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Redefining the Rights of Undocumented Workers

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Abstract
Should a nation extend legal rights to those who enter the country illegally? The Supreme Court recently addressed this question when it held that unauthorized immigrants who are fired illegally for unionizing cannot recover monetary remedies. This has led to a significant decline in employment protections for unauthorized immigrants beyond the unionized sector. For example, some courts now question whether unauthorized immigrants can receive full remedies for sexual harassment, workplace discrimination, or on-the-job injuries.

Scholars have criticized these losses but have yet to formulate a coherent framework for evaluating the employment rights of unauthorized immigrants. This article does so by distilling and applying several core principles at issue when employment laws conflict with immigration laws. I begin by explaining how the text and purpose of selected immigration and employment statutes show that Congress never intended to restrict unauthorized immigrants' employment rights. Remedial restrictions not only harm the workplace protections at issue, they fail to discourage illegal immigration. Thus, neither legislative intent nor national immigration goals justify limiting the workplace remedies available to unauthorized immigrants.

Although the future rights of unauthorized workers will turn partly on the issues of statutory purpose and immigration policy discussed in the early sections of the article, equally important are the consequences of diminished rights. Accordingly, the article concludes by explaining why restricting workplace protections based on status harms citizens as well as immigrants. Cunningham-Parmeter contends that employment protections are "rights of partial inclusion" that reflect a distinctive sphere - the workplace - where unauthorized immigrants should be placed on par with citizens in pursuing collective interests. In contrast to arguments that favor limiting resources to lawful residents, partial inclusion explains how employment protections can effectively preserve national identity while simultaneously enhancing unauthorized immigrants' incentives for social investment. In doing so, partial inclusion furthers the community's self-definition, while providing unauthorized immigrants with a sense of belonging in a world increasingly focused on their exclusion.

Keywords
Immigration, Reform, Alien, Citizen, Worker, Race, National origin, Discrimination, Hoffman, Title VII, NLRA, FLSA, IRCA, Labor, Work, INS, ICE, Congress, Policy, Deportation, Removal, Courts, Federal, Rights, Membership, Belonging

ARTICLES

REDEFINING THE RIGHTS OF UNDOCUMENTED WORKERS

KEITH CUNNINGHAM-PARMETER*

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INTRODUCTION

Unauthorized immigrants live in precarious times. American demand for inexpensive goods draws international migrants to our factories and fields. Developing nations encourage their people to work in the United States. As they are pushed and pulled toward the country,[1] immigrants arrive in the United States to find armed Minutemen at the border and a growing public distaste for the unauthorized arrivals.[2] They are wanted yet disdained, needed yet derided.

Most Americans and the immigrants themselves would be surprised to learn that these "lawbreakers" receive a host of legal protections once they cross the border.[3] The extent of those rights falls along a sliding scale of status. From the unauthorized immigrant,[4] to the lawful permanent resident, to the naturalized citizen, a person's basket of rights fills as his immigration status formalizes. The naturalized citizen can vote and participate on a jury; the temporary worker cannot.[5] The long-term resident alien can claim public benefits; the unauthorized immigrant cannot.[6] But even unauthorized immigrants—those who stand at the bottom of the status scale—enjoy certain rights. For example, they are "persons" under the Constitution who enjoy equal protection and due process of law.[7]

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1. *See* Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 760–61 (2003) (discussing migration trends); *see also* JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. i–ii (2006) (same).

2. *See* DAVID JACOBSEN, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 42 (1997) (discussing public attitudes toward unauthorized immigrants); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1485 (2002) (same).

3. *See* Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2451 (2007) (challenging the "apparently self-evident notion that 'citizenship is for citizens'"); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 822 (1993) (stating that unauthorized immigrants are often unaware of their legal rights).

4. I use the term "unauthorized immigrants" to refer to foreign nationals who live in the United States without work authorization. The term is designed to avoid the political charge and semantic difficulties presented by labels such as "illegal alien" and "undocumented immigrant." *See* Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 29 n.7 (2008) (explaining the term).

5. *See* 28 U.S.C. § 1865(b)(1) (2006) (excluding any person who "is not a citizen of the United States" from jury service).

6. *See* Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1588–92 (1997) (discussing restrictions on public benefits).

7. *See* Plyler v. Doe, 457 U.S. 202, 213–31 (1982) (holding that a Texas statute denying public education to unauthorized immigrant children violates the Equal Protection Clause); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose

Regardless of status, there is a floor on the level of protections enjoyed by all persons territorially present in the United States. The extension of legal rights to "lawbreakers," however, raises several questions. Why would a host country grant legal protections to people who flout the country's rules of admission? Is the currency of "citizenship" in all its forms enhanced or diminished by extending rights to the unauthorized? What are the implications of a nation-state's decision to rescind those rights?

Political and legal theorists have grappled with these questions as they relate to contemporary issues of membership.[8] They have considered how immigration law serves the need for a bounded political community and whether extending rights to immigrants dilutes the notion of citizenship.[9] Yet the issues most often raised in these discussions involve border enforcement, admission, and exclusion—traditional topics of immigration law. This Article seeks to expand the dialogue by explaining how workplace rights can define membership in a community.

Until recently, unauthorized immigrants could claim virtually every right and remedy available under federal workplace protections. In most instances they could join unions, sue for sexual harassment, and assert other employment rights in the same manner as citizens.[10] The United States Supreme Court disrupted this parity, however, when it barred unauthorized immigrants from receiving monetary compensation when they are fired illegally for supporting a union.[11] For the first time, the Court announced that not all victims of union-related discrimination should be treated the same.[12] Employers have attempted to expand this remedial limitation from the unionized setting (i.e., "traditional labor law") to other workplace protections,

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presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth Amendment] protection."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (affirming the applicability of due process and speedy trial rights guaranteed by the Fifth and Sixth Amendments to unauthorized Chinese immigrants).

