002 when announcing the path breaking Decoster Farm settlement explained further below: “Protecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC.”

The Commissioners influence the priorities of the career staff in the Office of Legal Counsel, who are responsible for formulating guidance to be used in the resolution of individual charges in the field offices. As an Office of Legal Counsel staff person explained, “there is both a legal component laid out our enforcement standards and there is a political component that involves weighing. The politics is in the weighing. Our work comes in after that.” The Office of Legal Counsel has statutory authority to interpret procedural provisions of Title VII by issuing informal policy guidance in accordance with the Administrative Procedure Act; in practice, notice and comment is widely used, even when not required to formulate interpretive guidance. As an example, prior to 2002, the Office of Legal Counsel issued guidance permitting broad remedies for unlawful discrimination against undocumented workers in keeping with this status-blind approach. 

Three months after the Supreme Court’s Hoffman decision, on June 28, 2002, the EEOC rescinded its 1999 Guidance on “Remedies Available to

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93 Ida Castro served as EEOC Chairwoman from 1998 to 2001. She was appointed by President Clinton as the first Latina Chairwoman of the EEOC in 1998 and unanimously confirmed by the U.S. Senate the same year. She previously worked at the U.S. Department of Labor and as a labor and employment lawyer. See Press Release: Ida Castro Resigns from Commission (8/13/01), available at http://www.eeoc.gov/eeoc/newsroom/release/8-13-01.cfm
95 Cari Dominguez was sworn in as EEOC Chair in 2001, under President George W. Bush. She had previously served in the U.S. Department of Labor and numerous employment-related private law firms. See Press Release: Cari M. Dominguez Takes Oath as EEOC Chair, available at http://archive.eeoc.gov/press/8-6-01.html
96 Phone interview with EEOC Office of Legal Counsel (1/20/12).
Undocumented Workers Under Federal Employment Laws.” Although not at liberty to
discuss internal deliberations in specific terms, a staff member in Office of Legal Counsel
explained that the rescission was the product of an awareness of a tough political, legal,
and economic climate. To be sure, the rescission was legally compelled insofar as the
EEOC’s guidance relied on precedent directly overturned by the Supreme Court: Hoffman
posed obstacles to awarding back pay remedies comparable to what the EEOC awards
under Title VII. But while the Supreme Court exhibited an awareness that Hoffman would
have some implications for Title VII during oral argument, neither the majority nor the
dissenting opinions offered the agency any guidance for new policy. Facing a vacuum of
legal authority, the EEOC did not immediately substitute new guidance on remedies for
undocumented workers. It instead reaffirmed its commitment to vigorously pursue
charges brought by undocumented workers and seek relief to the extent consistent with the
Supreme Court’s ruling. EEOC staff contended “enforcing the law to protect vulnerable
workers, particularly low income and immigrant workers, remains a priority for EEOC” for
organizational and pragmatic reasons as well.

As an Office of General Counsel attorney explained to me, much of the EEOC’s work is
complaint driven. In order to guard against chilling employees from coming forward to
initiate complaints, the EEOC has adopted a status-blind approach to investigations
comparable to the DOL and the NLRB. The Office of General Counsel attorney
characterized the EEOC’s cultivation of trusting relationships with workers as
instrumental to achieving compliance; the effort put into maintaining those relationships is
the product of the “mutual dependence” of the EEOC on workers coming forward to
procure discrimination in a docket that is overwhelmingly complaint-driven. Charge-
driven work “strikes a different balance between sitting around and deciding to get
involved” than agencies with the ability to proactively decide how to direct their
resources.

In the Office of General Counsel and the field offices they supervise, a charge must fall
within the jurisdiction of the EEOC before it can be lodged and the agency can get
involved. Once a cause of action is established, career staff investigate these charges by

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97 The 1999 Enforcement Guidance relied on NLRA cases to conclude that undocumented workers are entitled to
all forms of monetary relief – including back pay – under federal employment discrimination statutes.
98 Phone interview with EEOC Office of Legal Counsel (1/20/11).
99 The oral argument transcript includes a lengthy colloquy between the Justices and Hoffman’s attorney about
how a prohibition on back pay under the NLRA might affect Title VII cases. Oral Argument Tr. At 18-20,
for Protecting Undocumented Workers in a Title VII Context and Beyond, 22 Hofstra Labor and Employment
J. 473, 498 (2004-2005)).
100 EEOC Rescission, supra, note 22. Under the former guidance, an undocumented worker was presumptively
entitled to back pay as long as the worker remained present and available for work. See Employment
Opportunity Comm’n, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal
101 Id.
102 Interview with EEOC Office of Legal Counsel (1/20/12).
103 The Supreme Court case establishing this principle, the only one to opine on the meaning of national origin
discrimination, is Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (stating that aliens “are protected from
illegal discrimination under the Civil Rights Act, but nothing in the Civil Rights Act makes it illegal to
discriminate on the basis of citizenship or alienage”). The EEOC Compliance Manual for National Origin
Discrimination describes Citizenship-Related Issues in Part 13-VI, National Origin Discrimination EEOC
seeking clear evidence of discrimination; they must “find cause” to proceed. Only the charges that have been worked and get to a point where the employer won’t settle become part of the pool from which the EEOC selects its litigation enforcement.\textsuperscript{104} This is the primary context in which the EEOC can exercise its remedial powers, although settlement and informal mediation have also led to robust remedies. The EEOC does not inquire into a worker’s immigration status “on its own initiative”, nor does it consider “an individual’s immigration status when examining the underlying merits of a charge.”\textsuperscript{105} However, the characterization of a charge often involves agency discretion: race or religion, gender or sexual orientation, or some combination of mixed motive. This judgment call can impact the viability of the claim. For immigrants facing status-based discrimination in the workplace, national origin discrimination may provide the legal hook and secure associated protections, but only in the limited circumstances when a citizenship requirement is a “pretext” for national origin discrimination or if it is part of a wider scheme of discrimination.”\textsuperscript{106} Title VII does not prohibit citizenship discrimination per se.\textsuperscript{107}

