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Where You Stand Depends on Where You Sit: Immigrant Incorporation in Federal Workplace Agencies

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Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers

Ming H. Chen†

This Article integrates social science theory about immigrant incorporation and administrative agencies with empirical data about immigrant-serving federal workplace agencies to illuminate the role of bureaucracies in the construction of rights. More specifically, it contends that immigrants' rights can be protected when workplace agencies incorporate immigrants into labor law enforcement in accordance with the agencies' professional ethos and organizational mandates. Building on Miles' Law that "where you stand depends on where you sit," this Article argues that agencies exercise discretion in the face of contested law and in contravention to a political climate hostile to undocumented immigrants for the purpose of protecting workers. Consequently, strongly pro-immigrant policies in the political branches are not necessary for the recovery of immigrants' rights. Instead, entrenched institutional commitments to professional ethics and recognition of organizational mandates constrain

† Associate Professor, University of Colorado Law School. My greatest appreciation extends to the attorneys and advocates who shared insights and experiences that provided the impetus for this article. My colleagues at the University of Colorado Law School and the Rocky Mountain Junior Scholars Forum 2011, Law and Society Association Annual Meeting 2011-2012, the Immigration Law Professors Workshop 2012, the Western Political Science Association 2012, and the American Sociological Association 2012 provided valuable perspectives. Thanks especially to Leisy Abrego, Stephen Chen, Els de Graauw, Jennifer Gordon, Shannon Gleeson, Ruben Garcia, Kate Griffith, Clare Huntington, Leila Kawar, Sophia Lee, Stephen Lee, Steve Legomsky, Hiroshi Motomura, Helen Norton, Ahmed White, and Phil Wolgin. Ashley Boothby, Mohit Sandhu, Jane Thompson and Matt Zafiratos provided helpful library and research assistance.

politics resulting in a hybrid form of bureaucratic politics. 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.

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INTRODUCTION

Notwithstanding President Obama’s re-election in 2012, immigration scholars in the legal academy have been exceedingly pessimistic about the

federal government's commitment to undocumented¹ workers' rights over the last decade. A majority of the criticisms focus on the need for comprehensive immigration reform in Congress.² A considerable number of these critiques focus on *Hoffman* as case law limiting the protective remedies of undocumented workers against employers who exploit the most vulnerable among their labor force.³ The minority of legal scholars who seriously consider agency actions contend that such actions are insufficient and inadequate, even if well-intended.⁴ Immigration scholars have

1. Throughout the article, I use "noncitizen" and "immigrant" interchangeably. I favor these terms over "alien," which still appears in legal language and some legal scholarship. Where the text refers expressly to undocumented workers as opposed to immigrants with work authorization, I specify "undocumented."

2. A sample of articles calling for comprehensive immigration reform includes: Kevin Johnson, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Hiroshi Motomura, *What is Comprehensive Immigration Reform: Taking the Long View*, 63 ARK. L. REV. 225 (2010); Michael A. Olivas, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: The Political Economy of the DREAM Act and Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2010).

3. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002); see, e.g., Elizabeth R. Baldwin, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers after Hoffman Plastic Compounds, Inc. v. NLRB*, 27 SEATTLE U. L. REV. 233 (2003); Jennifer Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What to Do About It*, 13 KAN. J.L. & PUB. POL'Y 585 (2004); Dennise A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119 (2003); Catherine L. Fisk & Michael J. Wishnie, *Hoffman Plastic Compounds, Inc v. NLRB: The Rules of the Workplace for Undocumented Immigrants*, in IMMIGRATION STORIES 311 (David A. Martin & Peter H. Schuck eds., 2005); Shahid Haque, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357 (2004); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 2-4 (2003); Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313 (2003).

4. See, e.g., Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 553 (2010). Citing multiple reports demonstrating high rates of industry noncompliance with wage and hour laws, Gordon and Fine proclaim that "labor standards enforcement is not working." *Id.* at 553. They attribute noncompliance not only to a lack of resources, but also to an inherent mismatch between modern workplaces and agencies' logic of detecting violators. See also Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1092 (2011) (arguing that the Department of Labor has "struggled" to protect unauthorized workers due to information asymmetries with ICE); Kati L. Griffith, *ICE Was Not Meant to Be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137 (2011) (characterizing worker protection as central to the federal regulation of immigrant workers and calling on the EEOC and ICE to adhere to Congressional intent); Jayesh M. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1158-62 (2011) (enumerating the complexity of the regulatory environment and the inevitable politicization of regulatory bodies as obstacles to cooperation between the DOL and the ICE); Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390-91 (2003-2004) [hereinafter Wishnie, *The Border*] (presenting evidence of "deep

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.⁵ The criticisms extend across Republican and Democratic administrations.⁶ While based on understandable disappointment with President Obama's first term policies on immigration, 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 the face of restrictive legal precedent on the rights of immigrant workers.⁷ 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.⁸

This Article integrates legal scholarship on immigrant workers with social science theory about bureaucratic discretion and the role of bureaucracies in the construction of rights. More specifically, it integrates two competing theories of agency behavior to propose a theory of bureaucratic incorporation largely consistent with Miles' law that "where you stand" on a policy matter often depends on "where you sit" within an organization.⁹ The article uncovers empirical evidence of regulatory responses to *Hoffman Plastic v. NLRB*,¹⁰ which limited the remedies available to undocumented workers facing workplace abuses, to illustrate this theory. A comparison of three case studies—the National Labor Relations Board (NLRB), U.S. Department of Labor (DOL), and the U.S. Equal Employment Opportunity Commission (EEOC)—uncovers a pattern of regulatory resistance to hostile immigrants' rights laws. Characterizing these agency responses as reconfiguring, buffering, and mitigating respectively, the Article contends that federal workplace agencies use discretion to issue guidance that counters the contraction of immigrants' rights in courts. Counterintuitively for immigration scholars, the Article

entanglement" of worksite and immigration enforcement activities in 102 of 184 INS raids in New York City from 1997-1999).

5. See Wishnie, *The Border*, *supra* note 4.

6. See, e.g., N.C. Aizenman, *Latinos Increasingly Critical of Obama's Record on Immigration*, WASH. POST, Mar. 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031904676.htm>; Jonathan Xavier Inda, *Borderzones of Enforcement: Criminalization, Workplace Raids, and Migrant Counterconducts*, in *THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY* 74-75 (Vicki Squire ed., 2011); Jennifer Ludden, *Immigration Experts Predict Fewer Workplace Raids*, NATIONAL PUBLIC RADIO, Dec. 2, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=97700373> (last visited 10/1/2012).

7. See *infra* text accompanying notes 67-75.

8. For an elaboration of these concepts, see the social science literature on bureaucratic incorporation in Part II.

9. See *infra* note 65 for the origins of Miles' law.

10. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

attributes these acts of regulatory resistance to a professional ethos of protecting workers and to a commitment to enforcing labor laws independent of the policy preferences of the civil servants and political leadership. While this finding may not surprise bureaucracy scholars—some of whom have studied regulatory guidance other settings—it contributes a more nuanced portrayal of institutional dynamics in a novel setting: the regulation of undocumented workers where law and politics collide.¹¹

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. The Article's case studies show that the political leadership within an agency 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 exercise of discretion within agencies is constrained by considerations such as professional ethos, agency culture, and the perceived mandate of the agency to enforce labor and employment laws.¹² Moreover, the Article does not claim that regulatory resistance is superior to other forms of immigrant worker advocacy or legislative and litigation intervention, which can also curtail rights retractions; nor does it challenge legal scholars' perceptions that the agencies could do more. The Article's chief contribution is to empirically illustrate institutional dynamics that reinforce bureaucratic protections for immigrant workers when the agencies are confronted by a countervailing legal and political environment, and to probe the motivations of agency officials for intervening on behalf of those immigrant workers.

Part I introduces the legal and political environment of regulating immigrant workers and documents instances of regulatory resistance to *Hoffman*. Part II reviews emerging social science literature on bureaucratic incorporation and assesses its relevance to the regulation of immigrant workers. Part III applies the concept of bureaucratic politics to case studies of labor and employment law enforcement¹³ in the NLRB, the DOL, and the

11. With the exception of Jill Family, few scholars have placed criticism of immigration agencies in the context of classic debates in administrative law. Family presupposes that although immigration law is idiosyncratic in many ways, "on the subject of administrative guidance, immigration law is in the mainstream," particularly when it comes to troubles with guidance documents. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64. ADMIN. L. REV. 565, 616 (2012). She concludes that the proper use of guidance in immigration agencies entails trade-offs: they provide "flexible tools" and "a window into the agency's outlook and attitude" in a complex and rapidly-changing area of law administered by a diffuse group, even if they curtail the certainty of notice and comment rulemaking. *Id.* at 589.

12. These terms are defined more fully in the literature review within Part II.

13. Throughout this article, I refer to the EEOC, NLRB, and DOL interchangeably as law enforcement agencies and federal regulatory agencies. While "regulatory agency" may be more

EEOC. Part IV extends the findings by explicating similarities and differences in the federal workplace agencies' responses to *Hoffman* and theorizing application to other studies. The Conclusion explores the implications of bureaucratic incorporation theory and the empirical evidence for legal scholarship on undocumented immigrant workers' rights.

I.

REGULATION OF UNDOCUMENTED 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 workplace 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 Supreme Court's landmark *Hoffman Plastic v. NLRB* decision in 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 immigrant workers suspected of lacking status and to dim the prospects for immigrant workers to challenge those abuses. The Department of Homeland Security's (DHS) aggressive use of workplace raids as a strategy for immigration control—first under President Bush and continuing under President Obama, albeit to a lesser extent—has exacerbated the situation, making credible employer threats to expose the status of their immigrant workers lacking documentation in retaliation for those workers' complaints.¹⁴ Tasked with enforcing employment laws in a climate

commonly used in the bureaucratic incorporation literature, the agencies refer to themselves as "law enforcement" to underscore their function of eliciting legal compliance from regulated entities. Nevertheless, the three workplace agencies under study should not be confused with *local* law enforcement (police) or the Department of Homeland Security (DHS)—agencies that may also come to mind.

14. See Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 29, 2011, at A1 (noting that "Under President George W. Bush, immigration agents frequently conducted high-profile factory raids, leading away scores of unauthorized workers in handcuffs, often to face jail time for document fraud or identity theft before being deported," while "Obama administration officials are sharpening their crackdown on the hiring of illegal immigrants by focusing increasingly tough criminal charges on employers while moving away from criminal arrests of the workers themselves. . . . While conducting fewer headline-making factory raids, the immigration authorities [under Obama] have greatly expanded the number of businesses facing scrutiny and the cases where employers face severe sanctions."); Julia Preston, *Illegal Workers Swept From Jobs in "Silent Raids"*, N.Y. TIMES, July 9, 2010, at A1 ("Over the past year, Immigration and Customs Enforcement has conducted audits of employee files at more than 2,900 companies. The agency has levied a record \$3 million in civil fines so far this year on businesses that hired unauthorized immigrants, according to official figures. Thousands of those workers have been fired, immigrant groups estimate. Employers say the audits reach more companies than the work-site roundups of the administration of President George W. Bush."); Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, THE WASHINGTON

entangling immigration control with employment, workplace agencies have been caught in the crossfire: their statutory mandate to protect workers remains intact, while the political and legal context blunts their tools to implement 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 with contracting immigrants' rights.

This Part provides an overview of the political and legal context of federal workplace agencies. It focuses on the federal agencies that comprise the regulatory environment of immigrant workers and on legal developments limiting the rights of undocumented workers. It begins by briefly describing 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. Finally, it details three case studies in which those agencies have used memoranda, policy statements, and other forms of guidance that fall short of regulations to resist legal developments elsewhere in the federal government.¹⁵

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 agency regulates a different federal statute, each of which is 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

POST, July 26, 2010 ("The Obama administration has been moving away from using work-site raids to target employers. Just 765 undocumented workers have been arrested at their jobs this fiscal year, compared with 5,100 in 2008, according to Department of Homeland Security figures. Instead, officers have increased employer audits, studying the employee documentation of 2,875 companies suspected of hiring illegal workers and assessing \$6.4 million in fines.")

15. The Administrative Procedure Act (APA) 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 requires no actual hearing, in contrast, 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 Memoranda of Understanding, Dear Colleague or advisory letters, operating instructions, and compliance manuals; while influential, these guidance documents are not legally binding. Most of the issuances in this Article refer to policy statements and guidance. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311, 1319-27 (1992) (offering a taxonomical guide to the various forms of sub-regulatory guidance and their legal effect).

programs,¹⁶ the National Labor Relations Act,¹⁷ the Fair Labor Standards Act,¹⁸ and Title VII of the Civil Rights Act of 1964¹⁹ — guiding statutes for the NLRB, DOL, and EEOC respectively—do not explicitly 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. These stances are elaborated below.

The NLRB is an independent agency charged with investigating and remedying unfair labor practices. It administers the National Labor Relations Act (NLRA).²⁰ 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 harm the general welfare of workers, businesses, and the U.S. economy.²¹ The statute itself includes no express provisions for immigrants. Case law reveals that immigrants are within its statutory purview and have long been recognized as subjects of regulation.²² *Hoffman*, which will be discussed in Part I.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 NLRB's 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.

16. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1811-1816 (2012); Immigration and Nationality Act, 8 U.S.C.A. § 1153 (West 2012).

17. 29 U.S.C. §§ 151-169 (2006).

18. 29 U.S.C. § 201 (2006).

19. 42 U.S.C. § 2000e (2006).

20. *Id.*

21. James Gross authored a series of books and articles detailing the history of the NLRB. See JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (2003); James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. REV. 7 (1985); JAMES A. GROSS, *THE MAKING OF THE NLRB: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* (1974). Beginning in 2008, the Board sunk into a state of near-paralysis 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 once 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, Jan. 12, 2012, at A12.

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

The DOL complements the NLRB's work by administering laws concerning workplace conditions, wages, and other employment standards. Amid the patchwork of laws the DOL administers, the Fair Labor Standards Act (FLSA)²³ of 1938 prescribes standards for wages and overtime pay, which affect most private and public employment. The DOL Wage and Hour Division administers the FLSA. The Wage and Hour Division 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. It also enforces the labor standards provisions of the Immigration and Naturalization Act that apply to aliens authorized to work in the United States under certain nonimmigrant visa programs (H-1B, H-1B1, H-1C, H2A, H2B). The Wage and Hour Division also administers the Migrant and Seasonal Agricultural Worker Protection Act (MPSA), which regulates the hiring and employment activities of agricultural employers, farm labor contractors, and associations using migrant and seasonal agricultural workers. The MPSA 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 provides legal advice on interpretations of immigrants' rights under the statutes the Department enforces since they frequently present issues of first impression.

The EEOC was established for a different purpose than the NLRB and the DOL: Title VII of the Civil Rights Act of 1964 created it and charged it with eradicating employment discrimination.²⁴ Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, or national origin.²⁵ Title VII also prohibits employer retaliation against a worker for the reason that the worker complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.²⁶ While citizenship status is not coterminous with national origin discrimination, the prohibition of discrimination on the basis of national origin sometimes provides a statutory basis for interventions on behalf of immigrants.²⁷ National origin

23. 29 U.S.C. § 201.

24. 42 U.S.C. §2000e-4.

25. 42 U.S.C. §2000e-2.

26. *Id.*

27. See Enforcement Guidance: National Origin Discrimination, 13 EEOC Compl. Man 13-II (Dec. 2, 2002) [hereinafter EEOC National Origin Discrimination Guidance], available at <http://www.eeoc.gov/policy/docs/national-origin.html#II>. See generally Ming H. Chen, *Regulatory Rights: Civil Rights Agencies Translating "National Origin Discrimination" into Language Rights, 1965-1979* (Spring 2011) (unpublished Ph.D. dissertation, U.C. Berkeley examining the application of

discrimination involves treating people 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.²⁸ Although the EEOC does not directly enforce the Immigration Reform and Control Act (IRCA),²⁹ the EEOC works closely with the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Labor Practices to ensure fair implementation of its provisions forbidding discrimination against lawful immigrants.³⁰ These special provisions were enacted to ensure that sanctions placed on employers for hiring undocumented workers would not lead to racial profiling or otherwise discourage the hiring of workers perceived to be immigrants for jobs that need not require U.S. citizenship. IRCA further specifies that employers may not refuse to accept lawful documentation that establishes an employee's employment eligibility, or demand additional documentation beyond the I-9 form 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 its Office of General Counsel handles litigation and other regional casework requiring coordination, and the Office of Legal Counsel consults with the bipartisan, politically appointed Commissioners on developing unified policy.

Although the Department of Homeland Security does not fall within this Article's express focus, 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 targeting workplaces to uncover unlawful hiring of noncitizen workers in violation of the Immigration and Naturalization Act and the Immigration Reform and Control Act.³¹ Acting on 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.³² These laws have teeth: IRCA's

national origin protections to immigrants under Title VII and other civil rights statutes), *available at* http://digitalassets.lib.berkeley.edu/etd/ucb/text/Chen_berkeley_0028E_11462.pdf.

28. EEOC National Origin Discrimination Guidance, *supra* note 27.

29. Immigration and Nationality Act, 8 U.S.C. § 1324 (2006).

30. The DOJ 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. 8 U.S.C. § 1324b.

31. Other branches of the Department of Homeland Security include U.S. Citizenship and Immigration Services and Customs and Border Patrol.

32. Through IRCA, Congress endeavored to simultaneously deter unlawful migration and to protect U.S. workers from depressed wages and conditions generated by the fulfillment of jobs by

employer sanctions state that neglecting to verify status leads to civil penalties and that knowingly hiring undocumented workers can trigger criminal penalties.³³ IRCA also have serious consequences for undocumented workers who can be deported if their lack of status is discovered. The tactic of worksite “raids” for immigration control led to a deportation boom during the Bush Administration, but receives decreasing emphasis in the Obama Administration’s immigration enforcement strategy.³⁴

B. *Hoffman Plastic and Regulatory Resistance in Workplace Agencies*

While all three workplace agencies administer distinct federal statutes, they have all been either directly or indirectly impacted by IRCA and related case law limiting undocumented workers’ rights. Key among these decisions is *Hoffman Plastic Compounds, Inc. v. NLRB*.³⁵ In *Hoffman*, the Supreme Court ruled that undocumented workers are not eligible for backpay under the NLRA because granting backpay would conflict with IRCA’s mandate to prevent the hiring of undocumented workers.³⁶ The case arose from charges that Hoffman Plastic Compounds, a California firm that produces plastic materials used to make pharmaceutical, construction, and household products, unlawfully fired nine workers after learning of their organizing activities in 1989.³⁷ In response to an AFL-CIO sponsored

immigrant workers willing to work for less. Preventing employers from hiring those workers would diminish job opportunities, which in turn would eliminate incentives for economically-motivated migration from places with even more depressed wages and work conditions.

33. 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 (codified at § 1324a(1)). If an employer violates IRCA, he will be “fined not more than \$3,000 for each unauthorized alien” or be imprisoned for up to six months. *Id.* at (f)(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 [(a)](1)(A) with respect to such hiring, recruiting, or referral.” *Id.* at (a)(3).

34. The Obama administration has shifted away from worksites as interior enforcement strategies and toward criminal and security-related enforcement strategies. Department of Homeland Security, *Frequently Asked Questions on the Administration’s Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases*, <http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf> (last visited Nov. 14, 2012). These shifted priorities are borne out by data on enforcement outcomes. For example, since President Obama took office, the overall number of worksite raids has diminished, and in fiscal year 2009 alone they dropped by 70%. Crackdowns on employers have doubled in the same period. See Aizenman, *supra* note 6.

35. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Much of the background information concerning the *Hoffman* proceedings can be found in Fisk & Wishnie, *supra* note 3.

36. 535 U.S. at 151.