8. *See, e.g.*, Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 448–50 (2000) (discussing the debate over the meaning of "citizenship" among political and social theorists).

9. *See generally* Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2502 (2007) (summarizing discourse on membership).

10. *See* Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 501–02 (2004) (discussing coverage of unauthorized immigrants under employment statutes). *But see infra* Part I and accompanying text (discussing the few instances in which an employee's immigration status limited employment protections).

11. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).

12. *See id.* (holding that unauthorized immigrants are not entitled to recover backpay).

such as wage and antidiscrimination laws, with limited success. For example, women in New Jersey who are unauthorized immigrants can no longer recover backpay for pregnancy discrimination.[13] The same is true for sexual harassment claims in Texas,[14] workplace injury claims in Michigan,[15] and wage retaliation claims in Illinois.[16]

Scholars have criticized these losses but have yet to formulate a coherent framework for evaluating the rights of unauthorized immigrants. This Article does so by distilling and applying several core principles at issue when employment laws conflict with immigration laws.

In Part I, I survey the current state of employment protections for unauthorized immigrants. Beginning with case law that originally ignored the role immigration status played in employment claims, I show how the rights of unauthorized workers remained intact until fairly recently.

In Part II, I describe three possible endpoints to the decline in rights. These options include: an "equalized rights" scenario, in which unauthorized immigrants enjoy all employment rights and remedies; a "diminished rights" scenario, in which unauthorized immigrants lack the ability to bring workplace claims; and an "ambiguous rights" scenario, in which unauthorized immigrants enjoy certain workplace protections but not others, thereby causing them to assert fewer claims because of the cluttered state of the law. In order to determine the likelihood of each outcome, I identify several functional concerns at issue when unauthorized immigrants assert workplace claims. For example, the Supreme Court has considered the remedial purpose of federal employment laws and the institutional competence of agencies enforcing those protections when deciding whether to limit unauthorized immigrants' recoveries.[17] I apply these criteria to wage and antidiscrimination protections and contend that differences in statutory purpose between traditional labor law and other workplace protections counsel in favor of equalized employment rights.

13. *See* Crespo v. Evergro Corp., 841 A.2d 471, 472–73 (N.J. Super. Ct. App. Div. 2004) (upholding an employer's discharge of an unauthorized immigrant returning from maternity leave).

14. *See* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896–98 (S.D. Tex. 2003) (dismissing a plaintiff's claims for backpay under Title VII).

15. *See* Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 512 (Mich. Ct. App. 2003) (denying wage-loss benefits).

16. *See* Renteria v. Italia Foods, Inc., No. 02C495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003) (striking an unauthorized worker's claims for backpay).

17. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144-49 (2002).

In Part III, I explain that in addition to the functional concerns discussed in Part II, unauthorized immigrants' rights depend on the immigration-related incentives created by extending protections to all workers. Because limiting the employment protections available to unauthorized workers will not fundamentally alter the incentives driving illegal immigration, I argue that national immigration goals cannot be achieved through diminished employment rights. Nonetheless, equalized rights are far from inevitable. In fact, the inherently malleable nature of any analysis involving immigration-related incentives could lead to a significant loss of protections for unauthorized workers. For example, the Supreme Court has stated that awarding backpay to unauthorized immigrants rewards their illegal behavior.[18] These same incentives arguably apply to federal minimum wage protections. An immigrant who enters the country illegally, tenders false documents to obtain employment, and then sues for nonpayment of wages could also be characterized as receiving a "reward." Although there are key distinctions between "backpay" under different workplace protections, it is not entirely clear whether these distinctions respond to the Supreme Court's focus on immigration-related incentives. If they do not, then the diminished rights scenario becomes more likely.

Although the future rights of unauthorized workers will turn partly on the foregoing analysis of statutory purpose and immigration policy, equally important are the consequences of diminished rights. I conclude the Article by explaining why restricting workplace protections based on status harms citizens as well as immigrants. I argue that employment protections are "rights of partial inclusion" that reflect a distinctive sphere—the workplace—where unauthorized immigrants should be placed on par with citizens in pursuing collective interests.

The theory of partial inclusion responds to communitarian rationales embedded in the Supreme Court's jurisprudence on unauthorized workers. From a communitarian standpoint, firm borders preserve community identity and protect scarce resources.[19] According to a communitarian approach to employment protections, enlarging the circle of workplace rights to include unauthorized immigrants harms the community's project of self-definition.[20]

18. *Id.* at 145.

19. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31 (1983); *see also* Gordon & Lenhardt, *supra* note 9, at 2501 (discussing communitarian views).

20. *See* WALZER, *supra* note 19, at 31–32 (discussing community membership).

Consistent with this view, the Supreme Court has attempted to limit labor protections based on an employee's immigration status in order to bolster immigration law's system of determining "who belongs" at work and, consequently, in the community.[21] Here I argue that such restrictions undermine the core normative object of the communitarians: the need for members to invest in their community with a shared common purpose. Antidiscrimination statutes depend on universal enforcement. Wage rates are more likely to drop for members of the community, including citizens, if employers are attracted to job applicants who cannot recover the minimum wage. Workplace rights are not scarce resources, and the ends that employment laws seek to achieve—safer conditions, nondiscrimination, and minimum wages—are goals shared by every worker, regardless of status. All members of the community—status citizens and unauthorized immigrants alike—benefit when the entire workforce can assert these rights. Employment protections thus turn communitarian rationales on their head by arguing in favor of extending rights to nonmembers.