A more straightforward charge can be made on the basis of race or gender, which are better defined categories with more established case law guiding the outcome. For this reason, claims brought by female immigrant workers might be brought on the basis of gender alone or gender in combination with national origin rather than on the basis of national origin or citizenship alone.\textsuperscript{108} The Decoster Farms case demonstrates an instance when the EEOC asserted its remedial authority on the basis of a combined gender and national origin claim. In \textit{EEOC v. Decoster Farms}, female immigrant workers alleged that Decoster Farms engaged in sexual harassment in violation of Title VII, including rape, sexual abuse, and retaliation for challenging work conditions.\textsuperscript{109} As EEOC Regional Attorney Bill Tamayo recounts: “Late one night in 2000, I received a disturbing call from the Iowa Coalition Against Domestic Violence telling me that several Mexican women had been trafficked into the United States to work in the poultry plants of Decoster Farms... The EEOC promptly sent a team of investigators to Iowa. But the victims were scared to cooperate with the federal investigation since they had also been threatened with physical harm, including

\textsuperscript{104} Id.
\textsuperscript{105} Id. This point has been made in several cases citing \textit{Hoffman} in an antidiscrimination context, including \textit{Rivera v. NIBCO}, 364 F.3d 1057, 1066-70 (9th Cir. 2004); \textit{Escobar v. Spartan}, 281 F. Supp. 2d 895, 897 (S.D. Tex 2003); and \textit{De la Rosa v. North Harvest Furnitur}, 210 F.R.D. 237, 238 (C.D. Ill. 2002). The \textit{NIBCO} litigation makes a particularly strong case for how status can be avoided in the context of Title VII even after IRCA. \textit{NIBCO} established that \textit{Hoffman} does not permit employer’s defense attorneys to ask about immigration status during discovery as a means of coercing withdrawals of claims or intimidating plaintiffs. The Ninth Circuit, drawing heavily on briefs from the Employment Law Center seeking a protective order to quash inquiries into their immigration status during discovery, said that the significant differences between the NLRA and Title VII merit different interpretations of \textit{Hoffman}. \textit{Id.} at 502. Unfortunately, this is not the case all circuits.


\textsuperscript{107} Id. at Chapter 13-VI Citizenship-Related Issues. Discrimination on the basis of a citizenship requirement for a job can be distinguished from an employer hiring undocumented workers in violation of federal immigration law and then discriminating against them relative to other workers.

\textsuperscript{108} Interview with former EEOC Vice Chair Paul Igasaki (2009, 2010).

\textsuperscript{109} EEOC v. Iowa AG, LLC dba Decoster Farms, No. 01-CV-3077 (N.D. Iowa filed Aug. 2001); Complaint for EEOC v. Decoster Farms of Iowa, Civil Action C02-3077MWB at 3 (N.D. Iowa filed 9/26/2002).
more rapes, if they cooperated.”

The EEOC filed papers for a preliminary injunction to stop the retaliation so that they could investigate. Given that the allegations involved sexual harassment and sexual assault, the EEOC characterized its charges as discrimination on the basis of sex; they sought monetary damages under Title VII to compensate victims for their lost jobs, medical expenses, pain and suffering, equitable relief including but limited to a permanent injunction; and “further relief as the Court deems necessary and proper in the public interest.”

After months of investigation and negotiations, the parties entered a consent decree and the case settled. Although portions of the agreement are sealed, the consent decree lists in its general provisions prohibitions of sexual harassment, retaliation, and hostile work environment, plus promulgation and posting of anti-harassment and anti-retaliation policies. In addition, the EEOC announced a $1.525 million settlement and one of the earliest successful petitions for a U-visa nonimmigrant classification under the Violence Against Women’s Act (VAWA)’s Battered Immigrant Women Protection provisions upon showing that the workers had suffered workplace abuses that qualified for temporary protected status. Subsequently, the EEOC developed procedures for the certification of U-visas for eligible employees and proved willing to seek them for a wider array of workplace abuses. Working across agency boundaries, they also worked extensively with the other workplace agencies to develop similar procedures. The DHS released U-visa Guidelines in September 2007 that enumerated certifying agencies and specified more stringent requirements for future U-visa certifications – for example, EEOC regional attorneys retained authority to certify applications, but only upon the recommendation of the EEOC General Counsel and the Commission Chair. Although some advocates claim that these changes have somewhat blunted the availability of U-visas, others remark that the visas