37. Fisk & Wishnie, *supra* note 3, at 317.

organizing drive, the supervisors interrogated the employees about their union activity and dismissed all involved with the union, including Jose Castro and Casimiro Arauz.³⁸ Mr. Arauz filed an unfair labor practice charge with the NLRB.³⁹ In 1990, the administrative law judge for the NLRB held a hearing on the charge and found, *inter alia*, that Hoffman had violated the NLRA by basing its layoff decisions on its workers' union activity.⁴⁰ "Both the General Counsel and [Hoffman] appealed to the full NLRB, which. . . largely upheld the" administrative law judge's "findings and conclusions."⁴¹ Most of the workers settled their claims with Hoffman.⁴² The sole exception was Mr. Castro, whose immigration status became an issue during a subsequent hearing on the remedies owed to him; the Board typically orders reinstatement and backpay from the date of discharge to the date of reinstatement (minus mitigating income obtained through interim employment, as required by the NLRA), but the legal question was how to account for an undocumented immigrant's ineligibility to work.⁴³

The law governing Mr. Castro's eligibility for remedies was complex, inviting contest at each stage of litigation and potentially placing immigration and labor laws governing immigrant workers in conflict. Over a decade prior, the Court had announced that the NLRA statutorily protected undocumented workers, but it left unclear whether backpay remedies were available to those workers.⁴⁴ The case law of the NLRB and the Ninth Circuit at the time that charges were filed against Hoffman held undocumented workers eligible for backpay if they were physically present in the United States (as opposed to deported).⁴⁵ Contrasting Seventh Circuit precedent would have held Castro ineligible for backpay under those same

38. *Id.*

39. *Id.* at 318.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 318-20.

44. In *Sure Tan, Inc. v NLRB*, 467 U.S. 883 (1984), an employer whose employees voted for a union contacted the INS. The INS questioned all Spanish-speaking employees, then arrested and deported five of them. The Board found that the employer's actions prompting an INS raid amounted to unlawful constructive discharge and ordered reinstatement with backpay. They left for the compliance hearing the question of whether the deported workers were "available for work" as required to be eligible for backpay. The reviewing circuit court of appeals calculated six month's backpay, based on the assumption that the workers would likely have been employed for that length of time absent the employer's unlawful labor practices. The Supreme Court upheld the ruling that the workers were covered, but it struck the mandatory minimum backpay award as too speculative (IRCA had not yet been enacted and it was not unlawful for an undocumented immigrant to be hired or to work in the United States).

45. *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro)*, 795 F.2d 705 (9th Cir. 1986) (holding that a wrongfully discharged undocumented worker who remains in country is eligible for backpay), *abrogated by Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

circumstances.⁴⁶ The administrative law judge followed Seventh Circuit precedent, even though Hoffman was located in California.⁴⁷ During a five-year lag while awaiting review from the full NLRB (which changed in composition and issued new Board precedent in the intervening time⁴⁸), the Board awarded partial backpay; Hoffman persisted with an appeal to the D.C. Circuit, which it eventually lost.⁴⁹ On review, the Supreme Court concluded that the Board lacked the discretion to award undocumented workers backpay for wages they were ineligible to earn for work not yet performed in 2002.⁵⁰ In a controversial 5-4 decision, the majority reasoned that providing backpay would conflict with U.S. immigration policies requiring: (1) employees to present documents establishing their identity and authorization to work when hired, and (2) employers to check those documents and to refrain from knowingly hiring someone not authorized to work.⁵¹ The dissenting justices expressed concern over the soundness of the legal reasoning, especially the undesirable policy implication that employers could avoid liability for labor violations if the charges were brought by undocumented immigrant workers.⁵²

Given the decision's importance for immigrant workers and inescapable questions about regulatory interpretation and implementation, *Hoffman* triggered a rapid response from all three federal workplace agencies.⁵³ Within months of *Hoffman*, the NLRB, the DOL, and the EEOC promulgated policy statements, internal memoranda, and a variety of regulatory guidance on the interpretation and implementation of case law.⁵⁴

46. *Del Ray Tortilleria Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (holding that undocumented workers who remain in the country ineligible for backpay).

47. *Fisk & Wishnie*, *supra* note 3, at 320.

48. During this time lag, the Board issued a decision *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995), which attempted to harmonize NLRA remedial authority with IRCA's prohibition on employing unauthorized immigrants. The decision favored awarding NLRA remedies to reinforce the major purpose of IRCA: deterring the employment of undocumented workers.

49. Writing for the D.C. Circuit, Judge Tatel repeated the NLRB's conclusion that Congress' intent was best served with expanded enforcement of labor standards. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 240 (D.C. Cir. 2000). He distinguished as non-binding dicta a sentence in *Sure Tan* that might have deemed employees unavailable for work during any period when they were not lawfully entitled to be present and employed in the United States. *See id.* at 254, *enforcement granted by Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 642 (D.C. Cir. 2001).

50. *Hoffman Plastic*, 535 U.S. at 137.

51. *Id.* at 147-51.

52. *Id.* at 153-54 (Breyer, J., dissenting) (internal citations omitted) (“[Backpay] discourag[es] employers from violating the Nation’s labor laws. Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.”).

53. *Fisk & Wishnie*, *supra* note 3, at 332-33 (listing cases that followed in the aftermath of *Hoffman* and describing policy-level attempts to limit the reach of the holding).

54. Under the Administrative Procedure Act, both formal and informal rulemaking carry the force of law. Formal rulemaking requires agency adjudication with an actual hearing emulating a judicial

While none of these promulgations took the form of notice and comment rules and not all carried the independent force of law,⁵⁵ these documents memorialized the agencies' interpretation of existing law and indicated how they planned to exercise their discretion. The defining characteristic of each guidance document was an agency interpretation that blunted the Supreme Court's opinion. While the specific exercise of discretion varied across agencies, each agency read *Hoffman* narrowly, reaffirmed that immigration status is not relevant to the labor and employment rights they protect, and emphasized that the agency practice is not to inquire into immigration status in the course of investigations.⁵⁶ If the agencies find a workplace violation and simultaneously reveal a lack of status by an employee, they award monetary damages to the extent permitted by law. Over time, they have also expanded mechanisms for redressing workplace abuse, such as seeking protective orders regarding discovery of immigration status, deferred action on deportation orders, and certifying U-visas for DHS consideration. These mechanisms facilitate workers' vital participation in labor enforcement actions and, in the case of the U-visa, provide work authorization that restores the workers' ability to collect the wages to which they are entitled once granted by the DHS.⁵⁷ For example, an individual who qualifies for a U-visa can remain in the United States for up to four years, will receive authorization to work, and may be eligible to

trial; informal rulemaking requires publication of a proposed rule in the Federal Register and the solicitation of public opinion through a notice and comment period sometimes called a paper hearing before finalizing the rule. Statements of policy and sub-regulatory guidance do not require these procedures; they are meant to be advisory, but they do not carry the force of law in the sense of settling future legal challenges. See 5 U.S.C. § 553(b) (2006); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322-23 (2001).

55. Distinguishing between binding rules and these forms of guidance is notoriously difficult and sometimes tautological. The D.C. Circuit laid out two criteria that provide an operational definition for this article: (1) the policy statement operates prospectively; and (2) the policy statement "genuinely leaves the agency and its decision-makers free to exercise discretion." *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citing *Am. Bus. Ass'n v. U.S.*, 627 F.2d 525, 529 (D.C. Cir. 1980)).

56. See e.g. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC DIRECTIVES TRANSMITTAL NO. 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002) [hereinafter EEOC Rescission], available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (June 27, 2002); U.S. Dep't of Labor, *Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by the Wage and Hour Division* (2002) [hereinafter DOL Fact Sheet], available at www.dol.gov/whd/regs/compliance/whdfs48.htm (last updated July 2008).

57. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299) ("[Created] 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"); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533.

subsequently adjust her status.⁵⁸ For an immigrant to qualify for U-visa classification, the Secretary of the Department of Homeland Security must determine the eligibility of immigrants for U-visa protection on the basis of a statutorily provided showing.⁵⁹ 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.⁶⁰

While it is difficult to generalize from an array of uncoordinated agency actions, their respective responses counter the judicial harms visited upon immigrant workers in a challenging legal environment. As many of the workplace agencies argued during the litigation and maintained during statutory implementation,⁶¹ avoiding backpay harms immigrant and nonimmigrant workers alike by insulating employers from the consequences of workplace abuses waged against undocumented workers. This creates perverse incentives for employers and a double harm for the immigrant and nonimmigrant workers who become more burdensome to hire by comparison.⁶² In addition, limitations on worker remedies undermine workplace agencies' enforcement efforts because they discourage immigrant workers from coming forward to report labor violations and they send a signal that the agencies devalue immigrant workers' rights.⁶³

58. For more background on U-visas, see Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 284-87 (2009); Leslye E. Orloff, Kathryn C. Isom & Edmundo Saballos, *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and its "Any Credible Evidence" Rules – A Call for Consistency*, 11 GEO. J. GENDER & L. 619 (2010); Nat'l Emp. Law Project, *The U Visa: A Potential Remedy for Immigrant Workers Facing Labor Abuse* (November 2011). As of November 2011, all three agencies had released certification protocols for U visas. Copies of the agency protocols are available at www.just-pay.org.

59. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(15)(U)(i), 114 Stat. 1464, 1534; 8 U.S.C. § 1101(a)(15)(U)(i) (2011) (being reviewed under the 2012 VAWA Reauthorization as of Aug. 1, 2012).

60. While the statute does not specify the certification agencies, subsequent DHS regulations include the EEOC, DOL, and the NLRB. See *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299); 8 C.F.R. § 214.14(a)(2) (2012).

61. See *Brief for Respondent, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), 2001 WL 1597748; *Brief for Respondent in Opposition, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), 2001 WL 34090274 (arguing that the NLRB's limited backpay award is a proper exercise of its discretion, that *Sure-Tan* does not preclude limited backpay under the circumstances, and that limited backpay accommodates the goals of the NLRA and IRCA).

62. See, e.g., DONALD M. KERWIN & KRISTEN MCCABE, *Labor Standards Enforcement and Low-Wage Immigrants*, MIGRATION POLICY INSTITUTE LABOR MARKETS INITIATIVE (2011).

63. The sentiment resonates with longstanding case law in the NLRB. See, e.g., *S. S.S. Co. v. NLRB*, 316 U.S. 31, 46-47 (1942) ("Section 10(c) of the [NLRA] permits the Board to require an

Beyond the practical results, *Hoffman* indicates a broader phenomenon: agencies exercising discretion for the purpose of protecting workers in the face of contested law and in contravention to a political climate hostile to undocumented immigrants.⁶⁴ It is in this sense that this Article characterizes the collective agency responses as forms of regulatory resistance. The question is why and under what circumstances do agencies take these pro-immigrant stances? Part II describes the social science theory of bureaucratic incorporation and political control as competing explanations for agency actions. While not mutually exclusive, the Article argues that bureaucratic incorporation constrains political influence on policies towards undocumented workers. To again paraphrase Miles' Law, the argument is that "where you stand" on policies toward undocumented workers depends on "where you sit" in the government bureaucracy.⁶⁵ This theory is then applied to multiple case studies of post-*Hoffman* regulatory intervention in Part III and IV.

II.

THEORIES OF BUREAUCRATIC POLITICS

This Part integrates social science research on immigrant incorporation with theory on political control and bureaucratic discretion as a foundation for understanding the regulation of immigrant workers' rights. It starts with the premise that bureaucratic protection of undocumented workers flows from inherent ambiguities in law, particularly when agencies contemplate policy implementation in complex regulatory arenas consisting of "shared

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 Labor Relations Act 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.").

64. Scholars disagree about the harmfulness of *Hoffman*. For articles decrying the decision, see, e.g., RUBEN GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006). But cf. the perspective of labor law scholar Ellen Dannin, *Symposium: The Evolving Definition of The Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law: Hoffman Plastics As Labor Law - Equality At Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393 (2009) (arguing that understanding whether *Hoffman* is good or bad is less important than is understanding bureaucratic perceptions of the decision; guidance documents and first-person interviews provide insight into these perceptions and illustrate the values that guide discretion when the law is unstable).

65. Rufus E. Miles, Jr., *Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399 (1978). This phrase is commonly attributed to an article by Graham Alison. See Graham T. Alison, *Conceptual Models and the Cuban Missile Crisis*, 69 AM. POL. SCI. REV. 689 (1969) (Alison credits Paul Hammond, but Miles claims original authorship).

regulatory space” across agencies or contemplate multiple goals set by Congress and the President for a single agency. Two competing explanations for workplace agencies’ favorable exercise of discretion are critically examined: the political control and the professional ethos theses emphasized by bureaucratic incorporation theorists. An integrated model of agency behavior akin to Graham Alison’s “bureaucratic politics” and encapsulated by the Miles’ Law cited in the title of this Article is favored.⁶⁶ This model of agency behavior acknowledges that political leadership creates openings for change, but that the professional ethos of civil servants constrains partisan preferences. This Part generates hypotheses that set forth the unifying themes that Part III applies in three case studies.

A. Incorporation of Immigrants and Bureaucratic Discretion

“Immigrant incorporation” refers to the inclusion of noncitizens into society and can occur along economic, social, political, and cultural dimensions.⁶⁷ 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.⁶⁸ The social science literature on immigrant incorporation focuses on institutions as a key component of the immigrant-receiving society, namely the United States, and attempts to unpack the processes by which immigrants are absorbed into that society.⁶⁹ While scholars studying immigrant incorporation traditionally focused on non-state institutions such as civic organizations,⁷⁰

66. See Miles, *supra* note 65; Alison, *supra* note 65.

67. 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 & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 INT’L MIGRATION REV. 606 (1989); Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANNUAL REV. SOC. 105 (2005).

68. Rogers Brubaker, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 21, 23 (1992) (defining the modern state as a “not simply a territorial organization but a membership organization, as association of citizens;” “[c]itizenship is thus both an instrument and an object of closure”). Linda Bosniak draws on membership theory in *Citizenship Denationalized*, an influential essay disaggregating the notion of citizenship into legal status, rights, political activity, and identity or solidarity. Linda Bosniak, *Symposium: The State of Citizenship, Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000); see also D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817 (2010) (applying membership theory to workers).

69. See *supra* note 67 and accompanying text.

70. See JANELLE S. WONG, *DEMOCRACY’S PROMISE: IMMIGRANTS AND AMERICAN CIVIC INSTITUTIONS* (2006); Els de Graauw, *Nonprofit Organizations: Agents of Immigrant Political Incorporation in Urban America*, in *CIVIC HOPES AND POLITICAL REALITIES: IMMIGRANTS, COMMUNITY ORGANIZATIONS, AND POLITICAL ENGAGEMENT* 323 (S. Karthick Ramakrishnan & Irene Bloemraad eds., 2008).

unions and worker groups,⁷¹ interest groups,⁷² and social movement organizations,⁷³ increasing interdisciplinary attention is being paid to government institutions as sites of immigrant incorporation.⁷⁴ An emerging body of scholarship turns to bureaucracies as sites of immigrant incorporation and to the important role that they play in policy implementation.⁷⁵ The attention to bureaucracies partly reflects scholarly recognition that formal legal status is disaggregated into a bundle of rights.⁷⁶ The rights within that bundle can also be reordered; that is, 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. For example, rights in the workplace have proved to be an important precursor for immigrants' full membership in the broader community.⁷⁷ At least on the books,

71. Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC'Y REV. 669 (2009); Gordon & Fine, *supra* note 4; Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LABOR & EMP'T L. 1 (2005).

72. DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS (2007); Dara Z. Strolovitch, *Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender*, 68 J. POL. 894 (2006).

73. RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA (Kim Voss & Irene Bloemraad eds., 2011).

74. In 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. 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.

75. Some examples of recent bureaucratic incorporation scholarship include Michael Jones-Correa, *Race to the Top? The Politics of Immigrant Education in Suburbia*, in NEW FACES IN NEW PLACES 308 (Douglas S. Massey ed., 2008); Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOC. REV. 756 (2009); HELEN MARROW, *NEW DESTINATION DREAMING: IMMIGRATION, RACE, AND LEGAL STATUS IN THE RURAL AMERICAN SOUTH* (2011); Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFFAIRS REV. 874 (2007); Paul G. Lewis et al., *Why Do (Some) City Police Departments Enforce Federal Immigration Law? Political, Demographic, And Organizational Influences On Local Choices*, J. PUB. ADMIN. RES. & THEORY (2012).

76. Bosniak, *supra* note 68; Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, 24 CONTEMPORARY SOC. 326 (1995).

77. Although she was not writing in the context of immigration, feminist scholar Judith Shklar wrote that work was the basis of citizenship. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991). Similar notions underlie a vast legal scholarship on the intersection of immigration law, labor law, and employment law that includes Jennifer Gordon, Michael Wishnie, and many others. *See supra* notes 3-4.

workplace protections protect *all* workers from unsafe conditions, unfair wages, and discrimination on the basis of statutorily enumerated classes.⁷⁸ Theorists of bureaucratic incorporation suggest that one alternative to relying on Congress or courts to protect immigrant workers is looking to regulatory agencies charged with enforcing labor and employment laws. More specifically, bureaucracy scholars seek to explain the behaviors of civil servants and street-level bureaucrats working to enforce statutes and case law and to implement administrative policies in their daily work.⁷⁹

Many everyday law enforcement tasks 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 set their own priorities. Scholars in political science and administrative law have long written about the central place of discretion in policy implementation⁸⁰ although only recently in the immigrant context.⁸¹ 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.⁸²

In the context of regulatory agencies with mandates to enforce specific statutes, the tension between politics and legal professionalism provides a focal point for understanding the motivations of career civil servants. These conflicts frequently arise when agencies share “regulatory space.”⁸³ Shared regulatory space can take the form of overlapping agency functions;

78. But as Part I explained, Congress severely limited or stripped many economic rights from undocumented workers (in IRCA and its progeny) and the Supreme Court interpreted at least one important labor law to provide narrowly for immigrants (in *Hoffman*).

79. See *supra* note 75.

80. Two prominent bureaucracy scholars writing at the intersection of law and political science are KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 188 (1969) and JERRY MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 49 (1985) (characterizing bureaucratic rationality as searching for the good within the constraints of the possible). Other political scientists writing on this topic include Ken J. Meier, Joseph Stewart, Jr. & Robert F. England, *Politics of Bureaucratic Discretion: Educational Access as Urban Service*, 35 AM. J. POL. SCI. 155 (1991); Lael R. Keiser, *State Bureaucratic Discretion and the Administration of Social Welfare Programs*, 9 J. PUB. ADMIN. RES. & THEORY 87 (1999); GARY BRYNER, *BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES* (1987).

81. A recent article by Jill Family summarizes administrative law scholarship relevant to immigration law. Family, *supra* note 11. Her piece triggered lengthy discussion about sub-regulatory guidance among important immigration scholars on “immprof,” a widely-subscribed list-serve for immigration law professors. Among the types of guidance catalogued with varying degrees of precedential value: policy guidance, Executive Office for Immigration Review (EOIR) adjudication, memoranda of understanding and agency correspondence, practice manuals, and operating instructions. For an earlier example of the DHS predecessor, see Janet A. Gilboy, *Administrative Review in a System of Conflicting Values*, 13 LAW & SOC. INQUIRY 515 (1988) (discussing immigrant bail administration in detention).

82. MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* (2000).

83. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

related jurisdictional assignments; interacting jurisdictional assignments; and delegations requiring concurrence. Similar conflicts can also exist within agencies that must advance multiple goals or that are tasked with enforcing multiple statutes in tension with one another.⁸⁴ In each scenario, how to do “the right thing” is not clear: bureaucrats must engage in statutory interpretation when exercising discretion and implementing their competing mandates.⁸⁵

*B. Conflicting Mandates in Complex Regulatory Arenas:
Professionalism and/or Politics?*

How do bureaucrats exercise their discretion when confronted with competing mandates? There are two dominant answers in the relevant literatures: political control and professionalism. The political control perspective suggests that political controversies about immigration in the post-*Hoffman* era, for example, will lead toward punitive enforcement practices and a lack of support in service delivery from governmental agencies.⁸⁶ There are several reasons for these outcomes: undocumented immigrants’ powerlessness in electoral politics; the power of interest groups such as employers within corporations and trade associations prone to capturing agencies; and the tendency for principals to bring bureaucrats in line.⁸⁷ Political control thereby defrays a mission-focused professional ethos that includes fidelity to substantive laws, such as labor standards or antidiscrimination or inclusiveness.⁸⁸ Underlying this perspective is an implicit belief that policy is rational and therefore strategically directed at accomplishing instrumental ends.⁸⁹ In Graham Alison’s typology, this model of government behavior infers that if a government official performed a particular action, that official must have felt the action

84. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVT. L. REV. 1 (2009).