The workplace rights of unauthorized immigrants remain in flux. Advocates and scholars sympathetic to these workers have reassured one another that restrictions in labor law will not expand to other workplace laws such as wage and antidiscrimination protections. Although this prediction may be true, a compelling case has yet to be made based on a detailed analysis of statutory purpose, immigration policy, and citizenship theory. This Article builds a framework for equalized rights by engaging these topics.

I. ERODING RIGHTS

Immigration law did not collide with employment law until recently. Throughout most of the nation's history, immigration law said nothing about the terms and conditions of an immigrant's employment.[22] Even the Immigration and Nationality Act (INA)[23]—

21. *Hoffman*, 535 U.S. at 149–50.

22. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 146–62 (5th ed. 2003) (discussing the historical development of immigration law); 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. 473, 478–79 (2005) (same).

23. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)); *see also* Katherine E. Seitz, Comment, *Enter at Your Own Risk: The Impact of* Hoffman Plastic Compounds v. National Labor Relations Board *on the Undocumented Worker*, 82 N.C. L. REV. 366, 372–73 (2003) (arguing that immigration laws and labor statutes are generally silent as to their effect on one another).

the country's central immigration law—did not address unauthorized employment when Congress enacted it in 1952.[24] Although the INA made it illegal for a person to enter the country without permission, an immigrant did not violate any other laws by obtaining employment once inside the United States.[25]

The Immigration Reform and Control Act of 1986 (IRCA)[26] attempted to close this loophole by adding employment-related restrictions to the INA. In addition to granting legal status to two million unauthorized immigrants residing in the country at the time,[27] the IRCA imposed immigration verification requirements on employers.[28] As a result, employers are now required to inspect certain documents provided by new hires and to attest to the documents' apparent authenticity.[29]

Because immigration law said nothing about "illegal" employment until the IRCA, courts generally did not question the right of unauthorized immigrants to sue employers prior to 1986. For example, courts consistently held that unauthorized immigrants enjoyed the minimum wage protections of the Fair Labor Standards Act (FLSA),[30] the labor protections of the National Labor Relations Act (NLRA),[31] and the antidiscrimination protections of Title VII of the Civil Rights Act of 1964 (Title VII).[32] These pre-IRCA decisions

24. *See* William J. Murphy, Note, *Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT'L L. REV. 165, 165–66 (1994) (discussing previous versions of the INA).

25. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 499 (2007) (discussing immigration-related violations); Seitz, *supra* note 23, at 372–73 (emphasizing that previous versions of the INA did not make the employment of unauthorized immigrants illegal).

26. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

27. *See* Kris W. Kobach, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1330 (2008) (discussing the effects of the IRCA).

28. 8 U.S.C. § 1324a (2006); *see* Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and* Hoffman Plastic Compounds, 41 CORNELL INT'L L.J. 127, 128–29 (2008) (discussing the IRCA's work verification system).

29. 8 U.S.C. § 1324a(b) (2006).

30. *See, e.g.*, *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (applying pre-IRCA law and noting the broad definition of "employee" under the FLSA); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485 (10th Cir. 1985) (affirming the right of unauthorized immigrants to recover unpaid wages under the FLSA).

31. *See, e.g.*, NLRB v. Apollo Tire Co., 604 F.2d 1180, 1181 (9th Cir. 1979) (holding that unauthorized immigrants are "employees" as defined in section 2(3) of the NLRA).

32. *See, e.g.*, EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (sex discrimination); Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1172 (2d Cir. 1988) (race and national origin discrimination).

affirmed the workplace rights of unauthorized immigrants based on: (1) the broad definitions of "employee" contained in the relevant employment laws; and (2) the INA's silence as to unauthorized employment.[33]

The most important development in pre-IRCA case law occurred in 1984 when the Supreme Court decided *Sure-Tan, Inc. v. NLRB*.[34] The case involved a union-organizing campaign at a small leather processing plant.[35] The company president, who knew prior to the election that five of the eleven workers were unauthorized immigrants, reported the employees to the Immigration and Naturalization Service (INS) after the workers voted to unionize.[36] The INS arrested the employees and returned them to Mexico.[37] In response to charges filed against the employer, the National Labor Relations Board (NLRB) found that Sure-Tan had committed unfair labor practices by calling the INS in retaliation for the workers' protected activity.[38] The NLRB awarded the employees the "conventional remedy of reinstatement with backpay."[39]

On review, the Supreme Court first addressed the issue of statutory coverage. Noting that the NLRA states, "The term 'employee' shall include any employee,"[40] and contains specific exceptions, none of which involve immigration status, the Court held that the NLRA covers unauthorized immigrants.[41] Turning to the issue of remedies, the Court found that the Sure-Tan employees were not legally available for work because they would have to cross the border illegally in order to obtain new employment.[42] Accordingly, the employees who lost their jobs because of Sure-Tan's "blatantly illegal course of conduct" could not receive backpay or reinstatement until immigration authorities readmitted them to the country.[43]

Although *Sure-Tan* was the Court's first attempt to delineate the employment rights of unauthorized immigrants, the decision did not significantly impact the field for two reasons. First, the Court failed