111 Complaint for EEOC v. Decoster Farms of Iowa, Civil Action C02-3077MWB at 4. Consent Decree for EEOC v. Decoster Farms, Civil Action No. C02-3077MWB (N. D. Iowa filed 10/02/2002). Notice that the settlement came in 2002, the same year as Hoffman and during the Bush Administration’s EEOC.
114 Interview with EEOC Office of General Counsel (4/6/2011). The EEOC staff say that there was comparatively less consultation with the immigration agencies: “It’s more of a business relationship. We might have had more back and forth on Decoster Farms, but less so later on. Essentially, if it’s working well enough, the field doesn’t need to pull in headquarters and headquarters doesn’t need to broker compromises with outside agencies.” Id. The EEOC has filed comments on DHS policies on the proposed rule setting forth procedures governing employer’s actions when Social Security Administration or ICE send it a “no match letter” (Letter from Peggy Mastroiani, Assistant Legal Counsel EEOC to Richard Sloan, Director Regulatory Management Division of USCIS regarding Safe-Harbor Procedures for Employers Who Receive a No Match Letter, DHA Docket No. ICEB-2006-0004 (8/14/06).)
115 Critics have long noted that the U-visa is only available when there is an ongoing worksite investigation. The specific critique that the certification requirement has grown burdensome since the DHS’ 2007 U-Visa regulations is made in Leslye Orloff, Kathryn Isom, Edmund Saballos, Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the VAWA’s Immigration Protections and its “Any Credible Evidence” Rules – A Call for Consistency, GEORGETOWN J. OF GENDER AND L. 619, 640 (2010) (“This complex, multilayered, daunting process is having the effect of reducing EEOC’s issuance of U-visa certifications”).
have become the “remedy of choice for immigrant survivors of domestic and other forms of violence, and the lawyers who represent them.”\footnote{Email from immigration attorney: “Are S, T, and U-visas a good idea” (2/29/2012).} It is an immigration remedy and carries a much broader waiver than under VAWA; since it can lead to a self-petition for adjustment of status that can then be used to bring over immediate relatives, “many advocates consider the U to be the visa that keeps on giving.”\footnote{Id.} Although it is not without problems or controversy, the U-visa enables agencies to provide a valuable remedy to immigrants when laws governing the workplace limit available remedies post-\textit{Hoffman}. In an effort to raise the profile of the new remedy, in January 2011, Commissioner Stuart Ishimaru organized a Commission meeting on human trafficking to bring greater awareness to the connection between trafficking, harassment, and other forms of workplace abuse.\footnote{Written testimony of Daniel Werner and Ana Vallejo, available on eeoc.gov/eeoc/meetings/1-19-11.} Advocates have convened similar meetings to publicize and encourage the implementation of EEOC U-visa certification protocols.\footnote{The National Employment Law Project, for example, hosted a conference call on the subject of retaliation that included discussion of U-visas and has printed materials describing the U-visa in simple terms and collecting agency protocols. \textit{See e.g.} The U-Visa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse, National Employment Law Project (November 2011).}

In summary, the EEOC invokes the ethos of nondiscrimination that governs its enforcement activities as justification for protecting immigrant workers. This ethos is grounded in Title VII, which defines the substantive mission of the agency as well as the procedures by which the agency can remedy violations. It is also grounded in the widely-held perception of EEOC staff as being professionally responsible for protecting vulnerable workers and protected groups (including women), a commitment that mitigates the effects of limiting laws such as \textit{Hoffman} and motivates civil servants to pursue creative solutions (such as subsuming citizenship-based claims in sex-based claims) and novel remedies such as the U-visa to better accomplish their job.

\textbf{C. The NLRB follows \textit{Hoffman} insofar as its discretion on back pay is constrained, but it reconfigures other remedies for immigrant workers where openings permit}

These case studies illustrate the regulatory responses of agencies within the interstices of law and politics. In each case, there is sufficient openness to invite, or at least permit, delegation of decision-making authority to agency discretion. Of the three agencies under study, the NLRB experienced the greatest constraints and the least openness. The \textit{Hoffman} decision, after all, directly challenged the Board’s ruling on the availability of back pay to immigrant workers under the NLRA. As a matter of law, the NLRB’s interpretation of its legal mandate to protect workers clearly and unavoidably conflicted with the Supreme Court’s legal interpretation. As a matter of policy, the NLRB faced some of the staunchest challenges as well. For all of these reasons, this third case study poses the most challenging regulatory environment, the most difficult test case, and the most important instance of bureaucratic incorporation operating in favor of undocumented immigrant workers post-\textit{Hoffman}. Yet the NLRB’s dual commitment – to professionalism and the rule
of law – reinforces the theory of bureaucratic accountability to adhere to the benefit of immigrants. The case study begins by explaining the distinctive regulatory environment surrounding the Board’s interpretations of worker rights and remedies Hoffman. It then delves into interviews and internal documents to demonstrate the ways that civil servants navigated this difficult terrain.

Two decades before Hoffman, the Supreme Court held that undocumented workers are covered by protections of the NLRA in Sure-Tan v. NLRB.121 In Sure-Tan, the president of a leather processing firm objected to union organizing because six of the seven employees representing the union were undocumented. When the NLRB overruled this objection, the employer sent a letter to the INS asking that it check into the status of the employees as soon as possible. The INS arrested the workers, five of whom voluntarily departed the country to avoid deportation. The NLRB issued a complaint and ultimately ruled that the employers’ retaliatory call to the INS constituted constructive discharge in violation of the NLRA. The Board entered a cease-and-desist order with the “conventional remedies” of reinstatement and back pay.122 The Seventh Circuit affirmed; the Supreme Court affirmed the merits analysis but partly remanded the remedial analysis.123 A career attorney in the Office of General Counsel who had worked in the Advice Division during Hoffman explained that Sure-Tan remains good law and the NLRB has held to its “mantra of not asking about status so that it will not interfere with its primary statutory mandate to enforce labor standards.” That said, “Hoffman complicated matters quite a bit” for the NLRB Commissioners who had originally authorized back pay for the unlawful firing of undocumented immigrant workers. From the vantage point of the career staff, Hoffman proved “troubling” for the NLRB’s ability to ensure compliance with the NLRA because “employers have the opportunity to evade remedies for violating the law.”124 Without avenues for legal accountability, the challenge became for staff to figure out what avenues for remedies remained available for the execution of their statutory and professional duties.

Shortly after the Supreme Court reversed the NLRB enforcement order in Hoffman,125 the NLRB General Counsel Arthur Rosenfeld (a career position) sent its Regional Directors a memorandum setting forth procedural remedies for employees who may be undocumented aliens.126 The 2002 General Counsel memo (GC 02-06) shored up support for “several basic principles” left intact after Hoffman – including the starting presumption that employees and employers have conformed to the law, so that the Board is not obligated to conduct a sua sponte immigration investigation127 – and retained as “valuable and necessary” the use

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122 Id.
123 Id.
124 Phone interview with NLRB staff (1/11/2012).
127 Among the good law that remains after Hoffman is the coverage of undocumented immigrants as employees under the NLRA, the irrelevance of immigration status for findings of employer liability, and the irrelevance of immigration status for union eligibility. A litany of other protective measures are built into their procedures and affirmed in subsequent memoranda GC 11-62 (June 7, 2011), including the presumption of legality, refusal
of cease and desist orders, contempt sanctions, and formal settlements aimed at deterring “recurrence or extension of unfair labor practices” in the absence of back pay remedies. While GC 02-06 acknowledged that after Hoffman the NLRB could no longer seek back pay remedies “once evidence establishes that a discriminatee is not authorized to work during the back pay period,” it held as an open question whether it could order back pay when an employer knowingly hires undocumented workers. The question was again left unresolved in the General Counsel’s June 2011 update memo and would remain open until Mezonos was decided later that summer.