85. The terms “bureaucrats,” “civil servants,” and “career attorneys” are used interchangeably throughout this article because they refer to similar concepts in legal scholarship and social science literature. In particular, “bureaucrat” is used as a term of art in political science; it is not a pejorative term as it sometimes is in common parlance.

86. Lewis & Ramakrishnan, *supra* note 75, at 877 (“At the national level, much of the literature suggests that political control of the bureaucracy is significant. Researchers have found, for example, that political shifts, such as changes in presidential administrations, have led to important changes in bureaucratic priorities and enforcement efforts.”) (citing B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* (1994); Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in *ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND* 116 (Oliver E. Williamson ed., 1995)).

87. Lewis & Ramakrishnan, *supra* note 75, at 879.

88. *See id.*

89. On public choice as it relates to public interest law specifically, see STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008).

represented the best way of accomplish a desired end.⁹⁰ Revealing the strategic thinking that leads linearly from means to ends, then, is the key to understanding why a policy is enacted.⁹¹ In the context of understanding the federal government's policies toward undocumented workers, one must seek to understand: (1) the values and objectives of the federal government (i.e., deterring unauthorized migration by staunching employment of undocumented immigrant workers); (2) the perceived policy alternatives (i.e., punishing employers for hiring undocumented workers, rather than the immigrants themselves); (3) the range of intentional and unintentional consequences that can flow from each policy alternative (i.e., not punishing employers to keep the onus of responsibility on workers and to prevent unjust enrichment of workers); and (4) the net value of each set of policy consequences.⁹² A corollary interpretation of federal workplace agencies protecting undocumented workers would follow the same line of analysis with the starting assumption that the workplace agencies' objective is to maintain labor compliance for all workers and that ensuring compliance for U.S. citizen workers requires simultaneously ensuring compliance for noncitizen workers.

In contrast, social scientists who focus on the influence of professionalism over political control emphasize the "cultural" attributes of the organizations in which the professionals reside.⁹³ Those theorists of professionalism who focus on professionals within government bureaucracies begin by recognizing that the government consists of a confederation of "semi-feudal, loosely allied organizations, each with a life of its own."⁹⁴ Those organizations follow set "repertoires" when taking action; these repertoires are often fueled by their organizational imperatives and manifested in a "fixed set of standard operating procedures."⁹⁵ Policies and practices are analyzed as organizational outputs.⁹⁶ Bureaucratic

90. Alison, *supra* note 65 (contrasting rational choice theory with organizational process and bureaucratic politics models. The model presumed in this article approximates bureaucratic politics). Examples of rational choice include Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985) (using quantitative analysis to determine factors driving agency behavior and concluding that politics is a significant factor); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (testing competing models of agency behavior and finding systemic Congressional influence).

91. See Alison, *supra* note 65, at 693-96.

92. This formulation simplifies and somewhat exaggerates the underlying analytic paradigm for illustrative purposes. Many proponents will subscribe only implicitly or partially, even if predominantly.

93. See sources cited within Lewis & Ramakrishnan, *supra* note 75, at 879-82 (describing the insulation of bureaucracies from political control in multiple areas of public policy, including policing and social services).

94. Alison, *supra* note 65, at 698.

95. *Id.* at 698, 701.

96. *Id.* at 700.

incorporation theorists allege that government actors sit on top of the conglomerate of organizations, and they perceive problems through “organizational sensors.”⁹⁷ Thus, partisan politics are constrained, countered and sometimes overcome by the “norms and ethos of civil servants” within the agencies.⁹⁸ In the instance of bureaucrats serving immigrants from within workplace agencies, an organizational theorist would say that the motivating ethos is one of professionalism.⁹⁹ Most civil servants trained as attorneys and employed by federal workplace agencies are “socialized into understanding their role as unelected officials in a democratic political system where Congress dictates their agency mission.”¹⁰⁰ Their legal training makes them particularly cognizant of legal constraints related to the professional norm of procedural justice.¹⁰¹ While mindful of their political leadership, they strive to maintain their agency mandate across changing presidential priorities.¹⁰² Change happens, but it occurs gradually and infrequently: organizations tend toward “parochial priorities” such as organizational health, expressed in dollars appropriated and bodies assigned; attempting higher functions through banal tasks like preparing budgets and reports; evaluating options in terms of administrative feasibility; and updating their practices based on past practices, such as using last year’s budget as a template for this year’s expenditures.¹⁰³ Organizational parameters mostly persist through recruitment of loyal personnel, tenure of longstanding employees, and rewards for following existing procedures.¹⁰⁴ More dramatic change occurs in periods of budgetary feast or fast.¹⁰⁵ Problems often occur at the juncture of jurisdictional overlap of multiple organizations and require coordination for solution.¹⁰⁶

97. *Id.* at 698.

98. See also Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749, 786-87 (2003) (attributing the culture clash between the prosecutor and government agency relationship to socialization/acclturation at law school and career paths leading to the current station).

99. See *supra* note 75. Charles Epp advances a similar notion of “legalized accountability” within municipal bureaucracies that amounts to a socially constructed paradigm for responding to the threat of litigation. CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* (2009).

100. GOLDEN, *supra* note 82, at 25, 11-12; see also John D. Dilulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RES. THEORY 277, 316 (1994); James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987).

101. See GOLDEN, *supra* note 82.

102. See *id.*

103. Alison, *supra* note 65, at 700-01.

104. *Id.* at 701.

105. *Id.*

106. *Id.*

Several recent empirical studies of immigrant-serving law enforcement agencies demonstrate the professional motivation to serve immigrants within hostile political climates. Building on foundational work studying social service delivery to immigrants despite restrictive government policies,¹⁰⁷ scholars find that moments when restrictive government policies collide with bureaucrats' beliefs about fairness and appropriate action toward their clients most vividly reveal bureaucrats' professional norms.¹⁰⁸ Political scientists Paul Lewis and Karthick Ramakrishnan study inclusive policing practices in cities with many immigrants.¹⁰⁹ 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 mechanically taking political cues from elected leadership who may view immigration control as an electoral prerogative in the down economy.¹¹⁰ Law enforcement officials view themselves as public servants and professionals who follow an ideal of service, and they recognize the importance of the public they serve in order to do their job well.¹¹¹ Insofar as immigrants are part of that constituency, local law enforcement relies on them to accomplish core tasks of keeping the peace, gaining trust in the community, and maintaining quality of life for all concerned.¹¹²

Sociologist Shannon Gleeson extends the professionalism emphasis in bureaucratic incorporation theory to state law enforcement and regulation, where partisan politics are potentially more salient and immigration policies more fractured than at the local level, in two empirical studies of state-level workplace agencies.¹¹³ In one study, she shows that political ideology

107. Michael Jones-Correa studies suburban school districts that have dealt with substantial immigration and developed the concept of "bureaucratic incorporation" of new groups into the political system. Jones-Correa, *supra* note 75. 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. *See id.* at 321-23. Jones-Correa argued that such patterns defy the predictions of political control theory. *Id.* at 324-25. 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. *See id.*

108. *See, e.g.,* Marrow, *supra*, note 75 at 758-59 (studying bureaucrats engaged in the delivery of health care services and finding that policy preferences are trumped by "service-oriented professional norms").

109. Lewis & Ramakrishnan, *supra* note 75 (disputing political control as explanation for police practices that counteract federal immigration policy).

110. *Id.*

111. *Id.*

112. *Id.*

113. Shannon Gleeson, Assistant Professor, Latin American and Latino Studies, University of California, Santa Cruz, presentation at the University of California, Irvine Immigration Symposium: "To Protect One, We Must Protect All": Bureaucratic Scripts for Protecting Undocumented Workers (Feb. 17, 2011) [hereinafter Gleeson, Bureaucratic Scripts], available at http://learn.uci.edu/ocw/courses/10w/UCI_Immigration_Law_Symposium.php?panel=6&start=2943;

remains an insignificant part of bureaucrats' motivation to serve immigrants.¹¹⁴ When asked to reflect on the moral worthiness of immigrants who receive their services, state-level officials in the EEOC and DOL responded that the moral worthiness of their immigrant clients is irrelevant to their rendering of services, regardless of the immigrants' official eligibility for those services.¹¹⁵ "Doing the right thing," Gleeson argues, "can sometimes have little to do with a bureaucrat's personal sense of conviction towards a client."¹¹⁶ Instead, 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.'¹¹⁷ Although agency staff was sometimes sympathetic to immigrants, overwhelmingly they articulated their commitment to immigrants as a means to achieve organizational goals such as resource allocation and labor compliance.¹¹⁸ Gleeson's research design, which compares regulation of the workplace in liberal California with conservative Texas, shows that political pressure is constrained by professionalism: service to immigrants was available in both jurisdictions and did not depend on heroic actions or pro-immigrant advocacy on the part of individual bureaucrats.¹¹⁹

C. Bureaucratic Politics in Federal Workplace Agencies

This Article unites elements of the political control and professionalism models into a model of bureaucratic politics that takes into account both the influence of politics and the constraints of professionalism. It argues that while individuals within a conglomerate of organizations follow set "repertoires" when taking action, those repertoires exist within a complex regulatory context that is partially established by the political leadership of an agency sitting atop the organization, and partially established by the competing pressures within the regulatory arena (e.g., career civil servants, Congress, lobbyists, and industry groups).¹²⁰ The

see also Shannon Gleeson, Means to An End: An Assessment of the Status-Blind Approach to Protecting Undocumented Worker Rights [hereinafter Gleeson, Status-Blind Approach] (unpublished manuscript).

114. Gleeson, Bureaucratic Scripts, *supra* note 113.

115. *Id.*

116. *Id.*

117. Gleeson, Status-Blind Approach, *supra* note 113 at 3.

118. *Id.*

119. *Id.* at 13-17. For a fuller statement of this argument, see SHANNON GLEESON, CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON (2012) (arguing that pro-immigrant policies persist among bureaucrats in Texas and California despite the comparatively more conservative political context in Texas).

120. *Cf.* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REPUTATION AT THE FDA (2010) [hereinafter CARPENTER, REPUTATION AND

leaders within this tier of decision-makers are far from monolithic; each is a player in its own bargains and dilemmas.¹²¹ Bureaucratic politics exists between many actors who are not organized by a single strategic issue but rather by diverse problems and a range of personal, organizational, and policy goals.¹²² Many of those goals are determined by the role of the individual within the larger organization.

This is where Miles' law, cited in the article title, once again comes in: where you stand on immigration policy depends on where you sit within the government bureaucracy.¹²³ The occupational position of a cabinet secretary or commission member – both politically appointed leadership positions – produces different perspectives on policy outcomes than the position of a career civil servant within the agency. At the same time, the political leadership and career staff do not operate independently; the hierarchical nature of the agency's organizational structure lends itself to some "pulling and hauling."¹²⁴ The results of all the pulling and hauling sometimes reflect the triumph of one role over another; many times, the results yield a distinct result from what any individual intended—the result of a compromise among government officials who see an issue differently.¹²⁵

The stakes are raised for law enforcement agencies when bureaucrats confront apparently conflicting statutes, mixed or multiple agency goals and missions,¹²⁶ operate in "shared regulatory space,"¹²⁷ and internally experience ambivalence about laws that seem untenable in light of their professional duties.¹²⁸ Bureaucrats use their discretion to find gaps in the law to reconcile the competing mandates with one another and with their professional commitments.¹²⁹ They often do so in the "shadow of the

POWER] (describing Carpenter's notion of "bureaucratic autonomy"); *see also* DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001) [hereinafter CARPENTER, *FORGING OF BUREAUCRATIC AUTONOMY*]; Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61 (2009) (describing Teles's notion of "transformative bureaucracy").

121. This language of game theory is also used in international affairs, where outcomes of intricate, subtle, simultaneous, overlapping games among players located in positions of power result from the hierarchical arrangement of which constitutes the government.

122. *See* case studies of bureaucratic politics within workplace agencies in Part III.

123. *See* Miles, *supra* note 65.

124. Alison, *supra* note 65, at 707-09.

125. *Id.* at 711.

126. Biber, *supra* note 84.

127. Freeman & Rossi, *supra* note 83.

128. Gilboy, *supra* note 81.

129. Legal scholarship also describes the influence of the regulatory environment on the agency's willingness to achieve a primary versus a secondary or competing mandate. Many scholars have called on external agencies to monitor, coordinate, and lobby an agency with a conflicted mandate for the purpose of strategically enhancing performance of secondary missions, rather than relying on the agency

law,”¹³⁰ given the shared sense of authority and legitimacy afforded by the law to each of the players in these institutions.

Discretion can run both ways, of course: the kinds of “administrative defections” reported in several of the immigrant-serving agency case studies occur when civil servants see the law in question as particularly unsustainable or non-viable.¹³¹ Political scientist Melissa Golden demonstrates career attorneys’ accountability within four types of regulatory agencies in the civil rights arena.¹³² Her case study of the U.S. Department of Justice, Civil Rights Division (DOJ) during the Reagan administration shows that the DOJ attorneys felt obligated 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 support their political leadership.¹³³ Their loyalty was to legal principle over politics and to vigorous representation of their client—the regulatory agency for whom they worked.¹³⁴ This professional code of conduct influenced their desire to “do the right thing” as well as their definition of the “right thing.”¹³⁵ Whereas the civil servants in agencies with few lawyers tended to be more responsive to the political leadership than the civil servants in agencies dominated by lawyers, the DOJ attorneys exhibited qualities indicative of their legal training and focus on presenting arguments in their daily work

itself to force a change in priorities. Freeman and Rossi recommend coordination to overcome collective actions problems in four types of shared space: overlapping agency functions, related jurisdictional assignments, interacting jurisdictional assignments, and delegations requiring concurrence. See Freeman & Rossi, *supra* note 83. Separately, Biber promotes interagency monitoring to facilitate agency success on multiple goals. See Biber, *supra* note 84. Biber’s study of the Environmental Protection Agency posits that because *intra*-agency efforts to improve performance on secondary goals have limitations, *inter*-agency efforts such as policing agency decision-making to ensure compliance with performance on an undervalued goal or making legally binding determinations about whether the decision-making agency has met minimum standards for that undervalued goal have greater impact. *Id.*

130. This phrase is frequently used in socio-legal research and originated in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

131. See ALBERT O. HIRSCHMAN, DÉFECTION ET PRISE DE PAROLE: THÉORIE ET APPLICATIONS (1995). Thanks to Leila Kawar for the suggestion of this phrase.

132. GOLDEN, *supra* note 82.

133. *Id.* at 101-06 (DOJ case study and analysis). Reagan reversed the direction of the civil rights policy agenda taken by three decades of Republican and Democratic administrations. *Id.* Norman Amaker said: “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.” NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988). 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. *Id.* Golden finds that the administrative implementation of his policies was consistent with these policy goals, but it was not for lack of effort to voice opposition by the civil servants within the DOJ. See GOLDEN, *supra* note 82

134. GOLDEN, *supra* note 82.

135. *Id.*

and in the midst of conflict.¹³⁶ Golden's findings echo more general findings from organizational sociologists who study agency culture¹³⁷ and from the bureaucracy scholars who cite the dominant professional ethos as vital to understanding the motivations of bureaucrats.¹³⁸

D. Research Method: Comparative Case Studies of Federal Workplace Agencies

This Article focuses on regulation of the workplace, because this policy domain presents an important instance of two vulnerable, highly interconnected populations—immigrants and low-wage workers—bisected by politics, clashing laws, and agency missions.¹³⁹ Consistent with the bureaucratic incorporation theorists and counter to the political control theorists, this Article predicts that civil servants will resist rights and restrictions 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. To separate the confounding influence of state laws and state policy contexts, this Article focuses on *federal* workplace agencies administering parallel federal labor and employment statutes. This federal concentration brings

136. See *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, the Food and Nutrition Service, and the Environmental Protection Agency. *Id.*

137. 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* (Walter W. Powell & Paul J. DiMaggio eds., 1991); cf. Lauren B. Edelman, Christopher Uggen, Howard S. 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 B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. 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 CARPENTER, *REPUTATION AND POWER*, *supra* note 120; CARPENTER, *FORGING OF BUREAUCRATIC AUTONOMY*, *supra* note 120.

138. See text accompanying notes 94-119.

139. This identified conflict between work-immigration missions magnifies the internal conflicts in the immigration bureaucracy studied by Janet Gilboy, Kitty Calavita, and Stephen Lee. See Janet A. Gilboy, *supra* note 81; KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (discussing the INS during the Bracero Program); Lee, *supra* note 4 (discussing DOL-DHS workplace raids). Whereas Lee says that DHS's mission will usually trump the DOL's labor mission due to power asymmetries, my argument is that within the overlap there is space for workplace agencies to exercise discretion in favor of immigrant workers. See Lee, *supra* note 4.

methodological advantages, but it does overly simplify the regulatory environment during a time when states have asserted their interventions into immigrants' rights; it briefly mentions state regulation in Part IV, but mostly leaves the consideration of state regulation to future study.¹⁴⁰ In the meantime, this Article portends to find similar patterns of bureaucratic thinking and behavior in state and federal workplace agencies: so long as they are 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 should 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 much immigration scholarship that uses case studies of individual agencies, this Article studies institutional dynamics across three similarly-situated workplace agencies: the DOL, NLRB, and EEOC.¹⁴¹ This research design allows for observation of variation across agencies that each confront the same conundrum of reconciling their statutorily mandated labor enforcement charge with immigration enforcement strategies that originate elsewhere in the administration. 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, the Article studies civil servants in two independent agencies led by bipartisan commissions and in one executive agency headed by a cabinet-level secretary. Based on the theory that politics is not paramount, this Article would expect less influence from politics on career staff than politically appointed leadership, particularly those career staff who have remained in their positions across Republican and Democratic administrations. To the extent that political influence affects enforcement activities, the Article would expect negligible differences in the degree of influence on bureaucratic attitudes toward immigrant workers despite variation in institutional design, if politics is not the motivating factor.

The research design is hypothesis-generating instead of hypothesis-testing. That is, it does not so much choose between the two dominant explanations for bureaucratic behavior as draw on both traditions to suggest ways to understand the comparative case studies of workforce agencies

140. 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. See Gleeson, Status-Blind Approach, *supra* note 113. 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. See *id.*

141. See, e.g., Lee, *supra* note 4 (studying the DOL-DHS pairing); Griffith, *supra* note 4 (studying the DHS-EEOC pairing); Fine & Gordon, *supra* note 4; Gleeson, Status-Blind Approach, *supra* note 113 (studying the DOL-workplace agency pairing); CALAVITA, *supra* note 139 (studying the INS predecessor to the DHS).

protecting immigrant workers in complex regulatory arenas. For the same reason, the interviews and documentation evidencing the more general propositions should be read to illustrate processes and motivations, rather than as hard proof of causal inferences.¹⁴² The Article contends that both politics and professionalism matter: politics creates openings and professionalism constrains the exercise of discretion. Importantly, while the claim that politics matters less than commonly believed—or at least in different ways than commonly believed (i.e., not the naked assertion of policy preferences), the research design does not counter the hypothesis that regulatory resistance is at least partly conditioned on political preferences. That said, the time period studied covers two presidential administrations with markedly different approaches to immigration enforcement during a politically divisive time. Since *Hoffman* in 2002, a Republican and a Democratic president have had opportunities to respond directly and indirectly to tensions between immigration and labor enforcement. Presidents appoint the top leadership in the workplace agencies, who conduct their activities mindful of presidential policy. The leadership will inevitably influence the federal career staff working below them, even if the staff are partially insulated by civil servant protections. The integrated explanation for agency behavior advanced is not mutually exclusive with all political influence, though the Article expects to find evidence of regulatory resistance that constrains politics across administrations and across workplace agencies, if organizational factors and professional ethos are also at play.