33. *See In re* Reyes, 814 F.2d at 170 (discussing the FLSA's definition of "employee"); NLRB v. Apollo Tire Co., 604 F.2d at 1184 (noting the INA's silence as to employment matters).
34. 467 U.S. 883 (1984).
35. *Id.* at 886.
36. *Id.*
37. *Id.* at 887.
38. Sure-Tan, Inc., 234 N.L.R.B. 1187, 1187 (1978).
39. *Id.*
40. 29 U.S.C. § 152(3) (2006).
41. *See Sure-Tan*, 467 U.S. at 891 ("The breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.'").
42. *Id.* at 903.
43. *Id.* at 894.

to clarify whether the backpay limitation applied to unauthorized immigrants residing in the United States, as opposed to the five Sure-Tan employees in Mexico.[44] Second, the decision relied explicitly on the INA's "peripheral concern with employment of illegal entrants."[45]

With the enactment of the IRCA two years later, however, the relationship of immigration law to employment law was no longer peripheral. The new verification requirements injected the nation's immigration laws directly into the workplace.

Somewhat surprisingly, unauthorized workers' rights remained relatively unchanged for the first two decades following *Sure-Tan* and the IRCA. With few exceptions, courts continued to hold that unauthorized immigrants could recover backpay and other remedies for workplace violations.[46] The field changed significantly in 2002, however, with the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[47] Like *Sure-Tan*, *Hoffman* involved an employer who retaliated against unauthorized immigrants who engaged in activities protected by the NLRA; Hoffman committed an unfair labor practice by firing Jose Castro for supporting a union.[48] During a subsequent compliance hearing to calculate his damages, Mr. Castro admitted that he had tendered fraudulent immigration-related documents to Hoffman at the time he was hired.[49] The NLRB awarded Mr. Castro over $60,000 in backpay, despite the fact that Mr. Castro had misled his employer about his immigration status.[50]

On review, the Supreme Court considered whether the NLRB correctly awarded Mr. Castro backpay for the work he lost because of the illegal discharge.[51] Writing for the 5-4 majority, Justice Rehnquist described "a legal landscape now significantly changed" by the

44. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 146–47 (2002) (describing a split of authority as to whether *Sure-Tan* "applies only to aliens who left the United States and thus cannot claim backpay without lawful reentry").

45. *Sure-Tan*, 467 U.S. at 892 (quoting De Canas v. Bica, 424 U.S. 351, 359 (1976)).

46. *See, e.g.*, NLRB v. Kolkka, 170 F.3d 937, 940 (9th Cir. 1999) (extending coverage under the NLRA to unauthorized workers); NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 58 (2d Cir. 1997) (NLRA); Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988) (Title VII); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (FLSA); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (FLSA). *But see, e.g.*, Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186–87 (4th Cir. 1998) (holding that unauthorized immigrants are not "qualified" for employment under Title VII); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1120–22 (7th Cir. 1992) (extending the NLRA's coverage to unauthorized immigrants but denying backpay).

47. 535 U.S. 137 (2002).

48. *Id.* at 140.

49. *Id.* at 141.

50. *Id.* at 141–42.

51. *Id.*

IRCA.[52] The Court reversed the NLRB as to the backpay award, holding that to do otherwise would reward Mr. Castro's illegal behavior and conflict with the IRCA's border-enforcement objectives.[53]

Soon after *Hoffman*, employers began to argue that unauthorized immigrants could no longer sue under Title VII, the FLSA, or any other workplace protection.[54] To date, nearly every court to rule on the issue has refused to extend the backpay limitation in NLRA cases to minimum wage and overtime protections.[55]

Discrimination cases have yielded more mixed results, though unauthorized immigrants may still recover full Title VII remedies in most jurisdictions.[56] Actions outside the courts suggest that Title VII remains somewhat vulnerable to remedial losses. Following *Hoffman*, the Equal Employment Opportunity Commission (EEOC), which enforces Title VII, rescinded its previous support for extending backpay to all workers regardless of status.[57] In addition, some Title VII plaintiffs now withdraw their backpay claims rather than allow courts to rule on whether the remedy remains available to them.[58]

Scholars have expressed widely divergent views on whether the current backpay restrictions in labor law will extend to other employment protections. One camp argues that *Hoffman* represents a human rights crisis that will cause a great shift in the workplace

52. *Id.* at 147.

53. *Id.* at 145 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984)).

54. *See* Mariel Martinez, Comment, *The* Hoffman *Aftermath: Analyzing the Plight of the Undocumented Worker Through a "Wider Lens"*, 7 U. PA. J. LAB. & EMP. L. 661, 663–64 (2005) (discussing employer reactions to *Hoffman*).

55. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1276–77 (N.D. Okla. 2006) (discussing the definition of "employee" under the FLSA); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 323 (D.N.J. 2005) (concluding that unauthorized immigrants are "employees" under the FLSA); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501–03 (W.D. Mich. 2005) (explaining that the FLSA effectively protects unauthorized workers from exploitation and retaliation); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002) (agreeing with other courts that have applied the FLSA to employees regardless of their immigration status).

56. *Compare* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) (distinguishing Title VII from *Hoffman*), *with* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896–98 (S.D. Tex. 2003) (denying backpay under Title VII).

57. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL NO. 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002), *available at* http://www.eeoc.gov/policy/docs/undoc-rescind.html.