In order to coordinate responses to workplace abuse in this challenging legal climate, the June 2011 GC memo directs NLRB regional staff to “call home,” or to contact the Deputy Assistant General Counsel, in cases indicating an employer taking advantage of immigration status issues in an attempt to circumvent fair labor practices. The Deputy Assistant General Counsel, who doubles as the Director of Operations-Management, is tasked with supporting regional enforcement offices’ efforts at every stage of case processing, from investigation to litigation to remedies. Following Hoffman, the Director sought to “figure out where conflict does not exist [between immigration and labor enforcement] – that is, finding opportunities where agencies can be of mutual assistance in light of their statutory mandates and available remedies.” One such opportunity came with the realization that retaliatory threats to deport directly interfere with the labor enforcement mission of the NLRB, creating a valid opening to reach immigrant workers through labor-based justifications. Another opportunity came with cases where the employer is willing to acknowledge wrongdoing and settle but finds out, incidentally, that the worker lacks status. In such cases, the employer cannot keep the worker on payroll (if the worker is still in his employ) and cannot reinstate them (if he already has been let go.)

The Director reached out to other agencies and asked “is there a way to protect workers by giving status and rendering workers eligible for the full panoply of remedies under the NLRA within our limited parameters?” Looking to existing laws and policies in other agencies, he advised the General Counsel on ways to request from DHS deferred action or favorable discretion for workers who are necessary for labor enforcement activities and have been subjected to removal for retaliatory reasons. He also collected information from the EEOC about best practices for seeking U-visas on behalf of victimized workers, which can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident. These status-based measures deviate from NRLB’s usual

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128 GC 02-06 (citing Casehandling Manual (Unfair Labor Practices), s. 10164.2.
129 The Board left untouched a limited back pay remedy in a case that preceded Hoffman, A.P.R.A. Fuel Oil Buyers Group v. NLRB, 320 NLRB 408, 415 (1978), 134 F.3d 50 (2nd Cir. 1997).
130 Richard Siegel, Associate General Counsel NLRB to Regional Directors, GC 11-62 “Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings.” (June 7, 2011). Available at: http://mynlrb.nlrb.gov/link/document.aspx/09031d458049525b. The Updated Procedures Memo was issued in response to a reorganization of immigration-related responsibilities into three agencies within the Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP) and in consultation with an Interagency Worksite Enforcement Coordination Committee. Interview with NLRB Staff (1/11/2012).
131 Id.
132 Id.
practice of ignoring status: when prompted, they instead attempt to correct the status issue in order to get back to the labor compliance issues that are clearly their responsibility.

The Director openly acknowledges that he took initiative on behalf of immigrant workers when he became the point person on immigration matters. Why did he do it? He felt a sense of public duty. The Director explains, “There have always been immigration matters in labor. But since Hoffman and the increased [public] attention to immigration, it seemed like a concerted effort needed to be made to develop a response. We needed to take ownership of the issue.”133 Undoubtedly, the Director cares about immigrants’ rights. One of his colleagues said of him, “You get people like [the Director], who have a particular interest in immigrants’ rights. He carves time out of every day to work on immigration-related issues.”134 Still, the way that the Director pursued the issue was encased in professional responsibility. That is, the Director’s responsibilities for immigration were possible precisely because “Operations-Management has a general charge to make things run better – from supporting staff in the field who deal with compliance on a daily basis to more mundane activities that make the trains run – so we have more freedom.”135 The breadth of this charge permits him to “do more” in his professional capacity than a strictly bounded legal office would allow. Career attorneys in the director’s office (there are two assigned to work on immigration issues) likewise framed their responsibility in terms of professional commitment, rather than politics or personal conviction. With great self-awareness he said, “most of us are not engaging in advocacy for immigrants’ rights. We’re trying to figure out how to do our job. We all know a lot about the NLRA and little about anything else. Based on that knowledge [of the NLRA], we try to define the mission of our agency and make it work for immigrants.”136

The continuing vitality of the NLRB immigration work remains to be seen, as there has been considerable fluctuation in the legal and political context surrounding worker remedies under the NLRA. Ten years after Hoffman, in a case that presented similar facts to Hoffman and resurrected the issue of remedial authority, the NLRB decided in Mezonos Maven Bakery that Hoffman stripped them of discretion to award back pay to an undocumented worker, even when the employer knowingly hired the workers without regard to their status.137 In Mezonos, seven immigrants were hired to work for Mezonos Maven Bakery without being asked for documentation when they were hired. Eight years later, they were fired after complaining as a group about treatment they were receiving from a supervisor. They filed unfair labor practice charges, the Board issued an unpublished decision on behalf of the workers, and the parties settled. As part of the settlement, the Board ordered Mezonos to offer reinstatement and to make the employees whole for lost wages and benefits. The Board’s order was enforced by the U.S. Court of Appeals for the Second Circuit. Mezonos later argued that it could not offer reinstatement or back pay under the Hoffman decision because the workers were undocumented and, thus, unavailable to work. On November 1, 2006, Administrative Law Judge Steven Davis distinguished Hoffman and decided against the employer. The ALJ faulted the employer for failing to verify the workers’ legal status in Mezonos, unlike the employers presented

133 Phone interview with NLRB Office of General Counsel staff (1/11/2012).
134 Id.
135 Id.
136 Phone interview with NLRB Office of General Counsel staff (1/11/2012).
137 357 NLRB 47 (August 9, 2011) (Case 29-CA-25476 Supplemental Decision and Order).
with fraudulent work documents in the facts of *Hoffman*. The employers appealed the ALJ’s ruling. This time the NLRB found that *Hoffman* did indeed apply. A three-member panel of the NLRB consisting of Wilma Liebman, Mark Pearce, and Brian Hayes announced that *Hoffman* compelled the Board to conclude that it lacks the remedial authority to award back pay to undocumented immigrant workers whose rights have been violated under the NLRA.