III.

CASE STUDIES OF BUREAUCRATIC POLITICS IN FEDERAL WORKPLACE AGENCIES

Part III draws on three case studies of federal workplace enforcement agencies—the NLRB, the DOL, and the EEOC—to show how civil servants work from within their professional and statutory mandates to advance immigrant worker rights, despite the *Hoffman* precedent and changing presidential administrations. To obtain accurate perspectives on the exercise of discretion, the author interviewed high-level agency officials in the Washington, D.C., headquarters for each federal agency who had sufficient authority to make decisions and who participated in the formation of regulatory responses to *Hoffman*. In each agency, the author interviewed three or more career staff members in the policymaking and enforcement arms (usually in subdivisions of the Office of General Counsel) and

142. For more explanation of non-causal inference and qualitative research methods, see HENRY BRADY AND DAVID COLLIER, *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* (2010).

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 fifteen years or more—and were familiar with the political climate immediately preceding and following *Hoffman*. Documents from 1986 (the passage of IRCA) to the present were reviewed as both “window[s] into the . . . outlook[s] and attitude[s]” of agency officials¹⁴³ and current interpretations of law, including both regulations and sub-regulatory guidance such as policy, fact sheets, memoranda of understanding, opinion letters, and practice manuals. The author also interviewed immigration attorneys in several national advocacy groups familiar with the work of these agencies, seeking 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 variance is to be expected. However, across variation, the institutional dynamics of influence remain roughly the same and support bringing politics and professionalism together into a model of bureaucratic politics. 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 ranging 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 “reconfiguring” (NLRB), “buffering” (DOL), and “mitigating” (EEOC) respectively. Table 1 in the Appendix 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 and more systematically compared in Part IV.¹⁴⁴

A. *The NLRB follows Hoffman insofar as its discretion on backpay is constrained, but it “reconfigures” other remedies for immigrant*

143. Family, *supra* note 11, at 589.

144. 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 F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 494 (2006). In Barnes and Burke's schema, rights practices vary along two dimensions: the degree to which the organizations are proactive (anticipating problems) versus reactive, and the degree to which the organizations are minimalist (seeking only to meet basic legal requirements.) *Id.* at 505-14 & Table 3.

workers where openings permit.

Of the three agencies under study, the NLRB experienced the greatest constraints and the least openness from *Hoffman*.¹⁴⁵ The decision, after all, directly challenged the Board's ruling on the availability of backpay to immigrant workers under the NLRA.¹⁴⁶ 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.¹⁴⁷ As a matter of policy, the NLRB faced some of the staunchest challenges as well. Therefore, this first case study poses the most important illustration of bureaucratic discretion operating in favor of undocumented immigrant workers. The NLRB's dual commitment to professionalism and the rule of law in the challenging legal and political climate in which it found itself functions as a strong case of the Article's theory. The case study begins by explaining the challenging regulatory environment surrounding the Board's interpretations of worker rights and remedies to *Hoffman*. It then delves into interviews and guidance documents to demonstrate the interplay of professionalism and politics as 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*.¹⁴⁸ 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.¹⁴⁹ When the NLRB overruled this objection, the employer wrote to the INS asking that the agency check the status of the employees.¹⁵⁰ The INS arrested the workers, five of whom voluntarily departed the country to avoid deportation.¹⁵¹ 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 backpay.¹⁵² The Seventh Circuit affirmed; the Supreme Court affirmed the merits analysis and partly remanded the remedial

145. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

146. *Id.* at 149-50.

147. *See id.* at 156 (Breyer, J., dissenting) (“[T]he immigration law foresees application of the Nation’s labor laws to protect ‘workers who are illegal immigrants.’ And a policy of *applying* the labor laws must encompass a policy of *enforcing* the labor laws effectively. Otherwise, . . . ‘we would leave helpless the very persons who most need protection from exploitative employer practices.’”) (quoting *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring)) (emphasis in original).

148. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

149. *Id.* at 886-87.

150. *Id.* at 887.

151. *Id.*

152. *Id.* at 888.

analysis, leaving questions of implementation to the NLRB.¹⁵³ A career attorney in the Office of General Counsel who had worked in the Advice Division 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.¹⁵⁴

In 2002, shortly after the Supreme Court reversed the NLRB enforcement order in *Hoffman*,¹⁵⁵ the NLRB General Counsel Arthur Rosenfeld sent its Regional Directors a memorandum setting forth procedural remedies for employees who may be undocumented aliens.^{156,157} The 2002 General Counsel memo (GC memo 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 investigation. The memo also retained as “valuable and necessary” the use of cease and desist orders, contempt sanctions, and formal settlements aimed at deterring “recurrence or extension of unfair labor practices” in the absence of backpay remedies.¹⁵⁸ GC memo 02-06 acknowledged that after *Hoffman*, the NLRB could no longer seek backpay remedies “once evidence establishes that a discriminatee is not authorized to work during the backpay period.” As an NLRB General Counsel staff attorney explained, “*Hoffman* complicated matters quite a bit” for the NLRB. 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.”¹⁵⁹ Without avenues for legal accountability, the challenge for staff became to determine what

153. *Id.* at 889-90, 906.

154. Telephone Interview with NLRB Office of General Counsel (Jan. 12, 2012).

155. The NLRB’s prior stance on undocumented worker remedies is set out in its Petitioner’s brief before the U.S. Circuit Court of Appeals for the District of Columbia. Final Brief for Respondent, *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 299 (D.C. Cir. 2000) (No. 98-1570), 1999 WL 34814373.

156. The general counsel position is politically appointed. However, many of the memoranda carrying the name of the GC are influenced or written by the counsel’s civil servant staff.

157. Memorandum from Arthur F. Rosenfeld, Gen. Counsel, NLRB, to All Regional Directors, Officers-in-Charge and Resident Officers, NLRB (July 19, 2002) (“Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.*”). The memo displaced General Counsel Memorandum GC 98-15 (Dec. 4, 1998).

158. 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 to conduct *sua sponte* investigations into status and instead to defer such investigations to the remedial stage. Richard Siegel, Associate General Counsel NLRB to Regional Directors 1-2, 4 (June 7, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b> (“Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings”).

159. Telephone Interview, *supra* note 154.

avenues for remedies remained available for the execution of the agency's statutory and professional duties.

In order to coordinate responses to undocumented worker complaints arising in this unsettled legal terrain, a June 2011 General Counsel memo directs NLRB regional staff to “call home”—that is, 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.¹⁶⁰ The Deputy Assistant General Counsel, a career attorney who reports to 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.¹⁶¹ Following *Hoffman*, the Deputy Assistant General Counsel sought to “figure out where conflict does *not* exist [between immigration and labor enforcement] —or to find opportunities where agencies can be of mutual assistance in light of their statutory mandates and available remedies.”¹⁶² One possibility was to focus on unlawful retaliation. Given that *retaliatory* threats to deport directly interfere with the labor enforcement mission of the NLRB, the Deputy Assistant General Counsel considered retaliation a valid opening to reach undocumented workers.¹⁶³

A second possibility was to focus on equitable remedies for the barriers undocumented workers faced to monetary recovery. The General Counsel identified problematic cases where the employer is willing to acknowledge wrongdoing and settle but finds out, incidentally, that the worker lacks status. The employer cannot keep the worker on payroll (if she is still in his employ) and cannot reinstate her (if she already has been let go) under IRCA, despite the employer's desire to rectify wrongdoing. The Deputy Assistant General Counsel reached out to other agencies, asking if there was 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

160. Siegel, *supra* note 158. 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. See Telephone Interview, *supra* note 154.

161. Siegel, *supra* note 158.

162. *Id.*

163. *Accord Saucedo, supra* note 58, at 925 (citing *U.S. v. Kozminski*, 487 U.S. 931, 948 (1988)).

permanent resident.¹⁶⁴ These status-based measures deviate from NLRB's usual practice of ignoring status; when prompted, these measures instead attempt to correct the status issue to get back to the labor compliance issues that are clearly their responsibility.

The Deputy Assistant General Counsel openly acknowledges that he took initiative on behalf of immigrant workers in his pursuit of retaliatory deportation and U-visa certification. He felt "a great sense of desire to do the right thing" and had a particular "appetite" to help undocumented workers.¹⁶⁵ It was those two desires, combined with a sense that the politically appointed General Counsel welcomed his ideas and influenced his decision to take initiative. The Deputy Assistant General Counsel explains that 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. I was able to convince [the General Counsel] that we needed to take ownership of the issue."¹⁶⁶ Undoubtedly, the Deputy Assistant General Counsel particularly cares about immigrants' rights. One of his colleagues said of him, "You get people like [the Deputy Assistant General Counsel], who have a particular interest in immigrants' rights. He carves time out of every day to work on immigration-related issues."¹⁶⁷ Still, the way that the Deputy Assistant General Counsel describes his own commitment is encased in the professional responsibility to protect employee rights across the board, and he does not feel that his perception is distinctive among his colleagues in Operations-Management. Special responsibilities for immigration are possible only because "Operations-Management has a general charge to make things run better,"¹⁶⁸ which he described as ranging—from supporting staff in the field who deal with compliance on a daily basis to more mundane activities that make the trains run on time. "So we have more freedom" [than other branches].¹⁶⁹ The breadth of this charge permits the Division to do more in their professional capacity than a strictly bounded legal office would allow. Moreover, without a nurturing culture and adequate resources, it would be infeasible for anyone to make a meaningful difference for undocumented workers. While the Deputy Assistant General Counsel was willing to accept some credit for the advances on behalf of undocumented workers, he concluded that "initiative for undocumented workers would have occurred without me."¹⁷⁰ The

164. More extensive discussion of the U-visa remedy appears in the EEOC case study, *infra*, Part III(C).

165. E-mail from NLRB Office of General Counsel (Mar. 21, 2012) (on file with author).

166. Phone interview with NLRB Office of General Counsel (Jan. 12, 2012).

167. Telephone Interview with NLRB Office of General Counsel (Jan. 12, 2012).

168. *Id.*

169. *Id.*

170. E-mail from NLRB Office of General Counsel (Mar. 12, 2012).

conditions were in place for agency action that would advance the rights of undocumented workers.

Two career attorneys in the director's office, assigned to work with the Deputy Assistant on immigration issues, went even further to frame their responsibility in terms of professional commitment, rather than politics or personal conviction. With considerable self-awareness, one attorney said that he and his colleagues are not engaging in advocacy for immigrants' rights. Instead, they aim to "define or divine the mission of the agency and figure out how to make it work. We all know a lot about the NLRA and little about anything else."¹⁷¹ Based on an extensive knowledge of the history and purposes of the NLRA, he said that things "break down" when employers feel they can violate employees with impunity – by hiring and firing undocumented workers or by threatening or discriminating against them—so when the agency tries to compel compliance with federal workplace law "it's just a matter of trying to figure out how to serve [the agency's] mission in a constrained environment." The attorney credited agency culture to inculcating a common desire among his colleagues to extend the NLRA's protections: "Individuals share a focus here and there, but all of us are committed to extend the Act's protections to as wide a community as possible."¹⁷²

The continuing vitality of the NLRB immigration work remains to be seen, as considerable fluctuation has occurred in the legal and political context surrounding worker remedies under the NLRA. The 2011 General Counsel memoranda pushing back against *Hoffman* became possible under a politically appointed General Counsel receptive to the suggestions of the high-level career attorneys in Operations-Management during a period of quiet among the Board members. Shortly after the most recent issuance, a case that presented similar facts to *Hoffman* resurrected the issue of remedial authority. Without acknowledging the 2011 General Counsel memo, the NLRB decided in *Mezonos Maven Bakery* that *Hoffman* stripped the Board of discretion to award backpay to an undocumented worker, even when the employer knowingly hired the workers without regard to their status.¹⁷³ In *Mezonos*, seven immigrants were hired to work for Mezonos Maven Bakery without being asked for documentation when they were hired.¹⁷⁴ Eight years later, they were fired after complaining as a group

171. Telephone Interview with NLRB Office of General Counsel staff (Jan. 11, 2012).

172. *Id.*

173. *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (Aug. 9, 2011). Additionally, the Puerto Rican Legal Defense and Education Fund (now Latino Justice PRLDEF) filed a Motion for Consideration with the Board, and the Motion was denied. Order Denying Motion for Reconsideration, 357 NLRB No. 47 (Nov. 3, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45806f395e>.

174. 357 NLRB No. 47, at *1.

about treatment they were receiving from a supervisor.¹⁷⁵ They filed unfair labor practice charges, the Board issued an unpublished decision on behalf of the workers, and the parties settled.¹⁷⁶ As part of the settlement, the Board ordered Mezonos to offer reinstatement and to make the employees whole for lost wages and benefits.¹⁷⁷ The Board's order was enforced by the Second Circuit.¹⁷⁸ Mezonos later argued that it could not offer reinstatement or backpay under *Hoffman* because the workers were undocumented and, thus, unavailable to work.¹⁷⁹ On November 1, 2006, Administrative Law Judge Steven Davis distinguished *Hoffman* and decided against the employer.¹⁸⁰ The ALJ faulted the employer for failing to verify the workers' legal status in *Mezonos*, unlike the employers presented with fraudulent work documents in *Hoffman*.¹⁸¹

The employers appealed the ALJ's ruling, and this time the NLRB found that *Hoffman* applied.¹⁸² 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 backpay to undocumented immigrant workers whose rights have been violated under the NLRA.¹⁸³ Put another way, in *Mezonos*, the NLRB recognized that legal precedent rescinded the agency's discretion to make findings beyond settled law.¹⁸⁴ This modest protection for immigrant workers may seem anomalous with the prior case studies of regulatory resistance. However, it comports 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 federal regulatory law

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at *1-2.

181. *Id.* at *2.

182. More early background provided in NILC article, see Monica Guizar, *Employer That Knowingly Violated I-9 Requirement Ordered to Pay "Back Pay,"* 21 IMMIGRANTS' RIGHTS UPDATE 6 (July 20, 2007) (revised June 12, 2008), available at <http://v2011.nilc.org/immsemplymnt/emprihts/emprihts104.htm>. NILC is party to the case.

183. 357 NLRB No. 47, 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.")

184. The Board said, "*Regardless of the merits . . . we are not at liberty to disregard the Court's decision in Hoffman.*" *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 NLRA's enforcement, chills 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) (Liebman, J., concurring).

enforcement agency, its professional duty ultimately collapsed into its legal duty.

Lamented the General Counsel NLRB attorneys, “[W]hatever small gaps remained after *Hoffman*, the *Mezonos* decision made miniscule . . . [The *Mezonos* decision] confirms how limited a space we have to work in, if there was previously any doubt.”¹⁸⁵ That limited space cramped the possibilities for NLRB staff, but it did not violate the ethos of bureaucratic accountability to the rule of law and the boundaries of executive power. It did not definitively prevent NLRB attorneys from reconfiguring their approach toward enforcement efforts to circumvent the remedial limits of *Hoffman* in other legitimate circumstances. The *Mezonos* decision does not cite the 2011 General Counsel memo, even though it was released subsequent to the memo and touched on related questions. However, the concurring opinion ends with the statement:

In denying back pay to the undocumented workers in this case . . . we do not definitively shut the door on other monetary remedies [that] would advance Federal labor and immigration policy objectives [W]e 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.¹⁸⁶

The General Counsel attorneys reviewing *Mezonos* were uncertain about its importance; as of December 2012, no guidance has followed the *Mezonos* decision to direct the NLRB’s regional field offices on statutory implementation.

The Spring 2012 NLRB board order in *Flaum Appetizing Corp.* further indicates that the pendulum may swing back on the expansion of immigrants’ rights through policy implementation.¹⁸⁷ The Board in *Flaum* expressed concern about employers engaging in “fishing expeditions” by using NLRB procedures during compliance hearings to harass or otherwise raise the issue of status without legitimate reason or basis for doubt. More specifically, in *Flaum*, the NLRB determined that employers that discriminated against employees for engaging in activities protected by the NLRA must offer sufficient evidence that a worker is not authorized to work to challenge a back pay or reinstatement award under *Hoffman*, because “IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted.”¹⁸⁸ Absent sufficient evidence, the NLRB proscribed the employer’s affirmative defense that the complaining worker was

185. Telephone Interview with NLRB Office of General Counsel staff (Jan. 11, 2012).

186. 357 NLRB No. 47 at *4-9 (Liebman, J., concurring).

187. *Flaum Appetizing Corp.*, 357 NLRB No. 162 (Dec. 30, 2011).

188. *Id.*

undocumented and therefore ineligible for backpay.¹⁸⁹ In addition, the Board in *Flaum* criticized the employer's attempt to uncover disabling evidence on all its employees through subpoenas demanding employees' work authorizations and identity documents such as passports, alien registration cards, driver's licenses, and social security cards under IRCA. "Permitting such re-verification [of work authorization status] without sufficient factual basis would invite a form of abuse expressly prohibited by IRCA, and would contravene ordinary rules of procedure."¹⁹⁰ In so determining, the Board constructed procedural barriers for employers wishing to avail themselves of *Hoffman*, once again limiting the scope of *Hoffman*'s reach through regulatory action.

The General Counsel office issued a memo in May 2012 to provide field offices with guidance on how to respect NLRB procedures in light of *Flaum*.¹⁹¹ In it, the General Counsel office reiterated that a respondent employer may not use the compliance phase as a means to fish for evidence showing that an employee lacks work authorization and is ineligible for backpay under *Hoffman*.¹⁹² It instructed NLRB regional field offices to require that a respondent provide, either in the answer or a bill of particulars, a full accounting of the evidence upon which it intends to rely to assert that employees are ineligible for backpay, or if such an accounting is not provided, to file a motion to strike the employer's affirmative defenses or a motion for summary judgment.¹⁹³

Additionally, the memo announced a change in office policy: the Case Handling Manual no longer requires documentation for employee reinstatement and, indeed, a reinstatement offer will be considered invalid if conditioned on re-verification of employment status.¹⁹⁴ The memo goes beyond the *Flaum* order in its level of detail and its expectations of affirmative action; for example, the memo instructs NLRB counsel to object to attempts to litigate immigration status at compliance hearings.¹⁹⁵ Further, it raises the possibility that these fishing expeditions themselves constitute unfair labor practices in violation of section 8 of the NLRA.¹⁹⁶

189. *Id.*

190. *Id.*

191. Memorandum from Anne Purcell, Assoc. Gen. Counsel, NLRB, to All Regional Directors, Officers-in-Charge and Resident Officers, NLRB 1, 1-3 (May 4, 2012), available at http://www.unioncounsel.net/developments/immigration/news/case_handling_instructions.pdf. While these types of informal memoranda do not carry the force of law per se, they can be very influential in the development of the law and the adoption of office practices.

192. *Id.* at 2.

193. *Id.* at 2.

194. *Id.* at 2.

195. *Id.* at 3.