58. *See* Rivera v. NIBCO, Inc., No. CIV-F-99-6443, 2006 WL 845925, at *1 (E.D. Cal. Mar. 31, 2006) (Title VII plaintiffs who are unable to prove entitlement to work agree to withdraw backpay claims); Lopez v. Superflex, Ltd., No. 01 CIV. 10010, 2002 WL 1941484, at *1 (S.D.N.Y. Aug. 21, 2002) (plaintiff alleging disability discrimination withdraws backpay claim "in light of the Supreme Court's decision in *Hoffman*").

rights of unauthorized immigrants.[59] These critics contend that immigrants face an increasingly hostile judiciary that will eventually eliminate certain workplace rights available to unauthorized immigrants.[60] Others assert that *Hoffman* is limited to the NLRA and will not affect other employment statutes.[61]

Given the inconsistency among the responses to *Hoffman*, it is safe to say that immigrants' rights will remain undefined for the indefinite future.[62] This disarray underscores the need for a coherent framework for evaluating the future rights of unauthorized workers.

II. THE FUNCTION OF EMPLOYMENT PROTECTIONS

Three possible outcomes could emerge from the current amorphous state of unauthorized workers' rights. Here I explain those outcomes and consider the likelihood of each based on the structure and purpose of wage and antidiscrimination statutes, as compared to labor law.

I call the first scenario an "equalized rights" outcome. Congress might pass legislation that blunts the force of *Hoffman* or the Supreme Court may reverse itself. Lower courts could refuse to extend current backpay limitations to Title VII and the FLSA. In the equalized rights outcome, all employees could recover nearly every workplace remedy regardless of status.[63] Unauthorized immigrants

59. *See, e.g.*, LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS xxi (2004) (suggesting that workplace protections may be forfeited); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc.*, Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 146 (2003) (speculating that statutory protections for unauthorized immigrants may be in danger in some jurisdictions following *Hoffman*).

60. *See, e.g.*, Seitz, *supra* note 23, at 406–07 (expressing concerns that *Hoffman* may be used to deny minimum wage and workers' compensation protections); *see also* Wishnie, *supra* note 10, at 508 (suggesting that unauthorized immigrants may lose the ability to recover backpay under Title VII).

61. *See, e.g.*, 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, 5 n.19 (2003) (predicting limited impact); Christine Dana Smith, Comment, *Give Us Your Tired, Your Poor:* Hoffman *and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 364 (2003) (arguing that *Hoffman* does not extend to Title VII or the FLSA).

62. *See* María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After* Hoffman Plastic Compounds*: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 321 (2005) (arguing that "the future is yet to come" for unauthorized immigrants asserting Title VII claims); Seitz, *supra* note 23, at 370 ("[T]he rights of undocumented workers are perilously undefined.").

63. Unauthorized immigrants would remain ineligible for reinstatement, however, given that courts could not order employers to rehire unauthorized immigrants in violation of the IRCA. *See infra* Part II.C.2 (discussing the remedies available to unauthorized immigrants).

would still largely fail to assert these rights out of fear of retaliation or deportation, but the rights themselves would be available.

The second outcome, what I call an "ambiguous rights" scenario, reflects the current, muddled state of affairs. Because employers have experienced limited success in their attempts to extend remedial limitations in labor law to other employment laws such as antidiscrimination protections, unauthorized immigrants do not know which claims remain viable. Given that unauthorized immigrants are already reluctant to complain for fear of retaliation, the ambiguity surrounding their employment rights further decreases the likelihood that they will attempt to rectify workplace wrongs.

Under the third scenario, a "diminished rights" outcome, clarity is restored to the field. Legislative action or judicial consistency will state definitively that unauthorized immigrants can no longer recover certain remedies for employment violations. This could mean limiting backpay awards or banning unauthorized immigrants from asserting workplace claims altogether.

All three outcomes remain possible because courts have failed to establish clear criteria for resolving conflicts between employment laws and immigration laws. Here I develop those criteria based on the functional concerns expressed by the Supreme Court in its recent jurisprudence on unauthorized workers. By "functional concerns" I mean the structure and purpose of employment statutes as they relate to immigration restrictions. The Court has twice considered the function of the NLRA as it relates to the INA. In these cases, the Court restricted the remedies available to unauthorized immigrants, finding that the NLRB is not competent to evaluate immigration policy and that a backpay limitation would not undermine the basic purpose of the NLRA.[64]

By applying the same functional criteria—administrative competence and remedial purpose—to Title VII and the FLSA, I will explain why wage and antidiscrimination protections cannot be restricted in the same way that the Supreme Court has limited the NLRA. Title VII and the FLSA are certainly not the only employment statutes at issue, but they are arguably the most critical given that they secure such fundamental workplace interests as freedom from discrimination and payment of wages. In addition, employers have expended a great deal of effort on limiting backpay under Title VII

64. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 883 (1984).

and the FLSA, making these statutes crucial fault lines in the debate over the rights of unauthorized workers.[65]

A. Moving Beyond Statutory Text

The most logical starting point for determining whether immigration laws should limit Title VII and the FLSA would be the text of the relevant statutes—in this case, the IRCA and the employment statutes that the IRCA supposedly limits.[66] Oddly, the Supreme Court's recent decisions on unauthorized workers largely sidestep issues of statutory interpretation in favor of a broader policy analysis. The basis of the Court's authority to focus on policy while ignoring statutory text and history is not entirely clear. After all, there is no canon of statutory construction that allows courts to "pick and choose"[67] their favorite congressional enactments based on vague notions of "policy."[68] The *Hoffman* Court stated that the IRCA is "understandably silent" as to its effect on the NLRA.[69] This silence notwithstanding, the Court inferred an intent to displace labor law remedies based on Congress's decision to criminalize immigration-related document fraud.[70]

Although congressional silence led to diminished rights in the context of the NLRA, Title VII and the FLSA played a much more prominent role than the NLRA in congressional deliberations on the IRCA. Unfortunately, most scholarly critiques of *Hoffman* have glossed over this point. When the argument over congressional intent is raised, the discussion is usually limited to two congressional committee reports. The House Judiciary Committee reviewing the IRCA stated:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers

65. *See, e.g.*, Martinez, *supra* note 54, at 673 (discussing attempts to limit antidiscrimination statutes); Mohar Ray, Note, *Undocumented Asian American Workers and State Wage Laws in the Aftermath of* Hoffman Plastic Compounds, 13 ASIAN AM. L.J. 91, 97 (2006) (noting *Hoffman*'s impact on wage claims).