In other words, in *Mezonos* the NLRB recognized that legal precedent took away the agency’s discretion to make findings beyond settled law. The Board said, “*Regardless of the merits...* we are not at liberty to disregard the Court’s decision in *Hoffman.*” This modest protection for immigrant workers may seem anomalous with the prior case studies of regulatory resistance. However, it is consistent with the prior case studies insofar as the NLRB attorneys struggled to reconcile their competing professional commitments to protect workers, on the one hand, and to obey the law of the Supreme Court on the other. As a law enforcement agency, the professional duty ultimately collapsed into the legal duty. Lamented the General Counsel attorneys, “whatever small gaps remained after *Hoffman*, the *Mezonos* decision made miniscule... it confirms how limited a space we have to work in, if there was previously any doubt.” That limited space cramped the possibilities for NLRB staff without violating an ethics of bureaucratic accountability to the rule of law and the boundaries of executive power. It did not, however, prevent them from reconfiguring their approach toward enforcement efforts to circumvent the remedial limits of *Hoffman*.

In summary, the NLRB case study poses the most difficult test case for the theory of bureaucratic incorporation. Yet the NLRB’s dual commitment – to professionalism and the

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139 *Id.* at 4 (“We are persuaded that the Court’s opinion in *Hoffman* forecloses back pay awards for undocumented workers regardless of the circumstances of their hire.”)

140 *Id.* Although the *Mezonos* opinion was unanimous, the opinion reveals division within the Board. The concurring opinion, signed by two of the three board members, suggests that the legal constraint posed by *Hoffman* would have deleterious policy effects. The majority decision, it contends, provides employers unjust enrichment for wrongdoing and fails to make employee-victims whole. It additionally undermines the NRLA’s enforcement, chillι employees’ exercise of Section 7 rights to self-organize, fragments the workforce, and weakens a vital check on immigration law violators. *Mezonos* Maven Bakery, Inc., 357 NLRB No. 47 (Aug. 9, 2011) (concurring opinion).

The concurring opinion ends with the statement: “In denying back pay to undocumented workers in this case... we do not definitively shut the door on other monetary remedies, which have not been tested here. It is arguable, for example, that a remedy that requires payment by the employer of back pay equivalent to what it would have owed to an undocumented discriminatee would not only be consistent with *Hoffman*, but would advance Federal labor and immigration policy objectives... Because of the procedural posture of the case, we do not examine such a remedy here. However, we would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct.” *Id.*
rule of law – reinforces the theory of bureaucratic accountability through a concerted effort to reconfigure their remedial authority after *Hoffman* confined the space within which they operate.

*   *   *

To conclude Part IV, these case studies provide empirical evidence that supports theories of bureaucratic incorporation. More specifically, the case studies illustrate exercises of agency discretion favorable to immigrant workers, even if not initially executed on their behalf. Taken in isolation, these agency actions may seem insignificant given that the motive to protect immigrants is so incidental. But taken together, these regulatory responses change the parameters of regulation set by *Hoffman* by asserting bureaucratic accountability to higher ideals of professionalism and the rule of law. Common across the case studies, Miles’ law held: the career attorneys within the workplace agencies set out to do their job – a job made more difficult by the *Hoffman* decision – by prioritizing their professional commitments over their personal convictions or political preferences. Nevertheless, the form of regulatory response differed across the case studies. The DOL attorneys pursued policies of “deconfliction” with the DHS to buffer potential conflicts between immigration enforcement and labor enforcement priorities. The EEOC uses its mission of eradicating employment discrimination for protected classes of workers to mitigate workplace abuse against immigrants. The NLRB follows *Hoffman* in recognition of their duty to obey the law, but it continues to seek remedies for immigrant workers in the narrow openings available after *Hoffman*. The differences amount to no more than variations on a theme. Indeed, as Miles portends, where you stand does seem to depend on where you sit.

V. Varieties of Regulatory Response: Comparison of Employment Agencies with Education Agencies Serving Immigrants

So far, this article has argued that law enforcement agencies dedicated to improving the lives of workers can *sometimes* help immigrants. The major claim is that workplace agencies primarily fulfill their organizational goals and secondarily benefit immigrant workers.\(^\text{142}\) Moreover, agencies can advance immigrants’ rights absent a pro-immigrant agenda or political directives to that effect. The article presents in-depth case studies that expose possibilities consistent with social science literature about processes of bureaucratic incorporation. The resistance catalogued in this article may seem insignificant compared with regulation or legislation that create affirmative rights or more proactively harmonize immigration and employment enforcement goals. Still, these findings are valuable because they open up new ways of understanding agency behavior and new avenues for advancing immigrants’ rights.