196. The memo cites legal authority for the proposition that the effect of status-related inquiries outweighs the probative value of the discovery and could constitute an unfair labor practice and that the

Such detailed memoranda are neither routine nor uncommon. As a career attorney at the NLRB explained, “It needs to strike a chord with somebody here for some reason. It’s not uncommon to have a memo if two criteria are satisfied: the significance of the issue and the intersection of the subject with the interests of the current personnel.”¹⁹⁷ In this instance, issuing a memo was equally attractive to the politically appointed Board members and the regional field offices staffed by career attorneys because it safeguarded workers and protected the Board’s own processes from abuse.¹⁹⁸ The same official acknowledged that the memo’s indications that fishing expeditions might constitute unfair labor practices in violation of the NLRA is more noteworthy: the issue was not raised by the facts of *Flaum*, but was nevertheless included “to clarify the agency’s continually developing post-*Hoffman* jurisprudence” and to “routinize processes.”¹⁹⁹ He continued: “We’re trying to effectuate what we want immigration issues to look like in the Board. Where we see a means to provide guidance to the Region, we’ll try to incorporate it into the developing norms.”²⁰⁰ “It is rare to grab a board decision and to issue guidance to regions directing them to apply new guidance in a way that pushes the portfolio. The more it happens the happier I’ll be, but it doesn’t always happen.”²⁰¹

Summary. The NLRB case study strongly supports an integration of bureaucratic incorporation theory with the political control thesis as bureaucratic politics. Under the right political conditions, civil servants vigorously responded to *Hoffman* with their use of informal guidance to the field offices,²⁰² their novel classification of retaliatory deportation as an unfair labor practice, and their modeling of other agencies’ equitable approaches toward rehabilitating status through deferred action and U-visa certification. These actions took place primarily in the Operations-Management Division, which accords with organizational theorists’ emphasis on standard operating procedures. The institutionalization of

“Division of Advice would need to authorize complaint alleging that an Employer’s misuse of the Board’s hearing subpoena process” violates the NLRA. *Id.* at 3.

197. Telephone Interview with official, NLRB Office of General Counsel (June 5, 2012). In the interview, the official defined “significance” beyond the number of cases raised, as also including the complexity of the jurisprudence: “It’s not an easy area of the law given conflicting intent in IRCA and other legislation.”

198. *Id.*

199. *Id.* The NLRB position on the difficult question of when litigants’ petitions constitute an ULP is still developing. The regions are urged to confer with the Advice Division if they obtain a fact pattern with conduct that could constitute conduct that violates the NLRA. “We’re not telling regions to go out and test novel ideas without seeking advice first.” *Id.*

200. *Id.*

201. *Id.*

202. The NLRB Orders in *Flaum* and *Mezonos* show that agency discretion goes both ways. They also demonstrate the complicating relationship of law and politics in Board adjudication and GC memoranda. See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (Dec. 30, 2011); *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (Aug. 9, 2011).

these measures allows for continuity across changing political leadership. The NLRB Office of General Counsel's protection of undocumented workers despite *Hoffman*, along with their motivations, illustrates this Article's theme: in the complex regulatory environment resulting from the agency's dual commitment to enforcing the NLRA and the work-related provisions of IRCA, professionalism trumped politics. The following two case studies illustrate variations in other federal workplace agencies confronted with a similarly restrictive regulatory arena.

B. The DOL pursues policies of "deconfliction" to buffer potential conflicts between immigration enforcement and labor enforcement.

Although the broad dynamics of undocumented worker regulation in the DOL resemble those of the NLRB, there are at least two critical differences. First, the DOL is an executive agency headed by a cabinet-level secretary who serves at the pleasure of the President. As such, the agency is more susceptible to partisan politics than an independent commission such as the NLRB, which is composed of members of both parties and whose commissioners can only be fired for cause.²⁰³ The case study demonstrates this susceptibility of the DOL, and yet concludes that professional ethos nevertheless constrain politics. Thus, the case study provides a more nuanced view of bureaucratic politics the details how—not whether—politics matters in regard to enforcement of immigrants' rights. A second difference is that the *Hoffman* decision did not directly challenge the Fair Labor Standards Act (FLSA), administered by the DOL. This provides the DOL with greater leeway to exercise its discretion on behalf of immigrant workers. The case study begins by describing the DOL's regulatory arena. It then considers the public statements of DOL's political leadership in relation to the informal policy guidance and litigation positions of civil servants in the enforcement divisions of the DOL, in order to understand the interplay between politics and professionalism in the DOL's strategy to protect undocumented workers after *Hoffman*.

The post-*Hoffman* regulatory arena of the DOL is less legally complicated than that of the NLRB. Both preceding and following *Hoffman*, the DOL in its policy guidances consistently affirmed its statutory duty to protect vulnerable classes of workers.²⁰⁴ The definition of a vulnerable worker is not statutorily defined under the FLSA, but it has consistently been interpreted to include immigrants.²⁰⁵ In *Josendis v. Wall*

203. For an administrative law treatise covering differences in institutional design, see RICHARD J. PIERCE, SIDNEY A. SHAPIRO, PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* (2008).

204. DOL Fact sheet, *supra* note 56.

205. The interpretation of immigrants as being covered by the FLSA originated in *Sure-Tan*, 467 U.S. 883 (1984). See *supra* text accompanying notes 148-153.

to *Wall Residence Repairs*,²⁰⁶ for example, an immigrant construction worker filed for minimum wage, mandatory overtime, and backpay wages associated with the company's failure to comply with FLSA wage requirements; Wall to Wall declined to pay, stating that Josendis was ineligible for FLSA protections and remedies. The DOL's Office of the Solicitor filed a letter brief on behalf of the United States at the Eleventh Circuit's request, clarifying *Hoffman*'s impact on the coverage of undocumented immigrants under the FLSA.²⁰⁷ The DOL letter brief stated that FLSA minimum wage claims and overtime compensation claims remained viable because recovering unpaid wages for work already performed did not present the same perceived conflict with IRCA policies as did backpay awards for wage losses resulting from unlawful job deprivation under the NLRA. The DOL letter brief elaborated:

A suit for wages for *hours worked* under the FLSA seeks payment for work actually performed, rather than for work employees claim they *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 *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.²⁰⁸

The Eleventh Circuit affirmed the district court's summary judgment in favor of the employer on other grounds.²⁰⁹ Judges Tjoflat and Cox, who constituted the majority, did not expressly discuss the relevance of employee Josendis' immigration status, merely stating that "the limited discovery the district court afforded Josendis after the time for discovery had closed" did not constitute an abuse of discretion.²¹⁰ 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

206. *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011).

207. See Letter from Laura Moskowitz, Attn., DOL, Office of the Solicitor, to John Ley, Clerk of Court, United States Court of Appeals for the Eleventh Circuit (Aug. 26, 2010), available at <http://www.dol.gov/sol/media/briefs/josendis%28A%29-8-26-2010.pdf>.

208. *Id.* at 3-4.

209. 662 F.3d at 1292, 1298.

210. *Id.* at 1298, 1307-08.

requested, that ‘undocumented workers are entitled to recover minimum wages and overtime pay for hours worked under the FLSA’²¹¹ [as] another panel of the Eleventh Circuit recently held in an unpublished opinion, *Galdames v. N & D Inv. Corp.* . . .^{212,213}

The concern raised in *Hoffman* about awarding backpay to immigrant workers ineligible for reinstatement was not presented in the facts of *Josendis*. The DOL maintained its longstanding position, articulated in *Patel v. Quality Inn South*,²¹⁴ that the plain meaning and history of the FLSA²¹⁵ covered undocumented immigrants, and the court deferred to the Secretary’s longstanding interpretation.²¹⁶

If the legal dimensions of the DOL’s regulatory arena remain relatively straightforward, the political dimensions are potentially complicated by the agency’s structure as an executive agency. Led by a Senate-confirmed, cabinet-level Secretary who is appointed by and serves at the pleasure of the President, the agency is less insulated than the NLRB from the influence of partisan politics. Still, the continuity of the DOL’s legal positions with policy statements issued under both Republican and Democratic political leadership suggests that shifting politics alone fails to explain readily the DOL’s status-blind application of labor laws to immigrants.

Immediately after the *Hoffman* decision, 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’ right to be

211. Letter from Laura Moskowitz at 1, *supra* note 207.

212. *Josendis*, 662 F.3d at 1327 (Korman, J., dissenting) (citing *Galdames v. N & D Inv. Corp.*, 432 F. App’x 801 (11th Cir. June 23, 2011) (per curiam)). *Galdames* also followed Eleventh Circuit precedent, *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

213. 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.” 662 F.3d at 1327 (Korman, J., dissenting).

214. *See Patel*, 846 F.2d at 703-06 (taking notice of the DOL’s position and the legislative record for both IRCA and FLSA).

215. Richard Blum sets out a convincing legislative history in Richard E. Blum, *Labor Standards Enforcement and the Results 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. *Id.* While Carter’s comprehensive immigration reform bill did not pass, Congress incorporated 260 provisions into an appropriations bill in the Wage and Hour Division of the DOL “to strengthen enforcement of the Fair Labor Standards Act” including targeted investigations “into industries with high incidence of undocumented workers.” *Id.* at 1361-62 (citations omitted). The targeted enforcement became known as the Employers of Undocumented Workers Program. *Id.* at 1362. 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.

216. *See Patel*, 846 F.2d at 703.

compensated under the FLSA for work already performed.²¹⁷ 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.”²¹⁸ 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.”²¹⁹ She elaborated, “[T]he 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.”²²⁰ The overt references to consistency across administrations strongly suggest that the agency’s policies emanate from law, rather than partisan politics alone.

In keeping with these rule-bound stances, high-level attorneys in the enforcement divisions of the DOL explained the agency’s rationale for status-blind investigations of workplace violations in by referencing official agency documents and public statements.²²¹ 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” that simultaneously reaffirmed its pre-*Hoffman* legal positions and clarified the scope of the *Hoffman* decision on the FLSA.²²² In the fact sheet, the agency stated that *Hoffman* does not change the availability of payment for work already performed. It clarified that the *Hoffman* limitations on backpay for work that would have been performed but for unlawful hiring is limited to administration of the NLRA by the NLRB, not extending to administration of the FLSA by the DOL.²²³ While the fact sheet itself does not carry the force of law as sub-regulatory

217. See Letter from Laura Moskowitz, *supra* note 207.

218. Transcript, U.S. Department of State, U.S.-Mexican Labor Relations, Foreign Press Center Briefing (July 12, 2002), available at <http://2002-2009-fpc.state.gov/11831.htm>. There is some evidence that Chao’s statement with Mexico partly resulted from pressure due to pending litigation before the Interamerican Court, but this is not confirmed within the DOL.

219. Neil Munro, *Labor Secretary: U.S. to Protect Illegal Workers*, THE DAILY CALLER, September 2, 2011, available at <http://dailycaller.com/2011/08/31/labor-secretary-u-s-to-protect-illegal-workers/>. Secretary Solis was appointed by President Obama in 2009. She had previously served as a representative of the 32nd Congressional District in California from 2001-2009. Solis was the first Latina elected to the California State Senate in 1994.

220. *Id.* (emphasis added).

221. Telephone Interview with staff in Department of Labor, Wage and Hour Division (Jan. 13, 2012).

222. DOL Fact Sheet, *supra* note 56 (released under President Bush’s Secretary of Labor Elaine Chao within months of *Hoffman Plastic*, 535 U.S. 137).

223. *Id.* While the DOL Fact Sheet accurately conveys that *Hoffman* did not eliminate compensatory remedies for hours worked in the overtime and minimum wage context, it is less clear that it has staved off the effects of *Hoffman* and IRCA in the context of compensation for retaliation. *Id.* Also, the circuits are split on whether punitive damages are available. See Fair Labor Standards Act, 29 U.S.C. § 216(b) (West Supp. 2008).

guidance, it facilitates interpretations and implementation of the organic statute (the FLSA) in regulations that do have the binding force of law.²²⁴ Rather than discuss her own views of DOL obligations to undocumented workers, the senior administrator interviewed referenced the agency's written documentation.²²⁵ Other high-level officials interviewed who preferred not to be identified by their office gave similarly guarded responses to queries seeking their personal views.

The interviews with DOL officials suggested that the DOL's protections for undocumented workers are largely explained through its legal and organizational commitments. At the legal level, multiple enforcement divisions emphatically distinguished their agency's statutory mandate—ensuring maximal compliance with wage and hour laws under the FLSA—from *Hoffman's* limitations on backpay remedies for unlawful firing of undocumented workers. This minimizes the sense of conflict between the two enforcement regimes and gives the impression of wide latitude for agency discretion in policy matters. At the organizational level, the case study shows the ever-present need for federal agencies to allocate their resources toward industries employing the most vulnerable workers, who are often undocumented workers. It is not entirely accurate to say that politics does not matter, even if the organizational and professional pull of non-partisan law enforcement is strong.²²⁶ Partisan politics matters in more nuanced ways, influencing the availability of resources,²²⁷ the degree of enforcement,²²⁸ the ambitiousness of policy,²²⁹ and the level of community outreach.²³⁰

224. PIERCE ET AL., *supra* note 203.

225. Telephone Interview with staff, Department of Labor, Wage and Hour Division (Jan. 13, 2012).

226. My interviews with DOL staff reflected their increased vulnerability. Interviews required prior clearances and subjects were more guarded in their statements.

227. For precise figures and announcement of hiring of 300 new investigators under the Obama Administration, see <http://www.wageandhourlawupdate.com/tags/wage-and-hour-division/>.

228. As evidence, consider the shift in enforcement strategy from the Bush Administration (emphasizing workplace raid) to the Obama Administration (focus on criminals and vigorous exercise of prosecutorial discretion, with guidance to ask about employment issue during TIPS investigations and explicit mention in prosecutorial discretion.) That said, community advocates lauded the Bush Administration's disavowal of a workplace raid in North Carolina when DHS masqueraded as OSHA officials and then deported workers. "They got it." Telephone Interview with attorney, National Employment Law Project (June 11, 2012).

229. See *infra* text accompanying notes 241-256 (discussion of Memorandum from the Department of Justice and the Employment Standards Administration, Department of Labor, on Understanding Between the Immigration and Naturalization Services (Nov. 13, 1998)).

230. A good example is the "We Can Help" campaign under the Obama Administration. This represents an affirmative effort to publicize government services using celebrity voiceovers who promote the message that status doesn't matter. See Department of Labor video featuring Dolores Huerta, available at <http://youtu.be/d5ouQckFZYI>; Department of Labor video featuring Hilda Solis, available at http://youtu.be/l_dIWgY7Hms.

Within a legally and organizationally constrained view of politics, the DOL's regulatory activities involve noteworthy exercises of discretion. Workplace agencies—like all agencies—exercise the most basic discretion through allocation of their limited resources to achieve maximum effect.²³¹ At least anecdotally, the changing administration ushered in more departmental resources for labor enforcement.²³² These increased resources bolstered the DOL's capacity to engage in more aggressive enforcement generally. A long-time administrator in the Wage and Hour Division maintained that the DOL priorities are developed through self-initiated enforcement work, rather than through the complaints of individual workers.²³³ Choices about where to focus enforcement efforts are driven by organizational concerns such as achieving maximum impact with minimal funds.²³⁴ 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."²³⁵ Speaking within the broad context of industry changes, the administrator observed that the changes were 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."²³⁶ An independent report from the Migration Policy Institute confirms that industry changes often lead to higher violation rates.²³⁷ In addition, a "bump up" of enforcement often occurs during a recession—as people lose jobs, the fear of retaliation no longer discourages them from filing claims.²³⁸

While this does not disprove that politics matter—indeed, politics makes available increased funding levels—it underscores that pro-immigrant politics were not the motivating force and cannot singularly account for pro-immigrant actions. The Wage and Hour Division's explanations attribute stronger immigrant worker protections to effective

231. Consistent with Alison's model II and the sociologists' case studies. See Allison, *supra* note 65; sources cited *supra* note 137.

232. For descriptions of Labor Secretary Hilda Solis' initiatives since taking office, see Hilda L. Solis, WASH. POST, http://www.washingtonpost.com/politics/hilda-l-solis/glQA59lg9O_topic.html (last visited Nov. 20, 2012); Dep't of Labor, <http://www.dol.gov> (last visited Nov. 20, 2012).

233. Telephone Interview with staff, Department of Labor, Wage and Hour Division (Jan. 13, 2012).

234. *Id.*

235. *Id.*

236. *Id.*

237. DONALD M. KERWIN & KRISTEN MCCABE, LABOR STANDARDS ENFORCEMENT AND LOW-WAGE IMMIGRANTS, (Migration Policy Inst. 2011).

238. Telephone Interview, *supra* note 233.

labor enforcement that protects *all* workers, and not to a concern for immigrant workers per se or to reverence for the political leadership's changing priorities. Thus, from an organizational standpoint, protecting immigrants is a matter of agency stewardship.²³⁹

Another area where agency discretion matters is policy development. Attorneys in the current DOL headquarters divisions asserted that they follow an approach toward labor enforcement that harmonizes the purposes of the FLSA and IRCA.²⁴⁰ Yet history shows that the DOL attorneys have experienced friction between labor remedies and immigration remedies. In the years preceding *Hoffman*, the DOL drafted a Memorandum of Understanding (MOU) with DHS's predecessor, the Immigration and Naturalization Service, in 1998 that attempted to address some of the tensions inherently raised by IRCA.²⁴¹ The 1998 MOU stipulated that DOL investigators would no longer inspect employees' immigration-related documents in any investigation of a complaint alleging labor standards violations, because knowledge of a worker's undocumented status could chill individual complaints from workers fearing that a complaint could result in apprehension and deportation.²⁴² The 1998 MOU also stated that DOL investigators would no longer issue warning notices to employers found to be in violation of documentation obligations under IRCA, which blurred enforcement functions.²⁴³ These stances contradict the perceived

239. Gleeson, Status-Blind Approach, *supra* note 113.

240. Telephone Interview, *supra* note 233.

241. Memorandum of Understanding Between the Immigration and Naturalization Services, Department of Justice and the Employment Standards Administration, Department of Labor, 75 No. 47 Interpreter Releases 1711-1721 (Nov. 23, 1998) [hereinafter 1998 MOU]. 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 its ability to carry out its fundamental mission regardless of workers' immigration status," in practice the agreement turned DOL field investigators into INS enforcement agents. Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT'L MIGRATION REV. 1308, 1332 (2004). While its influence on the rescission of the 1992 MOU is contested, concerns that the 1992 MOU dampened 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.*

242. See 1998 MOU, *supra* note 240.

243. 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). CALAVITA, *supra* note 141. 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. *Id.* 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 placed priority on ensuring a generous supply of low-wage

inter-agency harmony described by the DOL staff that I interviewed; the DOL staff who I interviewed seem to sincerely perceive no conflict, but theirs is not the only interpretation available.²⁴⁴

Another example of DOL officials implementing *Hoffman's* requirements in ways sensitive to the needs of undocumented workers can be found in the DOL's memos expressing concern about employer retaliation against immigrant workers who seek to enforce their labor rights, often leading to DHS investigations following workers' legitimate complaints about workplace conditions. 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."²⁴⁵ The stated purpose of the 2011 MOU is "to ensure that respective civil worksite enforcement activities do not conflict."²⁴⁶ 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."²⁴⁷

Although similar in spirit to the 1998 MOU, the 2011 MOU is more explicit about its strategy of "deconfliction" between agency enforcement activities.²⁴⁸ For example, there is a general presumption in the MOU against ICE entering worksites to investigate immigration status once a DOL investigation into abuses of wage and hour laws has begun.²⁴⁹ This lessens the possibility that an aggrieved employer will call ICE officials to punish workers who reported them to DOL. It also lessens the possibility that a DOL investigation will be thwarted by clashing directives from ICE. For example, ICE might detail or deport key witnesses to DOL investigations prior to their testimony. This revised MOU ensures that abusive employers are not able to manipulate the investigation process to their own advantage. In instances when ICE engages in worksite

braceros, that this supply was considered integral to resolving their 'enforcement problem,' and that the DOL was perceived as their antagonist in this endeavor." *Id.* at 130.

244. See Telephone Interviews with attorney, National Employment Law Project (June 11, 2012).

245. Revised Memorandum of Understanding between the U.S. Department of Homeland Security and the U.S. Department of Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011) [hereinafter 2011 MOU], available at <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>. See also Press Release: US Labor Department to Exercise Authority to Certify Applications for U Visas (Mar. 18, 2010), available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.htm> (last visited Nov. 20, 2012).

246. 2011 MOU, *supra* note 245.

247. *Id.*

248. Lee 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." Lee, *supra* note 4 at 1121. He does not discuss the 2011 revision in depth (likely because the development is too recent) and expresses skepticism about the usefulness of U-visa certifications given that they only provide benefits at the "ex post" stage. *Id.* at 1126, 1129.