66. *See* Mallard v. U.S. Dist. Court, 490 U.S. 296, 300–01 (1989) ("Interpretation of a statute must begin with the statute's language.").

67. *See* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[C]ourts are not at liberty to pick and choose among congressional enactments.").

68. *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting) ("Where in the immigration laws can the Court find a 'policy' that might warrant taking from the Board this critically important remedial power? Certainly not in any statutory language."). *See generally* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 231–36 (2000) (discussing different methods of statutory analysis).

69. *Hoffman*, 535 U.S. at 149 (majority opinion).

70. *Id.*

> of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees.[71]

The House Education and Labor Committee stated that the IRCA did not prevent federal agencies, including the NLRB, the EEOC, and the Department of Labor (DOL), from "remedy[ing] unfair practices committed against undocumented employees."[72]

These reports appear to support equalized rights in wage and discrimination cases. They reaffirm the authority of the EEOC and DOL, which enforce Title VII and the FLSA respectively, to obtain full remedies for unauthorized immigrants. Yet the *Hoffman* Court expressly rejected this legislative history, describing the Judiciary Committee report as "a rather slender reed" on which to rely.[73] Given the Court's rather dismissive treatment of the legislative history, it seems unlikely that the committee reports alone will immunize Title VII and the FLSA from remedial restrictions.

This is not to say that courts considering whether to limit remedies in Title VII and FLSA cases should ignore the IRCA's legislative history. Rather, the analysis should extend beyond committee reports to other evidence related to the IRCA's effect, if any, on substantive employment protections. In the case of the FLSA, congressional action points toward equalized rights. For example, at the same time it enacted the IRCA, Congress appropriated additional funds to the DOL's Wage and Hour Division "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."[74] This step was consistent with efforts by the Nixon, Ford, Carter, and Reagan Administrations to fund targeted wage enforcement actions on behalf of unauthorized workers.[75] It is no coincidence that the same legislation barred unauthorized workers from obtaining employment and appropriated additional funds to allow them to recover overtime

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71. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

72. H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.

73. *Hoffman*, 535 U.S. at 149 n.4; *see* Agri Processor Co. v. NLRB, 514 F.3d 1, 13–14 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[O]ne of the reports cited by the majority opinion is the exact same report that the *Hoffman* Court dismissed as a 'rather slender reed.'" (citation omitted)).

74. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (codified as amended in scattered sections of 8 U.S.C.).

75. *See* Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers after* Sure-Tan, *the IRCA, and* Patel, 63 N.Y.U. L. REV. 1342, 1360–68 (1988) (discussing the history of immigration and labor enforcement).

and the minimum wage. Both acts serve the same goal: to raise the price of hiring this group of workers. Employers pay the price either through IRCA penalties or wage enforcement actions brought on behalf of unauthorized immigrants.[76]

Congress also considered Title VII, albeit indirectly, when enacting the IRCA. Legislators were concerned that the IRCA's work verification requirements would cause employers to discriminate against "foreign-looking" and "foreign-sounding" job applicants.[77] Accordingly, Congress included protections in the IRCA to prevent discrimination based on national origin and citizenship status.[78] For example, employers cannot refuse to hire job applicants because they are foreign-born.[79] Critically, Congress expressly excluded "unauthorized aliens" from the IRCA's antidiscrimination protections.[80] Thus, unauthorized immigrants cannot file an IRCA complaint if a company commits national origin discrimination against them. Unlike the IRCA, Title VII contains no such express exclusion.

Statutes should be read in a manner that gives each term meaning.[81] The only interpretation that gives meaning to the IRCA's exclusion of "unauthorized aliens" is that without the exclusion, the IRCA's antidiscrimination provision would cover this group of workers. Because Title VII contains no such exclusion, the argument goes, it should be read as covering all employees regardless of status.

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76. *See* Noriega-Perez v. United States, 179 F.3d 1166, 1170–71 (9th Cir. 1999) (discussing the purpose of the IRCA's enforcement scheme); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (maintaining that Congress intended for the FLSA to protect undocumented workers, as demonstrated by its appropriation of additional funds for this group of workers in order to enforce the FLSA); Susan Charnesky, Comment, *Protection for Undocumented Workers Under the FLSA: An Evaluation in Light of IRCA*, 25 SAN DIEGO L. REV. 379, 397–98 (1988) (same); *see also* Ho & Chang, *supra* note 22, at 483–84 (noting that the IRCA provided funding for the heightened enforcement of labor standards so as to discourage employers from hiring unauthorized immigrants).

77. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 41–42 (1990), *available at* http://archive.gao.gov/d24t8/140974.pdf; *see also* Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 277 (2001) (discussing discrimination under the IRCA); Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 802 (2003) (discussing employer retaliation).

78. 8 U.S.C. § 1324b (2006).

79. *Id.* § 1324b(a)(1).