\(^\text{142}\) For an example of an organizational goal, Dan Carpenter has written authoritatively on bureaucracies’ attempts to preserve and enhance their reputation is a key motivator for policy innovation. *See e.g.* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY IN EXECUTIVE AGENCIES, 1862-1928 (2001); DAN CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010).
The article has not gone so far as to argue that workplace agencies always or even usually will help immigrants, nor that they will go beyond the law to do so. Nor is the research design well-suited to tell us how commonly bureaucratic efforts will benefit immigrant workers, or to what extent. Readers may inquire whether the findings extend to agencies regulating immigrants in other policy arenas. While a systematic comparison of federal agencies across policy arenas is beyond the scope of this article, Part V offers a shadow case study from another policy arena of great consequence to undocumented immigrants: access to education. To review, my claim is that bureaucratic incorporation can benefit immigrants in situations of legal ambiguity that invite agency discretion via doctrines of delegation and deference. Still I acknowledge that the extent to which the agencies exercise their discretion favorably depends on the legal and political environment in which the organizational mission is pursed. Education offers a case study with a rights-expansive legal precedent (*Plyler v. Doe*) to demonstrate the scope of the main study of federal workplace agencies. If the dynamics of bureaucratic incorporation hold, the possibilities for regulatory resistance ought to be even greater where legal precedent *expands* rights of immigrants and is compatible with agency mission. These types of affirmative interventions have been described by other scholars as norm entrepreneurship, policy innovation, and administrative constitutionalism; they are not far off from my case study, although significantly the motives attributed to the bureaucrats in my case study differ from the more activist agendas found elsewhere: professional ethos, not politics is what matters most.

In summer 2011, the U.S. Department of Education, Office for Civil Rights proposed on behalf of the entire department a “Dear Colleague” letter reminding states and local school districts that they are required to provide all children – regardless of their own or their parents’ immigration status – with equal access to public education at the elementary and secondary level. This informal guidance was initially presented by the agency in October 2010 and published in the Federal Register in May 2011. The letter is a joint product of the U.S. Department of Justice and the U.S. Department of Education. It states that the Departments’ dual missions are to encourage education and to enforce numerous statutes that prohibit discrimination, including Titles IV and VI of the Civil Rights Act of 1964, and that the Title VI regulations prohibit districts from unjustifiably taking actions that have a disparate impact on the basis of race, color, or national origin. The letter cites to the United States Supreme Court decision in *Plyler v. Doe* for its ruling that a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise. In *Plyler*, the Texas Legislature revised its

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144 *See* Dan Carpenter, *supra*, note 63.
145 *See* Sophia Lee, *infra*, note 162.
146 A different type of counterfactual analysis might compare regulatory responses within an agency with a rights-restrictive mission with these education and employment agencies that both have rights-expansive missions. Such a study – of the DHS for example – would be a welcome addition to this literature, but it has rarely been attempted. Kitty Calavita’s *Inside the State*, which studies the DHS predecessor the INS comes closest: studies of local law enforcement implementing 287(g) agreements to restrict immigrant rights would also fit the bill, although it is these studies have mixed results for immigrants: in some cases, localities go along with the federal mandate and in others they actively resist. *See e.g.*, Amada Amenta, *From Sheriff’s Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 LAW & POLICY 191 (2012); cf. Paul Lewis and Karthick Ramakrishnan, *Police Practices in Immigrant Destination Cities*, 42 URB. AFF. REV. 874 (2007).
education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country.\textsuperscript{148} A class of school-aged children residing in Smith County, Texas but who could not establish that they had been legally admitted into the United States complained of their exclusion from the public schools. The District Court enjoined defendants from denying a free education to members of the plaintiff class. The Fifth Circuit and Supreme Court upheld this injunction as a violation of the Fourteenth Amendment. The decision has been cited in numerous lawsuits challenging state laws that target the children of undocumented immigrants.\textsuperscript{149}

The Dear Colleague letter expresses its support for immigrant students in terms of the conditions for enrollment in K-12 public schools. It states that Department of Education is aware of “student enrollment practices” that “chill or discourage participation, or lead to exclusion,” of students based on their status or their parent’s status. The specific enrollment practices cited in the letter focus primarily on disclosures of status where legality is not relevant to educational purposes. The letter states that seemingly neutral enrollment practices concerning enrollment can have unwitting and negative effects – implicitly, “disparate impacts” (although the term of art is assiduously avoided) on undocumented students.\textsuperscript{150} A range of practices posing particular difficulties for immigrants is targeted, including practices that are generally discouraged even if legally permissible. For example:

- Proof of residency within a school district is okay, but not proof of legal status
- Use of a birth certificate to establish enrollment age okay, but schools may not cite foreign birth certificates to deny entry into school
- Use of Social Security Numbers as student identification number is okay but it must be voluntary; they cannot penalize students for not providing a SSN

The Department of Education guidance is consistent with the agency’s overall purpose of ensuring access to public schools. Although it does not take up immigrants as a protected class under Title VI (much of the national origin discrimination analysis under Title VII also applies to Title VI), it inserts itself into the discussion of immigrant rights by declining to inquire and discouraging disclosure of status. While stopping short of granting substantive rights to education for immigrants, this approach suggests that the disclosure of legal status is the problem, not the underlying status of immigrant students. This theory of harm is akin to the military’s “don't ask, don’t tell” policy whereby revealing sexual orientation is an independent offense from the offense of being or performing homosexual acts. Interviews with career staff in the Department’s oversight office (Program Legal) revealed that the bureaucratic rationale for promoting non-disclosure of citizenship status is that disclosure would chill participation and potentially discourage undocumented students from enrolling in public schools for fear of being subjected to penalties for being

\textsuperscript{150} Although a full explanation of the availability of disparate impact is beyond the scope of this article, this is a significant statement after \textit{Alexander v. Sandoval}, 532 U.S. 275 (2001), which constrains private enforcement of Title VI under disparate impact theories of liability.
out-of-status (or exposing parents to penalties for being out-of-status), thus undermining the core aim of the agency.\textsuperscript{151} The Department of Education’s institution of a firewall preempts conflict between restrictionist immigration laws and inclusionary educational laws at the school site.