249. See 2011 MOU, *supra* note 245.

enforcement notwithstanding the general presumption against doing so,²⁵⁰ ICE agrees to provide DOL notice of their activities so that DOL can take appropriate measures to ensure the integrity of its enforcement efforts.²⁵¹

Distinct from guarding against unlawful retaliation against undocumented workers or the unjust enrichment of employers who violate the labor rights of undocumented workers without being required to issue backpay after *Hoffman*, DOL staff explained the rationale for the revised MOU in terms of the needs of labor enforcement.²⁵² According to DOL staff, ICE agreed to consider deferred action or temporary law enforcement parole for undocumented immigrant workers, to keep them available to the DOL for investigation of labor law violations.²⁵³ This type of discretionary boundary-keeping between the DOL and ICE enhances agency effectiveness and promotes the rule of law. When key witnesses in labor enforcement actions are threatened with deportation or are deported before providing critical testimony about working conditions or other employer abuses, labor investigations are effectively shut down. A DOL administrator explained that the 2011 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.”²⁵⁴

A corresponding operating instruction from ICE instructs its enforcement staff to exercise favorable discretion for workers engaged in protected activity, including union organizing and filing complaints about employment discrimination or workplace conditions.²⁵⁵ Notably, during

250. 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 concerns, or the enforcement activity is directed by the Secretary of Homeland Security, the Secretary of Labor, the Solicitor of Labor, or another DOL designee. *Id.* 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.*

251. *Id.*

252. Telephone Interview with DOL Administrator, Wage and Hour Division (Jan. 13, 2012).

253. *Id.*

254. *Id.*

255. *INS Revises Special Procedures on Enforcement Actions During Labor Disputes*, 74 No. 4 INTERPRETER RELEASES 188 (Jan. 27, 1997). Special Agent Field Manual 33.14(h) was formerly designated INS Operations Instruction 287.3a. *INS Field Manual Project to Eventually Replace Operations Instructions*, 77 No. 3 INTERPRETER RELEASES 33 (Jan. 14, 2000). 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. *Id.* 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. See, e.g., Michael J. Wishnie, *Introduction: Colloquium:*

their interviews about the 2011 MOU, DOL staff did not discuss their own feelings about DHS immigrant enforcement activities, unlawful retaliation, or the fairness of allowing undocumented immigrants to remain in the country.²⁵⁶ They merely spoke about the implications of the 2011 MOU for labor enforcement.

DOL staff consistently stated that while their actions may benefit immigrants, they are not deliberately advocating for favorable outcomes.²⁵⁷ Independent of their personal feelings about immigration, the DOL is concerned primarily with labor compliance and acts on behalf of the United States, rather than immigrant workers per se. Still, workers' rights advocates familiar with the DOL policies conceded that "much depends on the personal ethos of the political leader, which is shaped by their experience."²⁵⁸ In the past, workers' advocacy groups did not consider the DOL as a partner in securing the rights of undocumented workers.²⁵⁹ Now, however, these advocacy groups are developing detailed blueprints for working with the agency.²⁶⁰ They note that many of the people comprising DOL leadership have experience working with immigrants. For example, in the Obama administration, DOL solicitor Tricia Smith previously served as the Attorney General in New York, and Secretary Hilda Solis was previously an attorney who represented labor unions and immigrant workers. One legal advocate commented that politics mattered to the agency positions in the aggressiveness of enforcement: "Secretary Chao (under President Bush) said that DOL mission would not be affected by *Hoffman*, but there was no new U-visa protocol or MOU (as under President Obama)."

Despite the advocacy backgrounds of some of the DOL's political leadership and career staff, attorneys and advocates alike differentiate agency work that is driven by their organizational commitments from advocacy work of a more overt, political nature. While appreciative of DOL efforts, some advocates expressed dissatisfaction with certain aspects of the DOL-DHS agreement.²⁶¹ In interviews, advocates said that they

The Border Crossed Us: Current Issues in Immigrant Labor, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390 (2004); Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* 14 (2009), available at <http://digitalcommons.ilr.cornell.edu/laborunions/29/>.

256. Telephone Interview with NLRB staff in Office of General Counsel (Jan. 12, 2012); Telephone Interview with DOL Administrator, Wage and Hour Division (Jan. 13, 2012).

257. Telephone Interview with NLRB staff in Office of General Counsel (Jan. 11, 2012); Telephone Interview with DOL Administrator, Wage and Hour Division (Jan. 13, 2012).

258. Telephone Interview with Co-Director, ASISTA Immigration Assistance (June 5, 2012).

259. *Id.*

260. *Id.*

261. 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

sought more ambitious revisions to the MOU and felt the resulting MOU was comparatively modest.²⁶² One characterized the 2011 MOU as a “four corners” document with which the DOL and DHS are unlikely to comply if, for example, employers retaliated against workers’ families rather than the workers themselves.²⁶³ Another advocate expressed skepticism about the commitment to training line attorneys in MOU implementation.²⁶⁴ During a conference call among advocates, he recounted speaking with the director of a Wage and Hour regional office who said that the 2011 MOU was “above his pay grade” and that he knew nothing about it.²⁶⁵ 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.”²⁶⁶ It remains too soon to tell how vigorously the 2011 MOU will ultimately be used given its relatively recent enactment, but the immigrants’ rights advocates’ ambivalence speaks to their perceptions of the agency’s mixed motives.

In comparison to the 2011 MOU, the DOL’s protocols for certification of U-visas bespeak a more aggressive approach toward implementation. Although the DOL was the last of the three federal workplace agencies to announce that it would exercise its authority to certify U-visa petitions, it has taken the most comprehensive approach toward enforcement. In addition to appointing a national coordinator in headquarters,²⁶⁷ it hired five regional specialists²⁶⁸ to serve the field offices in its certification of U-visas. But perhaps as striking as the DOL’s commitment of resources and pursuit of structural change that strengthens the possibility for surviving change in

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. Telephone Interview with staff attorney, NELP (June 12, 2012). The difficulty that I had obtaining interviews with the DOL on the subject of the MOU suggests this advocate’s perception is accurate.

262. Telephone Interview with immigrants’ rights advocate (Jan. 23, 2010); Telephone Interview with immigrants’ rights advocates (Feb. 6, 2012); Telephone Interview with immigrants’ rights advocate (Feb. 22, 2012).

263. Telephone Interview with immigrants’ rights advocate (Jan. 23, 2012).

264. *Id.*

265. Telephone Interview with staff attorney, NELP (June 12, 2012).

266. Department of Labor U Visa Process and Protocols, Question - Answer (Apr. 29, 2011), available at <http://www.dol.gov/opa/media/press/whd/whd20110619-qa.pdf>. The same protocol explains that final authority for certification has been delegated to the Wage and Hour Division’s Regional Administrators, who are located in five cities nationwide. *Id.* These senior officials will be assisted by regional coordinators with specialized training to ensure that certification is handled “efficiently and effectively.” *Id.* This type of centralized decision-making is not uncommon for new or sensitive protocols among agencies.

267. According to the job listing, this is a career position in the DOL Wage and Hour Division. It is currently filled by Jennifer Marion, who serves as a “senior advisor.” See Wage and Hour Key Program Personnel, DEP’T OF LAB., <http://www.dol.gov/whd/whdkeyp.htm>.

268. The list of U-visa specialists is on file with the author.

political administration is that nobody at the DOL told me about the recruitment of U-visa coordinators for fear of political reprisal.²⁶⁹ (I instead learned about the recruitment plans from advocates.)

Summary. The DOL's regulatory arena is complicated for reasons of governance rather than reasons of law per se. The DOL claims that the FLSA does not conflict with IRCA as a legal matter and that *Hoffman's* ruling does not bar its workplace enforcement mission in the way it might for the NLRB.²⁷⁰ To the extent that DOL's commitments stand in tension with DHS's implementation of IRCA after *Hoffman*, however, the DOL uses an interagency MOU with DHS to buffer potential clashes.²⁷¹ The MOU promotes policies of de-confliction with ICE to maintain a respectful distance—in essence, “to leave one another alone” —within their overlapping regulation of immigrant workers.²⁷² In addition, the DOL's recent adoption of an ambitious implementation plan for U-visa certification indicates that changed political conditions influence the scope and vigor of the agency's execution of its mission in both subtle and overt ways.²⁷³ Politics matters more in an executive agency than in an independent agency, but organizational and professional values nevertheless constrain the executive agency as bureaucratic politics.

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

If the DOL and NLRB distinguished their legal obligations to undocumented workers after *Hoffman* to defend their protective stances, this third and final case study shows that the EEOC went a step further: it asserted its statutory obligations to mitigate workplace abuses damaging to immigrant workers. More specifically, the EEOC called upon its obligation under Title VII of the Civil Rights Act to eliminate discrimination on the basis of membership in several protected categories.²⁷⁴ Why is the EEOC willing and able to protect immigrant workers so vigorously? The pattern of bureaucratic politics developing through these case studies entails a

269. This approach contrasts starkly with their own approach toward the MOU and the NLRB's more ad hoc approach to U-visa certification that relies on General Counsel guidance impacting standard operating procedure in the field. It also contrasts with EEOC approach of centralizing certification authority with the five politically appointed Commissioners after many years taking a more localized approach.

270. See *supra* text accompanying notes 211-223.

271. 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. Telephone Interview with NLRB staff in Office of General Counsel (Jan. 11, 2012).

272. See 2011 MOU, *supra* notes 245-252 and accompanying text.

273. *Id.*; Lee *supra* note 4, at 1126.

274. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (2006).

complex regulatory arena, strong professional ethos, and a limited role for politics. The EEOC case study introduces some important variations that make possible unexpectedly strong immigrant worker protections. First, in terms of its regulatory arena, the EEOC's enforcement of Title VII, an antidiscrimination statute, does not squarely conflict with *Hoffman's* ruling on backpay as did the NLRB's prior stances. In addition, the impact of partisan politics and interagency clashes on EEOC decision-makers is weaker than in an executive agency such as the DOL.

This case study begins by describing the EEOC's commitment to immigrant workers in the context of its statutory charge to enforce Title VII. It then examines the roles of professionalism and politics in maintaining pro-immigrant stances across presidential administrations and in the years following *Hoffman*. The case study concludes with an accounting of the agency's protection of female farmworkers to illustrate its creative use of gender-based claims to reach allegations of sexual assault against immigrant workers.

Title VII of the Civil Rights Act created EEOC and specifies that its core mission is to eradicate employment discrimination on the basis of several protected categories, including race, sex, and national origin.²⁷⁵ Title VII does not directly provide for protection of immigrants on the basis of citizenship status,²⁷⁶ but such protection may arise in the course of investigating allegations of national origin discrimination, when a citizenship requirement is a "pretext" for national origin discrimination or part of a wider scheme of discrimination.²⁷⁷ Within its statutory mandate, individual EEOC Commissioners have championed their commitment to immigrant workers. President Clinton's EEOC Chairwoman Ida Castro²⁷⁸ wrote, "[U]nauthorized 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

275. *Id.*

276. 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., Inc.*, 414 U.S. 86, 95 (1973) ("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. Enforcement Guidance: National Origin Discrimination, 13 EEOC Compl. Man. § 13-VI (Dec. 2, 2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html#VI> (Citizenship-Related Issues).

277. Enforcement Guidance: National Origin Discrimination, 13 EEOC Compl. Man. § 13-II, available at <http://www.eeoc.gov/policy/docs/national-origin.html#II> (What is "National Origin" Discrimination?).

278. 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, U.S. Equal Employment Opportunity Commission, Ida L. Castro Resigns from Commission (Aug. 13, 2001), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-13-01.cfm>

they will be responsible for appropriate remedies (under Title VII, ADEA, ADA, and the Equal Pay Act) if they violate the civil rights laws.”²⁷⁹ Under Castro’s leadership, in 1999 the Office of Legal Counsel issued guidance permitting broad remedies for unlawful discrimination against undocumented workers, in keeping with this status-blind approach.²⁸⁰

The pre-*Hoffman* EEOC positions supporting backpay for immigrant workers are reflected in *Egbuna v. Time Life Libraries*.²⁸¹ In *Egbuna*, the EEOC opposed a district court finding that a Nigerian worker who had overstayed his visa could not demonstrate that he was a victim of discrimination after he was refused re-employment because of a sexual harassment complaint he made previously.²⁸² The district court had reasoned that, at the time he sought re-employment, Egbuna was unqualified for the job because he did not possess legal documentation authorizing him to work.²⁸³ Chair Cari Dominguez, a President Bush appointee, made similarly pro-immigrant statements in 2002: “Protecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC.”²⁸⁴

Although the Commissioners never retracted their commitment to immigrant workers in the 1997 guidance and 1998 *Egbuna* litigation, *Hoffman* complicated the EEOC’s regulatory terrain in 2002. After carefully reviewing the Supreme Court’s *Hoffman* decision, on June 28, 2002 (three months after the *Hoffman* decision), the EEOC rescinded its 1999 Guidance on “Remedies Available to Undocumented Workers Under

279. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Issues Guidance on Remedies for Undocumented Workers Under Laws Prohibiting Employment Discrimination (Oct. 26, 1999), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/10-26-99.html>. This stance continues the position of former EEOC Commissioner Paul Igasaki, who was appointed by Clinton.

280. *Id.*

281. See *Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353 (4th Cir. 1996).

282. *Id.*; see also Brief of the EEOC as Amicus Curiae at 6, *Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353 (4th Cir. 1996) (No. 95-2547), 1991 WL 17056115.

283. 95 F.3d at 353. *Egbuna* was subsequently overturned by the Fourth Circuit en banc, but the EEOC maintained that workers were entitled to remedy and persuaded the Fourth Circuit panel in the first instance. See *id.*; *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc). Notably, this line of decisions is somewhat separate from the *Hoffman* chain of events. The EEOC also engaged in non-precedential actions premised on assumptions of immigrant worker protection, such as filing for protective orders when necessary to avoid retaliation against complainants.

284. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination (Jun. 28, 2002), available at <http://eeoc.gov/eeoc/newsroom/release/6-28-02.cfm>. Cari Dominguez was sworn in as EEOC Chair in 2001, under President George W. Bush. See Press Release, U.S. Equal Employment Opportunity Commission, Cari M. Dominguez Takes Oath as EEOC Chair, available at <http://eeoc.gov/press/8-6-01.html>. She had previously served in the U.S. Department of Labor and numerous employment-related private law firms. *Id.*

Federal Employment Laws.”²⁸⁵ Although not at liberty to discuss internal deliberations in specific terms, a staff member in the Office of Legal Counsel explained that the rescission was the product of an awareness of a tough political, legal, and economic climate.²⁸⁶ Arguably, 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 EEOC awards under Title VII.²⁸⁷ But while the Supreme Court exhibited an awareness during oral argument that *Hoffman* would implicate Title VII, neither the majority nor the dissenting opinions offered the agency guidance to establish a new policy.²⁸⁸

Facing a vacuum of legal authority, the EEOC did not—and as of December 2012 still has not—substituted new guidance on remedies for undocumented workers.²⁸⁹ It instead has reaffirmed its commitment to vigorously pursue charges brought by undocumented workers and to seek relief to the extent consistent with the Supreme Court’s ruling.²⁹⁰ EEOC staff contended that “enforcing the law to protect vulnerable workers, particularly low income and immigrant workers, remains a priority for EEOC” for both organizational and pragmatic reasons.²⁹¹

That the EEOC’s stance on immigrant workers has not changed pre- or post-*Hoffman*, nor across presidential administrations, is not entirely surprising. As an independent agency, politics matters less overtly than it would in an executive agency under a cabinet-level secretary’s leadership.²⁹² The five EEOC Commissioners are politically appointed, but must be bipartisan, with a maximum of three members from the President’s

285. 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.

286. Telephone Interview with EEOC Office of Legal Counsel (Jan. 20, 2011).

287. Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 509 (2004) (describing the role of backpay in Title VII enforcement).

288. 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, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-15952002), 2001 WL 77224 (2002).

289. EEOC Rescission, *supra*, note 56. See Equal Emp’t Opportunity Comm’n, EEOC Notice No. 915.002, *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (1999) (rescinded June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc.html> (under the former guidance, an undocumented worker was presumptively entitled to back pay if the worker remained present and available for work).

290. *Id.*

291. *Id.*

292. For an administrative law treatise covering differences in institutional design, see PIERCE ET AL., *supra* note 203.

party.²⁹³ In addition, Congress substantively and procedurally circumscribes Commissioners' ability to make policy by statute, resulting in heavy use of guidance that does not itself carry the force of law.²⁹⁴ As one Regional Attorney who joined the EEOC under the Clinton Administration told me, "I've enjoyed strong leadership under the direction of both parties and consistent support for my [pro-immigrant] work."²⁹⁵ Another attorney commented that "the bipartisan structure is effective: Everyone has some kind of commitment to civil rights, even if you sometimes wish they would do more."²⁹⁶

Politics does play a role in the sense of the "small P," as one long-time Regional Attorney put it, referring to non-partisan politics. This attorney commented that "the Commissioners are influenced by the experiences and perspectives they bring to the job, most notably whether they've been in the field. People in the field have experience working with new populations [Latinos, immigrants] and new types of claims [harassment and assault], not just backpay. The world has changed."²⁹⁷ Apart from the Commissioners themselves, the top leadership also consists of the Office of General Counsel and the Office of Legal Counsel. The attorneys in the Office of General Counsel, who supervise the regional offices, are widely described as "lawyers' lawyers," because their reliance on legal precedent in litigation of cases and filing of amicus briefs in federal courts pronounces their fidelity to the law.²⁹⁸ The cases on their docket are complaint-driven, thereby limiting opportunities for affirmative decision-making or agenda-setting.²⁹⁹ The Commissioners influence the priorities of the career staff in the Office of Legal Counsel, who are responsible for formulating guidance for the resolution of individual charges in the field offices.³⁰⁰ As an Office of Legal Counsel staff person explained, "[T]here 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."³⁰¹

293. *Id.*

294. *Id.*

295. Telephone Interview with Regional Director (in San Francisco field office), EEOC (June 11, 2012).

296. Telephone Interview with Regional Attorney (in Chicago field office), EEOC (May 29, 2012).

297. *Id.*

298. Telephone Interview with Regional Director (in San Francisco field office), EEOC (June 11, 2012).

299. For general background on the EEOC operations, see agency descriptions at <http://www.eeoc.gov/eeoc/commission.cfm>.

300. *Id.*

301. Telephone Interview with EEOC Office of Legal Counsel (Jan. 20, 2012).

Politics and policy preferences further constrain the EEOC's work because much of the work is complaint-driven. Complaint-driven work "strikes a different balance between sitting around and deciding to get involved" than the work of agencies with the ability to decide proactively how to direct their resources.³⁰² Consequently, the agency does not usually initiate its own investigations and instead relies on workers to initiate complaints. In order to encourage aggrieved employees to file complaints without fear of exposing their legal status to the federal government, the EEOC adopted a status-blind approach to investigations, an approach comparable to that of the DOL and the NLRB. 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."³⁰³ 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 prosecute discrimination in a docket that is overwhelmingly complaint-driven and the workers drawing on the resources of the EEOC to prove their claims.³⁰⁴

As a corollary, the EEOC attorney explained that community engagement among immigrant workers is critical to Title VII enforcement during the charging phase.³⁰⁵ This is one of the areas in which the EEOC most distinguishes itself from the other workplace agencies. During years where Commissioners have been particularly supportive of immigrant workers, the agency engaged in considerable community outreach. The EEOC meeting minutes in the years since *Hoffman* reveal meetings of the Commissioners with a variety of advocacy organizations – including the Southern Poverty Law Center's Immigrant Justice Project and several other immigrant-focused worker groups—to discuss the need for employment

302. *Id.*

303. *Id.* This point has been made in several cases citing *Hoffman* in an antidiscrimination context; see, e.g., *Rivera v. NIBCO*, 364 F.3d 1057, 1066-70 (9th Cir. 2004); *Escobar v. Spartan*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003); *De la Rosa v. North Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002). The *NIBCO* litigation makes a particularly strong case for how status can be avoided in the context of Title VII even after *IRCA*. *NIBCO* established that *Hoffman* does not permit an 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 *Hoffman*. *NIBCO*, 364 F.3d at 1067-70. Unfortunately, this is not the case in all circuits.