80. *Id.*

81. *See* Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 837 (1988) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

Of course, one statute's express exclusion of unauthorized immigrants (the IRCA) does not necessarily preclude another statute's implied exclusion (Title VII). However, given that the two statutes prohibit an identical type of behavior (national origin discrimination)[82] and force employers who engage in that behavior to compensate employees with the same remedy (backpay), the fact that Congress felt compelled to expressly exclude unauthorized immigrants from the IRCA should at least inform an interpretation of Title VII.

The IRCA's text states explicitly that it has "no effect on EEOC authority."[83] When Congress enacted the IRCA in 1986, most courts and the EEOC itself had uniformly interpreted "EEOC authority" to include securing backpay for unauthorized immigrants who were the victims of discrimination based on national origin and other protected categories.[84] Congress is presumed to know judicial and administrative interpretations of existing law "pertinent to the legislation it enacts."[85] Therefore, when it stated that the IRCA's antidiscrimination provision relating to national origin discrimination had no effect on the EEOC's authority to combat national origin discrimination, Congress was aware that lower courts and the agency itself had interpreted its authority to include securing full remedies for unauthorized workers.

Congress knows how to limit the workplace protections of unauthorized immigrants when it decides to do so. IRCA's prohibition on national origin discrimination does exactly that, but Title VII's prohibition on national origin discrimination says nothing about excluding "unauthorized aliens."[86] The IRCA was amended twice in the 1990s, both times excluding "unauthorized aliens" from

82. Title VII applies to companies with fifteen or more employees, while the IRCA's antidiscrimination provision applies to companies with four to fourteen employees. 8 U.S.C. § 1324b(a)(2)(A), (B) (2006); Juan P. Osuna, *Breaking New Ground: The 1996 Immigration Act's Provisions on Work Verification and Employer Sanctions*, 11 GEO. IMMIGR. L.J. 329, 334 (1997).

83. 8 U.S.C. § 1324b (2006).

84. *See supra* Part I (discussing the pre-IRCA period during which courts universally extended Title VII coverage to unauthorized immigrants). In 1998, the United States Court of Appeals for the Fourth Circuit became the first and only federal appellate court to depart from this precedent. Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186–87 (4th Cir. 1998).

85. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–85 (1988); *see also* Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without any change.").

86. *See generally* Ho & Chang, *supra* note 22, at 506–08 (discussing the IRCA's antidiscrimination provisions); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 615–16 (1993) (discussing congressional intent in enacting the IRCA).

its antidiscrimination protections.[87] Likewise, Congress amended Title VII in 1991[88] without mentioning unauthorized immigrants, even though courts were awarding backpay to this group of workers.[89] Each time Congress amended the legislation without limiting Title VII's coverage or remedies, it accepted the judicial consensus on the issue.[90]

The IRCA's legislative text and history favor equalized rights for claims brought by unauthorized immigrants in Title VII and FLSA cases. Nonetheless, the Supreme Court has shown a decided lack of interest in considering Congress's intent in enacting the IRCA.[91] If lower courts similarly downplay the importance of legislative intent, the future rights of unauthorized workers will likely turn on other factors enunciated by the Supreme Court such as the purpose of wage and antidiscrimination laws and the border-related incentives they create.

B. Administrative Competence

The *Hoffman* Court refused to defer to the NLRB's inexpert determinations on immigration matters. Thus, although the NLRB and every federal agency that addressed the issue found that immigration law and labor law could coexist,[92] the Supreme Court disagreed, noting that the NLRB's order granting monetary remedies to unauthorized immigrants "trench[ed] upon a federal statute . . . outside the Board's competence to administer."[93] The Court could disturb the backpay award because it exceeded "the bounds of the Board's remedial discretion."[94]

If administrative competence is as important as the *Hoffman* Court suggested—and it strongly suggested that this was the *most* important criterion given its repeated references to the issue[95]—then the decision will not lead to diminished rights in Title VII and FLSA cases. The NLRB is a unique administrative body that investigates,

87. 8 U.S.C. § 1324b(a)(6); Pub. L. No. 104-208, § 421(a), 110 Stat. 3009 (1996).
88. 42 U.S.C. § 1981a(a)(1) (2006).
89. *See* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (discussing the effect of Title VII amendments on immigration law).
90. *Lorillard*, 434 U.S. at 580.
91. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 353 U.S. 137, 154 (2002) (Breyer, J., dissenting) (criticizing the majority for focusing on immigration policy rather than statutory language and purpose).
92. *See id.* at 153 (Breyer, J., dissenting) (noting unanimity among federal agencies).
93. *Id.* at 144, 147 (majority opinion).
94. *Id.* at 149.
95. *Id.* at 146–52.

prosecutes, and adjudicates unfair labor practice charges.[96] Although the NLRB is skilled at evaluating labor law violations, it is not competent to balance outside federal objectives.[97] Unlike charges brought before the NLRB, Title VII and FLSA claims are prosecuted in court.[98] Federal judges possess the very expertise needed to balance competing federal interests that the NLRB lacks.[99]

Imagine a Title VII plaintiff who is fired for complaining about sexual harassment. Although she was an unauthorized immigrant at the time of the discharge, she later received work authorization through a T-visa because she was a victim of human trafficking.[100] A federal judge hearing her Title VII case could evaluate the harm done to immigration policy by awarding the plaintiff backpay. The judge could compare the relative gravity of the employer's conduct, as compared to the immigrant's now-legalized presence, and evaluate the incentives for future illegal behavior created by awarding backpay.[101] Although the NLRB cannot engage in this kind of balancing, the court hearing the Title VII case can.