These actions were undertaken at the agency’s discretion, but they are justified in terms of the agency’s broader mission of educational access rather than pro-immigrant advocacy. In contrast to the workplace regulatory agencies, the U.S. Department of Education was not legally compelled to respond to the Supreme Court’s \textit{Plyler} decision since \textit{Plyler}’s pro-access mandate does not complicate or compete with its own interpretations of Title VI. However, the U.S. Department of Education’s Dear Colleague Letter operates in the interstices of formal law because the agency typically confines itself to enforcement of its organic statute (Title VI), not the Equal Protection Clause.\textsuperscript{152} To the extent that Department of Education responded to a raft of state laws limiting the educational access of immigrant school children (as suggested in background interviews), the Department was operating beyond its core mandate since they primarily maintain jurisdiction over federal laws. Indeed, the Department of Education has previously maintained that it lacks jurisdiction over these types of cases.\textsuperscript{153} The Department of Education’s voluntary intervention is notable and significant because it amplifies the findings elsewhere in this article. As with the workplace agencies, agency officials sought to secure their organizational mandate and only secondarily benefited immigrants. The personal convictions of career staff toward immigrant children – while admittedly favorable in most cases – was not paramount in their decision to intervene. Their professional convictions mattered most. A Department of Education attorney reflected that if he encountered a policy directive that opposed its Title VI mandate to promote education access, he would similarly be bound by professional and legal ethics to uphold the principle of access.\textsuperscript{154}

In short, bureaucratic incorporation provides concrete benefits for immigrant children as a byproduct of the broader mission to serve children regardless of status. The Dear Colleague Letter also provides channels for future claims-making around disclosure of citizenship status in schools – a claim that has been made in litigation challenging state laws that require disclosure of student status.\textsuperscript{155} So doing, the agency fosters equality principles that operate not only as a ceiling on education law – as Title VII and IRCA do for employment law – but also as a floor for development of undocumented immigrants’ rights in schools.

\section*{VI. Conclusion: Where You Stand Depends on Where You Sit}

\textsuperscript{151} Interview with U.S. Department of Education staff (5/24/2011).

\textsuperscript{152} The involvement of the U.S. Department of Justice makes enforcement of the Equal Protection Clause tenable because the DOJ enforces the civil and \textit{constitutional} rights of all Americans in addition to federal statutes prohibiting discrimination on the basis of national origin among other things. For more information, see http://www.justice.gov/crt/about/.

\textsuperscript{153} A FOIA request of the U.S. Department of Education, Office for Civil Rights resulted in two cases raising \textit{Plyler} issues. The Department of Education declined to take jurisdiction over both cases. (On file with author)

\textsuperscript{154} Interview with U.S. Department of Education staff (3/3/2012).

This article has argued that law enforcement agencies resist restrictive legal and political environments to advance immigrants' rights when doing so fulfills their organizational goals and thus satisfies their professional ethos. Based on three case studies of federal workplace agencies, I find that the process of bureaucratic incorporation emphasizes the organizational mission of workplace enforcement agencies to protect all workers as a means to the end of protecting immigrant workers. The inherent tension posed by the strategy of immigration enforcement through worksite enforcement presented in IRCA and reiterated in Hoffman was discussed in interviews with bureaucrats as being facilitative of labor enforcement insofar as it eliminates competitive advantages to hiring non-native workers. When prompted to navigate the tension in enforcement strategies among co-equal federal agencies—a murkier terrain than state-federal immigration contest, as a legal matter—the civil servants said that any such conflict could be side-stepped through jurisdictional boundary keeping in a fragmented federal bureaucracy and a consistent focus on the core agency mission dictated by statute. These findings held across workplace agencies.

_Future Research_

These findings could be expanded in three ways. First, further attention could be paid to the development of protocols and training that help implement workplace policies. Interviews could be conducted with civil servants and line attorneys in the field offices of the three federal agencies under study who are more directly involved in enforcement. By moving closer to the ground to inquire about the putting into practice of policies from above, the study would move more directly into conversation with the literature on street-level bureaucrats being undertaken by other social scientists. A methodological benefit of this expansion is that a broader, more representative sample of interviews could be drawn and state/local variations could be taken into account. A second means of expansion is that more consideration could be given to the role of advocates— for immigrant workers as well as for employers—in bureaucratic incorporation to provide another angle on the issue of political influence. Background interviews suggest that the access of advocates to the administration has improved with the Obama presidency, even if their influence over the substance of immigration policy remains to be seen. Conceptually, the access-influence distinction adds another dimension to the political control thesis. It also leads to the natural question about the effectiveness of regulatory response.

Third, further research is needed to define the scope and persistence of the bureaucratic incorporation theory. Additional research in agencies where the organizational mission is not easily harmonized with expansive conceptions of immigrants’ rights or leads to negative outcomes instead of favorable discretion would shed light on the transferability of these findings to counterfactual settings. The clearest examples pertain to local law enforcement operating under 287(g) agreements to arrest undocumented immigrants. The 287(g) program, which was written into immigration law in 1996, allows law enforcement agents to do the work that formerly only ICE agents could do: police become deputized immigration enforcement officers with the authority to enforce immigration laws in their
towns or localities or jails.\textsuperscript{156} At the federal level, the Obama administration’s replacement of an enforcement strategy targeting worksites for immigration enforcement with prosecutorial discretion that deprioritizes non-criminal immigrants, for example, could also be a fruitful subject for further study. Preliminary results of the prosecutorial discretion program for immigrant workers in detention and not otherwise charged with crimes or security violations are promising. However, the program has so far only been tried in two cities and systematic scholarly studies have only recently begun.\textsuperscript{157} Workers are explicitly contemplated in the DHS memos providing for discretion. Ostensibly, by making clear that employees deserve discretion indicates a vital recognition of worker rights, whatever the motivation. However, immigrant advocates point out that the fast-paced review of the immigrants’ files (called A-files) does not contemplate the worker criteria laid out in the ICE memo calling for discretion. An immigration attorney explained: “If I’m an ICE attorney, the file will not include evidence of workplace abuse or improper motives for reporting (such as retaliation), so these vulnerabilities cannot be considered.”\textsuperscript{158} Advocates also worry that without a “full-throated media campaign” clarifying that prosecutorial discretion is “not a call [for immigrants] to turn yourself over,” misunderstandings about prosecutorial discretion could lead to immigrants endangering themselves, as opposed to recognizing that there is relief available once they are already in the process.\textsuperscript{159}  