304. Once a cause of action is established, career staff investigates these charges to see if there is clear evidence of discrimination constituting "good cause" to proceed. Only the charges that have been determined as presenting cause upon investigation and then get to a point where the employer won't settle become part of the pool from which the EEOC selects its litigation enforcement.

305. Telephone Interview with EEOC Office of Legal Counsel (Jan. 20, 2012).

discrimination law protections for immigrant workers.³⁰⁶ Some employment attorneys unfamiliar with immigration law revealed that EEOC attorneys took a leadership role in teaching the community advocates about immigration law and advising them on their lobbying efforts on behalf of immigrant workers.³⁰⁷ Immigrants' advocates noted the receptivity and cooperation of the agency to learning about community-based efforts to protect the immigrant workers within their constituencies.³⁰⁸ One Regional Attorney relayed that his best hire was a young attorney from a farmworker family with relatively little litigation experience but an abundance of credibility with the immigrant community.³⁰⁹ The young attorney's ability to be trusted within the farmworker community proved more critical to persuading a fearful farmworker to file her charges of sexual assault in the workplace than years of courtroom experience.³¹⁰

The characterization of a charge as being on the basis of multiple protected grounds invites further opportunities for interpretation and agency discretion and policy development. For example, the EEOC can frame a female immigrant workers' complaint of sexual assault in the workplace as a complaint on the basis of race, national origin, gender, or a combination of grounds. The framing of the complaint can impact the viability of the claim. Since Title VII does not prohibit citizenship discrimination *per se*,³¹¹ a more straightforward charge can be made on the basis of the better-defined categories of race or gender, which have more established case law

306. See, e.g., Statement of William R. Tamayo, EEOC Regional Attorney, San Francisco District Office, to Launch e-Race Initiative (Feb. 28, 2007), available at <http://www.eeoc.gov/eeoc/meetings/archive/2-28-07/tamayo.html> (last visited Nov. 21, 2012) ("The challenge for the EEOC is to ensure that all workers are protected. In California, for example, Latinos are 35% of the state population, and Asians are 12%, thereby constituting nearly 50% of the population. They are over represented in the service industry and low wage jobs and are very vulnerable, but our charges have yet to reflect those demographics and there is much work to be done."); Written Testimony of Ana Isabel Vallejo, Supervising Attorney, Florida Immigrant Advocacy Center (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/vallejo.cfm> (last visited Nov. 21, 2012); Written Testimony of Daniel Werner, Deputy Director, Immigrant Justice Project, Southern Poverty Law Center (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/werner.cfm> (last visited Nov. 21, 2012); Written Testimony of Joshua Stehlik, National Immigration Law Center (July 18, 2012), available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/stehlik.cfm> (last visited Nov. 21, 2012).

307. Telephone Interview with staff attorney, National Immigrant Women's Advocacy Project and Legal Momentum (June 4, 2012).

308. Telephone Interview with staff attorney, National Employment Law Project (June 11, 2012) (on U-visa implementation); Telephone Interview with Co-Director, Asista Immigration Assistance (June 5, 2012) (on drafting VAWA language); Telephone Interview with staff attorney, National Immigrant Women's Advocacy Project and Legal Momentum (June 4, 2012).

309. Telephone Interview with Regional Attorney (in San Francisco field office) (June 11, 2012).

310. *Id.*

311. See Enforcement Guidance: National Origin Discrimination, 13 EEOC Compl. Man. § 13-VI, *supra* note 277. 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. *Id.*

given the long history and well-documented history of workplace discrimination leading up to enactment of the 1964 Civil Rights Act.³¹² Claims brought by female immigrant workers might be brought on the basis of gender in combination with race or national origin, rather than on the basis of citizenship alone.³¹³

The EEOC investigation into sexual abuse on an egg-farm in Iowa demonstrates an instance when the EEOC creatively used its powers of implementation to maximize protections for immigrant workers within the bounds of its statutory mandate.³¹⁴ The 1980s and 1990s witnessed a growth in the number of farmworkers in the United States, and a simultaneous growth of in the number of female and immigrant workers subjected to sexual abuse on the job.³¹⁵ The EEOC attorneys involved in the Decoster Farms case claimed that they recognized the need to stay relevant to farmworkers by considering their needs—which differed from traditional cases seeking backpay remedies.³¹⁶ The agency sought ways to serve immigrants, who tended not to report crimes, and sexual harassment provided an avenue to connect the Violence Against Women Act's (VAWA) protections with workers.³¹⁷ EEOC attorney Jean Kamp explained that employers subjected their employees to sexual violence precisely because the undocumented immigrant worker was unlikely to complain, for fear of being reported to the federal government.³¹⁸

In *Decoster Farms*, female undocumented workers alleged that their employer engaged in sexual harassment, including rape, sexual abuse, and retaliation for complaining of work conditions, in violation of Title VII.³¹⁹ As EEOC Regional Attorney Bill Tamayo recounted: “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 False 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

312. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1989).

313. Telephone Interview with Regional Attorney (in San Francisco field office), EEOC (June 11, 2012); Telephone Interview with Regional Attorney (in Chicago office), EEOC (May 29, 2012).

314. EEOC v. *Quality Egg, LLC*, Civil Action No. 3:11-cv-03071-MWB; EEOC v. *Iowa AG, LLC dba DeCoster Farms*, No. 01-CV-3077 (N.D. Iowa 2001); Complaint at 3, EEOC v. *DeCoster Farms of Iowa*, Civil Action C02-3077 MWB(N.D. Iowa Sept. 26, 2002) [hereinafter *DeCoster Farms*].

315. See PHILIP MARTIN, *HARVEST OF CONFUSION: MIGRANT WORKERS IN US AGRICULTURE* (1988).

316. Telephone Interview with Regional Attorney (in Chicago office), EEOC (May 29, 2012).

317. *Id.*

318. *Id.*

319. See cases cited *supra* note 314.

threatened with physical harm, including more rapes, if they cooperated.”³²⁰ The EEOC filed papers for a preliminary injunction to stop the retaliation so that they could investigate.³²¹ Given that the allegations involved sexual harassment and sexual assault, the EEOC characterized its charges as discrimination on the basis of sex. The EEOC sought monetary damages under Title VII to compensate victims for their lost jobs; medical expenses; pain and suffering; equitable relief including, but not limited to, a permanent injunction; and “further relief as the Court deems necessary and proper in the public interest.”³²² After months of investigation and negotiations, the parties entered a consent decree and the case settled.³²³ Although portions of the agreement are sealed, in its general provisions the consent decree listed prohibitions against sexual harassment, retaliation, and hostile work environment, plus promulgation and posting of anti-harassment and anti-retaliation policies.³²⁴ In addition, the EEOC announced a \$1.525 million settlement.³²⁵

Decoster Farms led to one of the earliest successful petitions for a U-visa nonimmigrant classification under the VAWA’s Battered Immigrant Women Protection.³²⁶ A parallel investigation by the Iowa Attorney General and the DOJ accompanied the EEOC civil lawsuit and demonstrated that the workers had suffered workplace abuses that qualified for temporary protected status.³²⁷ On the advice of community advocates, the EEOC relied on these tandem criminal investigations to satisfy requirements for a U-visa, which offered not only temporary protected status but also work authorization and a path toward legalization.³²⁸ The EEOC filed U-visa applications on behalf of the immigrant workers with U.S. Citizenship and Immigration Services (USCIS) using an extremely

320. William R. Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F. L. REV. 253, 263 (2009). More history of the U-visa and the EEOC is contained in Orloff et al., *infra* note 58; see also Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN’S L.J. 139 (2004).

321. Tamayo, *supra* note 320, at 263..

322. Complaint, *supra* note 322, at 4.

323. Press Release, EEOC Newsroom, EEOC and Decoster Farms Settle Complaint for \$1,525,000 (Sept. 30, 2002), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-30-02-b.cfm> (last visited Nov. 21, 2012).

324. Consent Decree for EEOC v. Decoster Farms, Civil Action No. C02-3077MWB (N.D. Iowa Oct. 3, 2002). Notice that the settlement came in 2002, the same year as *Hoffman* and during the Bush Administration’s EEOC.

325. *Id.*

326. Press Release, *supra* note 323; Phone Interview with EEOC Office of General Counsel (4/6/2011).

327. Dennis McBride, EEOC Lead attorney (Milwaukee) met with the Assistant United States Attorney and State Attorney General for the parallel litigation in *DeCoster Farms*. Telephone interview with Regional Attorney (in San Francisco field office), EEOC (June 11, 2012).

328. Telephone Interview with EEOC attorneys in San Francisco and Chicago field offices (May 29, 2012).

informal, ad hoc procedure.³²⁹ The attorneys involved recall “making it up as we went along” when confronted with the forms to accompany the U-visa petition.³³⁰ Nevertheless, the government cooperated and granted the U-visa.³³¹

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.³³² Defying agency boundaries, they also worked extensively with the other workplace agencies to develop similar procedures.³³³ The DHS released U-visa guidelines in September 2007 that enumerated certifying agencies.³³⁴ Each agency would develop its own protocol for certifying petitions to the USCIS.³³⁵ Within the EEOC, the protocol 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 Chair.³³⁶ Although some claim that these changes have somewhat blunted the availability of U-visas, others remark that the centralized process and uniform standards help in regions less familiar with farmworker claims and those that lack attorneys experienced with the U-visa petition process.³³⁷

329. *Id.*

330. *Id.*

331. *Id.*

332. Memorandum from EEOC Chair Naomi Earp to District Directors on EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/U%20VISA_EEOC%20Certification%20Memo_7.3.08.pdf (last visited Nov. 21, 2012).

333. *Id.*

334. On September 27, 2007, the U.S. Citizenship and Immigration Services published an interim rule, “Alien Victims of Certain Qualifying Criminal Activity,” implementing the U nonimmigrant status created by VAWA 2000. 8 C.F.R. § 214.14 (2009). Subsection (g), “Duration of U nonimmigrant status,” provides that U nonimmigrant status may be approved for a period not to exceed four years in the aggregate. 8 C.F.R. § 214.14(g) (2009). USCIS will grant the derivative the extra time needed to make his or her period in the United States equal four full years. On December 12, 2008, USCIS published an interim rule, “Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status,” implementing the adjustment of status provisions for U nonimmigrants. This rule became effective on January 12, 2009. 8 C.F.R. § 245.24 (2009) (“Adjustment of aliens in U nonimmigrant status”).

335. *Id.*

336. The EEOC certification protocol enacted July 3, 2008 was the first among the federal workplace agencies. Memorandum from EEOC Chair Naomi Earp, *supra* note 332; EEOC certification protocol on file with author.

337. Critics have long noted that the U-visa is only available when there is an ongoing worksite investigation. Specifically, the critique is that the certification requirement has grown burdensome since the DHS’ 2007 U-Visa regulations. *See* Orloff et al. *supra* note 58, at 640 (“This complex, multilayered, daunting process is having the effect of reducing EEOC’s issuance of U-visa certifications.”). Others claim that the U-visa has become a wedge issue in the immigrant advocacy community because, especially in the context of family violence (from which the U-visa emanates), many of the accused abusers are themselves immigrants.

After years in the making, the prominence of the U-visas continues to rise. 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 within the EEOC's jurisdiction.³³⁸ Advocates have convened similar meetings to publicize and encourage implementation of the EEOC U-visa certification protocols and to combat Congress' attempts to limit U-visa availability during VAWA reauthorization.³³⁹ The visas have become the "remedy of choice for immigrant survivors of domestic and other forms of violence, and the lawyers who represent them."³⁴⁰ It is an immigration remedy that carries a much broader waiver than under VAWA, since it can lead to a self-petition for adjustment of status that can be used to bring over immediate relatives. "[M]any advocates consider the U to be the visa that keeps on giving."³⁴¹ Although it is not without problems or controversy, the U-visa enables agencies to provide a valuable remedy to immigrants after *Hoffman* limited available workplace remedies.

Summary. The EEOC case study confirms the bureaucratic politics thesis developed in the DOL and NLRB case studies and also emphasizes two distinctive features of the EEOC's policies toward undocumented workers: its engagement with immigrant communities and its creative use of guidance to promote policy positions not obviously required by Title VII. The EEOC deploys its statutory mandate on behalf of immigrant workers aggressively, by invoking the ethos of nondiscrimination that governs its enforcement activities as justification for protecting workers without regard to status. This approach is grounded in Title VII and the EEOC's close engagement with farmworker communities experiencing novel forms of discrimination (e.g. sexual harassment) and seeking nontraditional remedies such as the U-visa. The agency's long-standing commitment to immigrant workers—pre- and post-*Hoffman*—paved the way for the EEOC's ingenious strategies of joining citizenship-based claims with sex-based claims to petition successfully for U-visas that provide meaningful assistance to immigrant workers.

338. See Written Testimony of Daniel Werner, Deputy Director, Immigrant Justice Project, Southern Poverty Law Center (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/werner.cfm> (last visited Nov. 21, 2012); Written Testimony of Ana Isabel Vallejo, Supervising Attorney, Florida Immigrant Advocacy Center (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/vallejo.cfm> (last visited Nov. 21, 2012).

339. 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. See, e.g., Nat'l Emp. Law Project, *The U-Visa*, *supra* note 58.

340. Telephone Interview with staff attorney, NELP (June 12, 2012).

341. *Id.*

IV. VARIETIES OF REGULATORY RESPONSE

A. *Theme and Variations*

These case studies illustrate the regulatory responses of agencies within the interstices of law and politics using a theme and variations approach. Although they vary in their particulars, each case study illustrates as its theme the core dynamics of bureaucratic politics that improve the lives of immigrant workers through policy guidance, despite challenging legal precedent. The common explanation emerging from the case studies comports with Miles' Law: 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. The disaggregated components of Miles' Law,³⁴² when posed as a policy-making process, include: (1) a complex regulatory arena, with sufficient legal ambiguity to invite (or at least permit) multiple interpretations *and* potentially conflicting agency goals for implementation; (2) an individual commitment to professional ethos that includes organizational mandates, a fidelity to legal norms, and role identification; and (3) a sufficient openness in the political environment to permit professionalism to penetrate partisan politics.

As for variations, more study is required to transform these components of Miles' Law into variables that measurably sway bureaucratic discretion toward or away from protecting immigrant workers. The varying regulatory responses developed in these case studies suggest as salient factors:

- *The relationship between the legal constraints on an agency and the agency's development of an immigrant-friendly response.* The tighter the legal constraint on an agency, the narrower the opening for policy innovation; the looser the constraint, the greater possibility for such innovation. The NLRB continues to seek remedies for immigrant workers in the narrow openings available after *Hoffman*, but it is significantly constrained by recognition of its duty to obey a law that directly contravened an earlier Board ruling. Consequently, the *Mezonos* decision flows from *Hoffman*'s narrow reading of workers' rights.³⁴³ In contrast, the EEOC offensively deploys Title VII's mandate to eradicate employment discrimination for protected classes of workers, to forestall workplace abuse on the grounds of sexual assault—a legal ground

342. See Miles, *supra* note 65.

343. The *Flaum* memo's assertion that baseless status inquiries can be considered ULPs could undo the grip of *Hoffman*, but it is raised in dicta and its effect on worker remedies is only speculative. See *Flaum*, *supra* note 187.

not contemplated by *Hoffman* that leaves a wide field for interpretation and innovation.

- *The complexity of the regulatory arena.* The complexity of the shared regulatory space between workplace agencies and immigration enforcement agencies and, specifically, how taut the tension is between their organizational goals of enforcing labor laws and immigration laws influences the latitude for policy innovation by the agencies. For example, given its long history of clashing with immigration enforcement, the DOL pursued policies of “deconfliction” with DHS to buffer potential conflicts between immigration enforcement and labor enforcement priorities, such as addressing retaliation and intimidation through DHS calls. The space created by this buffer facilitates the DOL’s ability to adopt practices and policies helpful to immigrant workers.
- *The extent of the politics shield to professional norms.* This dynamic is more subtle in the case studies provided, given that both the Republican and Democratic administrations in place since *Hoffman* in 2002 were relatively receptive to immigrant workers. However, the DOL’s greater vulnerability to changing political leadership as a result of institutional design—the DOL is headed by a single, cabinet-level secretary appointed by the President—unsurprisingly demonstrates larger policy swings on U-visa implementation. The DOL was the last to exercise its authority to certify, and yet the most wide-reaching apparatus for doing so. It also offered more cautious justifications than the independent agencies led by bipartisan commissions, suggesting deference of civil servants to political appointees in headquarters.

Miles’ Law is not a surefire formula for success, however. This Article argues that federal workplace agencies can *sometimes* help immigrants. It does not argue that workplace agencies always, or even usually, will engage in regulatory resistance. Because the research design is not well-suited to explain how commonly bureaucratic efforts will benefit immigrant workers, or to what extent, readers may reasonably inquire whether the findings extend to agencies regulating immigrants in other policy arenas. Unfortunately, the small sample of federal workplace agencies responding to immigrants makes answering this question difficult. Moreover, while variation exists across agencies, no discernible negative case illustrates an agency that has declined to take such action.³⁴⁴ Thus, while further research is needed to define the scope and persistence of the bureaucratic incorporation theory, viable case studies are hard to come by.

344. In the course of presenting this article to fellow immigration scholars, some have recommended including a case study of DHS and especially ICE. I have declined to do so because the law enforcement mission of the DHS differs so radically from the workplace agencies that I am comparing with one another, even if it also experiences mission conflict in some instances.

B. Future Research

The seeds of further study are planted in these preliminary case studies. Three studies are proposed: (1) U-visa implementation in federal workplace agencies; (2) state-level regulatory responses to *Hoffman*; and (3) exercises of discretion in the presence of executive orders.

First, the existing case studies indicate helpful variation in the extent of U-visa implementation across workplace agencies.³⁴⁵ Further attention is needed to the development of protocols and training that implement regulatory policies within each agency. In the field offices of the three federal agencies under study, interviews could be conducted with civil servants and line attorneys more directly involved in enforcement, in particular the five newly-selected U-visa Regional Coordinators in the Department of Labor who work in conjunction with a national-level specialist in the DOL headquarters. By moving closer to the ground to inquire about the implementation of policies from above, the study would move more directly into conversation with the literature being undertaken by social scientists on street-level bureaucrats. Methodological benefits of this expansion are that a broader, more representative sample of interviews could be drawn and that state and local variations could be taken into account. A related expansion might include interviews with prosecutors and other U-visa certifying officials. These officials have longstanding authority in this area and, presumably, a wider variety of practices given their number and geographical spread.

Second, study of state-level workplace policies would yield a greater variety of responses to *Hoffman*, including positive responses that reinforce constraints on remedies for undocumented workers, constituting negative cases in the parlance of social science research design.³⁴⁶ Preliminary research into state policies suggests that state-level responses to *Hoffman* have been mixed in approach and result. The greatest amount of activity has taken place in the courts, as employers seek to take advantage of *Hoffman* to shield themselves from the penalties associated with violating state employment laws.³⁴⁷ Only two states, California³⁴⁸ and Washington,³⁴⁹

345. For a general explanation of case study methodology and the need for variation in case selection, see John Gerring, *Case-Selection for Case Study Analysis: Qualitative and Quantitative Techniques*, in OXFORD HANDBOOK OF POLITICAL METHODOLOGY (Henry E. Brady, David Collier & Janet M. Box-Steffensmeier eds., 2008).

346. *Id.*

347. Corollary state litigation arose on wage loss (another form of monetary compensation) in California.

348. CA LAB. COMMISSIONER BULL., Volume 2, Issue 1 (2002), available at http://www.dir.ca.gov/dlse/SG_labor_Spring02_comp8.pdf (last visited Nov. 12, 2012).