\textit{Normative Implications and Theory Building}

My article has normative implications even though its core is empirical. For scholars of bureaucracy, this article attempts to elaborate on theories of bureaucratic incorporation and to present case studies demonstrating the ways that agencies use guidance to improve the lives of immigrant workers. As many administrative law scholars have noted, for better or worse, agencies are not engaged in a straightforward execution of statutory duties; within the framework of the Administrative Procedure Act, they exercise discretion in the issuance of guidance.\textsuperscript{160} In unsettled legal terrain – a characteristic of much immigration law – these interpretations can be consequential beyond the individual worker because administrative practices feed the development of law and policy. Regulatory resistance cannot overturn courts or craft new law. It is legally constrained by statutory delegations of authority and requires openings in the substance and structure of immigrant worker regulation. But to the extent that openings remain in the post-\textit{Hoffman} legal environment, agencies can intercede on behalf of immigrant workers in ways that mitigate damaging

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  \item[157] A review of virtually all deportation cases before the immigration courts in two places selected for a pilot study, Baltimore and Denver, led to relief for 1 in 6 or 16% of cases. Julia Preston, \textit{In Deportation Policy Test, 1 in 6 Offered Reprieve}, NY Times (January 19, 2012). Reports from the Transactional Records Access Clearinghouse (TRAC) show that new filings seeking deportation orders for non-criminal aliens are also down. TRAC Report: New Data Tracking ICE Prosecutorial Discretion (February 13, 2012), \textit{available at http://trac.syr.edu}. In comparison, TRAC data on the prosecution of criminal aliens and fugitives do not yet show a comparable increase.
  \item[158] Phone interview with immigrants’ rights advocate (1/23/2012).  
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legal precedent and blunt anti-immigrant political sentiment. Moreover, these regulatory interpretations carry the imprimatur of the state and represent a persuasive source of legal authority, even if not a legally binding or controlling as sub-regulatory guidance.\textsuperscript{161} The contribution of this research is to suggest that long-held beliefs about bureaucratic rationality and administrative discretion need to be modified. Politics is not an insurmountable threat to professional ethos, even though interest group theory and public choice theory would predict that pendulum swings in power will ensure the capture of regulatory agencies by powerful entities such as employers.

Among immigration scholars, the research suggests a new style of inquiry into immigrants’ rights, even and especially in the absence of comprehensive legislative reform or a strongly pro-immigrant president.\textsuperscript{162} Scholars’ critiques of administrative effectiveness might take into account the motivations of bureaucrats when formulating their prescriptions and take seriously Miles’ law\textsuperscript{163} by turning their attention toward the factors that social scientists have shown elicit regulatory responsiveness. This empirical research shows that important interventions occur for reasons independent of politics such as professional ethos and fidelity to the rule of law. Immigration scholarship should focus on factors that facilitate or undermine agencies’ work missions instead of presuming that the key battleground is making the case to agencies that protecting immigrants as a worthy end in itself. Pessimistic assumptions that all is lost miss evidence of more promising policies and practices that lay beneath the surface of regulatory agencies. As compared with these normative assumptions, the empirical evidence shows that politics matters, but it does not control policy outcomes. Also, the study has implications for advocates: rather than pushing forcefully for pro-immigrant political appointees, advocates might consider lobbying deeper within the bureaucracy. And rather than waiting for a policy overhaul, they might direct their efforts toward vigorous enforcement and meaningful implementation that translates the law on the books translates into “rights practices”\textsuperscript{164} on the ground.

Clashes between courts and agencies about the meaning of immigration law can be very productive for advancing – or at least curtailing the retreat – of immigrants’ rights when the law leaves space for agency discretion. My findings on bureaucratic incorporation challenge immigration scholars’ normative assumption that meaningful immigration reform can only happen when a constellation of political stars align or when laws bars agency discretion to depart from strongly pro-immigrant outcomes.\textsuperscript{165} As political scientist Robert Lieberman has described in the context of expanding worker rights under civil rights laws, when it occurs, “change arises out of friction among mismatched institutions

\footnotesize{\textsuperscript{161}A similar phenomena is described in the civil rights context in Sophia Z. Lee, Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 96 VA. L. REV. 799 (2010). Sophia Lee coins the term “administrative constitutionalism” to describe administrators’ creative extension, narrowing, resistance and avoidance of court doctrine in the absence of clear judicially defined rules or in the presence of ones that diverge from the agency’s autonomous aims.\textsuperscript{162} See earlier references in text accompanying notes 3 and 4.\textsuperscript{163} Text accompanying supra note 32.\textsuperscript{164} This phrase is taken from Jeb Barnes and Tom Burke, The Diffusion of Rights: From Law on the Books to Organizational Rights Practices, 40 LAW & SOCY REV. 493, 494 (2006).\textsuperscript{165} Take, for example, Stephen Lee’s recent article Monitoring Immigration in the Arizona Law Review, supra note 5. Drawing inferences from a fifty-year old study by Kitty Calavita on the INS’ implementation of the Bracero program, Lee concludes that DHS’ culture is antagonistic to immigrants’ rights and that the Department of Labor is unable to overcome the anti-immigrant bias. Lee, supra: Kitty Calavita, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS (1992).}
and ideas.”¹⁶⁶ There is, at least, the prospect of favorable discretion being exercise on behalf of immigrant workers when dealing with law enforcement agencies populated by civil servants anchored by a fidelity to the rule of law and professionalism. Even or especially in challenging political times, the process of working out clashes between law, politics, and professionalism can support the development of immigrants’ rights.

## Appendix

Table 1. Federal Agencies Regulating Immigrant Workers

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