349. Letter from Susan Jordan, Executive Director, Washington State Human Rights Commission, to Antonio Ginatta, Director, Washington State Commission on Hispanic Affairs (Oct. 7, 2002) (on file with NELP).

have undertaken regulatory guidance to codify or amend *Hoffman* as it pertains to backpay remedies under state employment and labor law. In California, these regulatory guidances subsequently gave rise to state legislative reform.³⁵⁰ State-level regulatory actions directly parallel to the federal workplace agencies remain scarce, even if the dynamics identified at the federal level exist in those instances.³⁵¹ Additionally, the long-standing, pro-immigrant political climate in the states that have enacted these regulation and legislation³⁵² limits the possibility of generalizing about insulation from politics in a useful way.³⁵³

Other than monetary remedies, two state agencies have adopted equitable remedies along the lines of the U-visa: California's Department of Fair Employment and Housing and New York's Department of Labor.³⁵⁴ The California policy enumerates the qualifying criminal activities, a subset of the more severe federal grounds. California also specifies that the state's Department of Fair Employment and Housing must conduct an ongoing investigation into a Fair Employment and Housing Act or Ralph Act claim, meaning that California's law contains a more stringent standard than the comparable federal regulations on U-visas, which do not require ongoing investigation of qualifying criminal activities.³⁵⁵ The New York Department of Labor is comparatively more generous: it covers all of the qualifying criminal activities in the federal statute and requires only that the investigating agency have jurisdiction over the claim. For the DOL, this means that the petitioner must allege a New York State labor law violation as well as the qualifying activity.³⁵⁶ Other state legislatures are considering more U-visa policies, but none have enacted any at the time of publication.³⁵⁷

In sum, these snapshots of regulatory action taken to strengthen the rights of immigrant workers in several states suggests similar bureaucratic behaviors as found in federal workplace agencies: pro-immigrant regulatory

350. See *Undocumented Worker Rights*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS (May 31, 2001), available at www.dir.ca.gov/qaundoc.html (last visited Nov. 21, 2012); Cal. Civ. Code § 3339 (2002); Cal. Gov't Code § 7285 (2002); Cal. Health & Safety Codes §§ 24000-26204 (2002); Cal. Lab. Code § 1171.5 (2002).

351. Rebecca Smith, Amy Sugimori, Ana Avedaño & Marielena Hincapié, *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB*, NATIONAL EMPLOYMENT LAW PROJECT, available at http://nelp.3cdn.net/f4626d080903865d3e_q7m6bn3qp.pdf (last visited Nov. 21, 2012); Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 610 (2004).

352. It is worth noting, however, that California led the way on several anti-immigrant initiatives such as Proposition 187, which limited eligibility of undocumented immigrants for public benefits.

353. See GLEESON, *supra*, note 119.

354. See Nat'l Emp. Law Project, *The U-Visa*, *supra* note 58.

355. *Id.*

356. *Id.*

357. Telephone Interview with staff attorney, NELP (June 12, 2012).

interpretations in wage and hour law and remedies, some policy innovation to develop alternatives to monetary remedies (including the U-visa taking hold of federal workplace agencies), and strengthening protections against national origin discrimination on the basis of citizenship and language.³⁵⁸

Third, more attention needs to be paid to the role of the executive in shaping the complex regulatory terrain within which agencies exercise discretion. The Obama administration's replacement of an enforcement strategy targeting worksites for immigration enforcement with, instead, prosecutorial discretion that de-prioritizes non-criminal immigrants and permits the possibility of administrative closure and removal of a low priority cases from an immigration court's docket, could be a fruitful subject for further study of agency-level discretion.³⁵⁹ Preliminary results of the prosecutorial discretion program for immigrant workers in detention and not otherwise charged with crimes or security violations are promising.³⁶⁰ However, the prosecutorial discretion program began as a pilot in only two moderately-sized cities, and systematic studies of the case closure rates as it has spread to larger cities have only recently begun to trickle out.³⁶¹

358. The availability of worker's compensation to immigrant workers provides fertile ground for studying variation in state responses to *Hoffman* given that all fifty states have some type of worker's compensation policy. Because there is no direct federal analogue to worker's compensation (for which workers become eligible following injury), and because the state-level responses have mostly been legislative, it is not included in this article. However, a growing literature documents the trends in worker's compensation laws. See Rebecca Smith, *Immigrant Workers and Workers' Compensation*, 55 AM. J. INDUS. MED. 537 (2012); NAT'L EMP. LAW PROJECT, UNINTENDED CONSEQUENCES: LIMITING WORKERS' COMPENSATION BENEFITS FOR UNDOCUMENTED WORKERS EXPOSES WORKERS TO GREATER RISKS OF INJURY, BUSINESS TO GREATER COSTS (Jan. 2011), available at http://nelp.3cdn.net/f4626d080903865d3e_q7m6bn3qp.pdf (last visited Nov. 21, 2012); Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709 (2004); Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 N.Y.U. REV. L. & SOC. CHANGE 299 (2006); Katrina C. Gonzales, *Undocumented Immigrants and Workers' Compensation: Rejecting Federal Preemption of the California Workers' Compensation Act*, 41 U.C. DAVIS L. REV. 2001 (2008). Thanks also to Shannon Gleeson for sharing a compilation of state workers' compensation laws (on file with author).

359. Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html>.

360. A 2011 DHS review of virtually all deportation cases before the immigration courts in Baltimore and Denver to identify appropriate cases for prosecutorial discretion led to relief for 1 in 6 or 16% of cases. Julia Preston, *In Deportation Policy Test, 1 in 6 Offered Reprieve*, N.Y. TIMES (Jan. 19, 2012), <http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html>. Reports from the Transactional Records Access Clearinghouse (TRAC) show that new filings seeking deportation orders for non-criminal aliens are also down. Transactional Records Access Clearinghouse, Report: New Data Tracking ICE Prosecutorial Discretion, Feb. 13, 2012), available at <http://trac.syr.edu>. The review of pending immigration removal cases is being extended to seven more cities in 2012: Detroit, New Orleans, Orlando, Seattle, New York, San Francisco, and Los Angeles. *EOIR Statement Regarding Second Stage of Case-by-Case Review Pursuant to DHS' Prosecutorial Discretion Initiative*, DEP'T OF JUST., available at: <http://www.justice.gov/eoir/press/2012/EOIRProsecutorialDiscretion04032012.htm>.

³⁶¹ According to figures obtained from the *Los Angeles Times* on July 30, 2012, DHS attorneys had reviewed the files of nearly 360,000 cases and identified 23,000, or 6.4%, as provisionally eligible for administrative closure. These numbers suggest that as the case review has progressed, the share of cases

Workers are explicitly contemplated in the DHS' Morton memos providing for prosecutorial discretion.³⁶² Ostensibly, clarifying that undocumented workers who are otherwise not charged with serious crimes deserve prosecutorial discretion indicates the Obama administration's vital recognition of worker rights, whatever the motivation. However, immigrant advocates note 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."³⁶³ 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 relief is available once they are already in the process.³⁶⁴ Even more attention will be given to the phenomenon of prosecutorial discretion as it pertains to the White House's executive order providing deferred action for childhood arrivals (mainly, undocumented youth who became eligible for administrative relief from deportation orders in lieu of a federal DREAM Act in August 2012)³⁶⁵ and to White House reconsideration of 57 or so 287(g) federal-local law enforcement partnerships that deputize trained local police officers to exercise federal immigration authority and under review by the administration.³⁶⁶

found eligible for administrative closure has grown smaller, but the reasons for this trend are unclear. Ben Winograd, ICE Numbers on Prosecutorial Discretion Keep Sliding Downward (July 30, 2012), available at <http://immigrationimpact.com/2012/07/30/ice-numbers-on-prosecutorial-discretion-sliding-downward/>.

362. Memorandum of John Morton, Director of U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

363. Telephone Interview with immigrants' rights advocate (Jan. 23, 2012).

364. *Id.*; see also Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion*, IMMIGRATION POLICY CTR. (2011), available at <http://immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010).

365. President Obama's executive order is implemented through procedures set forth by U.S. Secretary of Homeland Security Janet Napolitano in a memo to DHS branches, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). The U.S. Citizenship and Immigration Services, the responsible agency, began accepting applications on August 15, 2012 and reports that from August 15, 2012 to December 13, 2012 a total of 355,889 requests had been accepted for processing. Of those cases, 102,965 requests had been approved, and no requests had been denied. Updated statistics are kept by the USCIS and are available at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/A11%20Form%20Types/DACA/DACA%20MonthlyDEC%20Report%20PDF.pdf>.

366. The 287(g) program, which was written into immigration law in 1996, allows police 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. However, the

CONCLUSION: WHERE YOU STAND DEPENDS ON WHERE YOU SIT

This Article argues that regulatory agencies resist restrictive legal and political environments hostile to immigrants' rights when doing so fulfills their organizational goals and satisfies their professional ethos. Although bureaucratic motivations are not entirely devoid of politics, the influence of political leadership, partisan politics, and even personal policy preferences are significantly constrained. Interviews with high-level officials and agency staff in three federal workplace agencies revealed that bureaucrats emphasize the organizational mission of workplace enforcement agencies to protect *all* workers as a means to the end of protecting immigrant workers. The apparent tension posed by the strategy of immigration enforcement through worksite enforcement was seen to facilitate labor enforcement, rather than to conflict with it, insofar as worksite enforcement eliminates competitive advantages to employers hiring undocumented workers. Politics certainly played a role in agency actions, but the way it influenced agency actions was mostly indirect – it was filtered by the professional ethos of the civil servants and career attorneys implementing regulatory policy and organizational objectives such as resource allocation, efficiency, and effectiveness. These findings held across all three federal workplace agencies.

The implications for legal scholars, especially immigration law and administrative law scholars, are important. For administrative law scholars, this Article advances classic debates about bureaucratic discretion by applying bureaucratic incorporation theory to original empirical research demonstrating how and why workplace agencies use policy guidance to resist contractions in immigrant workers' rights. The findings largely comport with bureaucratic theory and administrative law scholarship. As others have noted, for better or worse, agencies do not engage in a

terrain is changing after *Arizona v. United States* (2012) and a coalition of more than one hundred advocacy groups and the Congressional Hispanic, Black, Asian American, and Progressive Caucuses petitioning the White House for follow-through in December 2012. *See e.g.* Letter to DHS Secretary Janet Napolitano and ICE Director John Morton titled End the 287(g) Immigration Enforcement Program (December 11, 2012), *available at* http://www.aclu.org/files/assets/dec_2012_terminate_287g_sign-on_final_sent.pdf; Letter from Representative Lucille Roybal-Allard to DHS Secretary Janet Napolitano (December 13, 2012), *available at* <http://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=315283>. On December 21, 2012, the Obama administration announced that it would not renew 287(g) agreements with local law enforcement and would instead rely on Secure Communities to focus on enforcement priorities. News Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources (Dec. 21, 2012), <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm>. For scholarly treatments, groundbreaking research into the effects of these federal-local enforcement programs is being conducted by Monica Varsanyi, Marie Provine, Scott Decker, and Paul Lewis is being conducted under the NSF project title "The Police and Immigration: Understanding Local Law Enforcement Policies And Practices Across The United States."

straightforward execution of statutory duties; they exercise discretion in issuing guidance by reconciling their professional ethos with fidelity to overlapping, and sometimes competing, laws.³⁶⁷ While politics is inevitably involved, positive outcomes for immigrant workers are largely incidental to politics—the product of independent forces such as organizational imperatives and professional ethics. In unsettled and rapidly-changing legal terrain—which characterizes immigration law generally and the immigration law post-*Hoffman* specifically—these advisory opinions impact the construction of undocumented workers' rights.

Administrative law scholars can and do debate whether guidance appropriately drives agency discretion. Some scholars call for administrative oversight to promote transparency and to constrain undue agency autonomy.³⁶⁸ an example of this form of oversight is the Office of Management Budget's "Good Guidance Practices,"³⁶⁹ which urges agencies to hold comment periods on proposed guidance for significant documents and to post guidance on their websites. Other scholars call for judicial review as a formal check on a highly informal area of governance. Administrative law scholar Cynthia Farina, for example, notes that is tricky to obtain judicial review and laments an "unfortunate" opinion by Judge Harry Edwards on the U.S. Circuit Court of Appeals, District of Columbia taking the position that guidance is per se unreviewable.³⁷⁰ In contrast, immigration law professor David Martin³⁷¹ opines that getting sub-regulatory guidance judicially reviewed will "inevitably reduce transparency by discouraging the promulgation and publication of such guidance—a net loss to good governance."³⁷² This Article does not definitively settle the wisdom of proliferating agency guidance. It merely

367. See e.g. William N. Eskridge, Jr. & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 YALE L. J. 2623 (2006).

368. See e.g. Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 301 (1991); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State* (2008) (unpublished manuscript), available at http://works.bepress.com/jessica_mantel/2/.

369. Memorandum from Rob Portman to Heads of Executive Departments and Agencies, Issuance of OMB's "Final Bulletin for Agency Good Guidance Practices" (Jan. 18, 2007), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf> (last visited Nov. 21, 2012).

370. E-mail from Cynthia Farina, Professor, Cornell Law School (Feb. 16, 2012).

371. David Martin is a professor of immigration law at the University of Virginia Law School and former General Counsel for the INS.

372. E-mail from David Martin, Professor, University of Virginia Law School (Feb. 16, 2012). Martin continues: "From my perspective as a former government lawyer, [guidance] is helpful to front-line officers in their decision-making and it assists middle and upper level managers who are working to assure both consistency in outcomes and the exercise of discretion in ways that follow the guidance of politically responsible top executives, rather than the random conceptions of good policy held by particular adjudicators . . . or outlier or rogue officers who stay within the hard legal limits set by statute and regulation but regularly push the boundaries."

hypothesizes that law and professional ethos doubly constrain the exercise of discretion. These institutional dynamics do not resemble the runaway bureaucrat presupposed and feared in much scholarship on administrative agencies.

With regard to the distinctive place of law in the bureaucratic construction of undocumented workers' rights, this Article recognizes that agencies negotiate competing, if not contradictory, impulses from immigration law and employment law after *Hoffman*.³⁷³ Within this fluid conception of law as a multilayered construct, the Article claims that regulatory responses—manifested in policy guidance—derive from an agency culture marked by principled professional commitments, not solely from uncontested, “prescriptive rules that courts and legislatures send out.”³⁷⁴ These agency interpretations may be subsequently ratified by courts and crystallized by Congress, either formally under doctrines of deference, or more informally by allowing agency preferences to set the substantive tone for interpretation and implementation.³⁷⁵ The contradictory realities of workplace regulation give rise to an ambivalent bureaucratic culture that expresses itself in the guidance effectuated to help agencies do their work on the ground. This revelation demonstrates for legal scholars—particularly immigration law scholars—that studying courts and formal law as a way to understand the development of rights merely scratches the surface. To fully understand the development of rights, it is important to penetrate the institutions, broadly defined to include agencies, that produce rights.

This Article models a new style of inquiry into immigrants' rights that draws on the insights of bureaucracy scholars in both the social sciences and legal academy, and it is informed by an appropriately nuanced conception of immigration law that recognizes the central place of guidance in negotiating a contested legal terrain. Guidance may only be only one data point—or a few data points, if there are structured comparisons of multiple case studies—but placed alongside interviews and other subjective indicators guidance can still be usefully revealing.

373. See Part IB.

374. Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 LAW & SOC'Y REV. 167, 168 (2012) (cataloguing different notions of law in distinct literatures examining the common question of law and social change).

375. An alternative interpretation of these case studies is that the real action resides in what public choice theorists and legal skeptics already know: agencies cannot protect workers without protecting all workers, including the undocumented, in the presence of de facto policies of tolerating large numbers of undocumented workers. It is in their self-interest to protect immigrant workers. For example, the United States Court of Appeals for the District of Columbia Circuit utilized this reasoning in *Agri Processor v. NLRB*, a case reviewing an NLRB order to an employer to bargain collectively with employees' union representatives after employees, including undocumented aliens, voted to unionize. *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), cert. denied, 128 S. Ct. 594 (2008).

This methodological improvement has a normative prescription for immigration scholarship: immigration scholars should probe the complex motivations of bureaucrats, elusive as they may seem, in fashioning their policy prescriptions. By taking seriously Miles' Law,³⁷⁶ immigration scholars can turn their attention toward the factors—variables, loosely-put—that elicit regulatory responsiveness toward their desired objectives. The self-perceptions of lawyers and civil servants within workplace agencies shape their ultimate actions. Scholars should speak to the administrators of immigration law, in addition to courts and Congress. This shift in emphasis may be more fruitful than making normative arguments that protecting immigrants is a worthy end unto itself, especially in the presence of ongoing ambivalence toward undocumented workers.

Finally, in the factual particulars, this Article suggests that clashes between courts, Congress, and agencies about the meaning of *Hoffman* can facilitate advancement of, or at least curtail the retreat of, immigrants' rights when the law leaves space for agency discretion, thus allowing law and politics to intertwine.³⁷⁷ These findings challenge the widely held assumption that meaningful immigration reform can only happen when a constellation of political stars align or when laws bar agency discretion to depart from strongly pro-immigrant outcomes.³⁷⁸ As political scientist Robert Lieberman described in the context of expanding worker rights under civil rights laws, when change occurs it "arises out of friction among mismatched institutions and ideas."³⁷⁹ There is the prospect of discretion favorable to immigrant workers when dealing with law enforcement agencies populated by civil servants anchored by a fidelity to the rule of law and professionalism, even amidst a regulatory environment hostile to immigrants' rights.³⁸⁰

376. See text accompanying note 65.

377. Public choice theorists and interest group theorists contend that political incentives matter most in the production of legal justifications for agency behavior, just as much as in the assertion of raw political power. For example, interest group theory and public choice theory would predict pendulum swings of political power or capture of regulatory agencies by entities such as employers. See *supra* text accompanying note 89; see also J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2288 (2005) (discussing implications of lobbying by lateral agencies to ensure agency accountability to secondary missions for models of agency behavior).

378. Lee, *supra* note 4, notes that paucity of empirical research to support normative arguments about the effectiveness of immigration enforcement. He hesitates before drawing inferences from a fifty-year old study by Kitty Calavita on the INS' implementation of the Bracero program to conclude that DHS' culture is antagonistic to immigrants' rights and that the Department of Labor is unable to overcome the anti-immigrant bias. Lee, *supra* note 4, at 1118 n.111; CALAVITA, *supra* note 139.

379. Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697 (2002), available at journals.cambridge.org/article_S0003055402000394 (last visited Nov. 21, 2012).

380. Others have pointed out that the converse is once again true: an agency with an anti-immigrant or pro-immigration enforcement culture might undermine existing legal protections. Examples might include the reports that some DHS officials have resisted presidential directives to

APPENDIX

Table 1. Federal Agencies Regulating Immigrant Workers

Case Law	DOL <i>Hoffman</i> <i>Patel</i> <i>Josendis</i>	EEOC <i>Hoffman</i> <i>Egbuna</i>	NLRB <i>Hoffman</i> <i>Sure-Tan</i>
Statutes	FLSA	Title VII	NLRA
Regulatory Response	2002 Fact Sheet 2011 MOU	Rescinded 1999 Backpay Guidelines	NLRB Order 2002 GC memo 2011 GC memo <i>Mezonos</i> <i>Flaum</i> and GC memo
Remedies Available	Back pay U-visa <i>Buffering</i>	No back pay U-visa <i>Mitigating</i>	No back pay U-visa <i>Reconfiguring</i>

engage in prosecutorial discretion rather than across-the-board removal of low priority immigrants in detention. Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 7, 2012, at A15. My contention is that this counter-example actually furnishes support for my argument about the relationship between law, politics, and bureaucracy. In the hypothetical case, the organizational mission of law enforcement and legal compliance is focused on administration of IRCA and the civil servants confronted with apparent conflicts between changed directives from their political leadership prioritize their professional commitment—to the rule of law (in this case IRCA)—rather than the new orders.