Despite the logic of the administrative competence argument, however, it avoids a statutory conflict that the *Hoffman* Court seemed determined to confront. In fact, if unfair labor practice charges were filed in federal court rather than with the NLRB, the outcome in *Hoffman* would probably not have changed. Assume that a federal district court, rather than the NLRB, had awarded backpay to unauthorized immigrants who were victims of unfair labor practices. On review, the *Hoffman* Court would have faced the same conflict between the IRCA and the NLRA. Even though a lower "expert" court would have balanced the competing federal objectives, the Supreme Court likely would have shown no more deference to the

96. *See* Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of* Hoffman Plastic*, Its Predecessors and Its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 49–50 (2008) (summarizing the argument over administrative competence).

97. Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

98. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974) (noting that Congress charged courts with bringing "ultimate resolution" to discrimination claims). Although employees can file charges with the EEOC and DOL, Title VII and the FLSA rely primarily on private enforcement in court. Charnesky, *supra* note 76, at 382–83.

99. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1068 (9th Cir. 2004) (discussing judicial competence in Title VII cases).

100. *See* Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT'L L. & POL'Y 169, 179–81 (2003) (describing the criteria human trafficking victims must meet in order to receive T-visas).

101. *See* Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, 39 TRIAL 46, 47–48 (2003) (noting that judges routinely balance competing interests when formulating equitable relief).

lower court's determination than it did to the NLRB's.[102] The Court would still have evaluated two federal laws in conflict and formulated a remedial outcome that alleviated the conflict.[103]

For wage and discrimination cases, the importance of administrative competence depends on whether courts wish to touch *Hoffman*'s heart or surface. On its surface, the decision stands for the limited proposition that a federal agency charged with prosecuting labor law violations has no business considering immigration matters. Because FLSA and Title VII cases do not involve such inexpert agency determinations, *Hoffman* is inapposite. On the other hand, courts may view these cases as presenting a conflict between the federal objectives of controlling the border and regulating the workplace.[104] If courts adopt the latter position, then the issue of administrative competence falls away, and other functional considerations enunciated by the *Hoffman* Court such as remedial purpose will become the critical factors in determining the extent of unauthorized workers' rights.

C. Remedial Purpose and Statutory Gutting

According to the Supreme Court, when immigration law conflicts with labor law, one federal interest must yield to the other.[105] If labor law prevails, immigration law is diminished. If immigration law restricts workplace remedies, labor law is diminished. The issue, then, is which outcome does less violence to either important federal interest. According to the Court, awarding backpay to unauthorized workers undermines the "cornerstone" of immigration enforcement, while stripping the remedy from the NLRA leaves intact the basic workings of federal labor policy.[106] In essence, the Court found that restricting backpay would not eviscerate the NLRA, while granting unauthorized immigrants backpay would significantly damage the

102. *See* Vu & Schwartz, *supra* note 96, at 50 (discussing the argument in *Hoffman* that the NLRB lacked competence to consider federal immigration goals).

103. *See* Rivera v. NIBCO, Inc., 384 F.3d 822, 833 (9th Cir. 2004) (Bea, J., dissenting) (rejecting *Hoffman*'s administrative competence argument). *But see* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 237 n.19 (2d Cir. 2006) (arguing that *Hoffman* is limited to cases involving inexpert agency determinations).

104. *See* Vu & Schwartz, *supra* note 96, at 50 (criticizing the administrative competence rationale); *see also* Matthew S. Panach, *Two Wrongs Don't Make A Right . . . To Receive Backpay?: The Post-*Hoffman *Polarity of* Escobar *and* Rivera, 60 ARK. L. REV. 907, 935–36 (2008) (characterizing the argument over agency expertise as "a distinction without consequence").

105. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

106. *See id.* at 145, 148 (holding that the NLRA's "more effective remedies" must give way to "the practical workings of the immigration laws" (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 (1984)).

INA. This creates what I call a "gutting standard" for evaluating remedial restrictions in other contexts. Courts can forbid unauthorized immigrants from recovering workplace remedies as long as the limitation does not severely restrict (i.e., "gut") the employment law's ability to achieve its core purposes.

The statutory gutting analysis, which has led to diminished rights in labor cases, does not support limiting wage and antidiscrimination laws. Although the Supreme Court determined that restricting labor remedies would not undermine the goals of the NLRA, the distinct nature of Title VII and the FLSA require a different outcome. For example, a backpay limitation would severely hamper Title VII's ability to eradicate workplace discrimination. Likewise, restricting the FLSA's remedies would undermine the statute's goal of improving workplace conditions. In essence, the balance between immigration law and labor law struck by the Court in its jurisprudence on unauthorized workers cannot be achieved for wage and antidiscrimination protections.

1. The high standard for gutting

The Supreme Court has noted that employers do not "get[] off scot-free" even though they pay nothing when they fire unauthorized immigrants in violation of the NLRA.[107] The NLRB can still require employers to post a workplace notice summarizing the misconduct.[108] In addition, employers are subject to cease and desist orders and "significant sanctions" should they violate the orders.[109] In essence, then, prohibiting unauthorized immigrants from recovering backpay for labor law violations does not "gut" labor law itself.

In order to determine whether the gutting standard announced in the NLRA context will lead to diminished rights in wage and discrimination cases, consider the breadth of the backpay restriction in labor law. Backpay, the *only* monetary remedy available to victims of discrimination under the NLRA,[110] is designed primarily to "protect[] and compensat[e] . . . employees."[111] The Supreme Court has emphasized the compensatory function of backpay under the

107. *Id.* at 152; *see also Sure-Tan*, 467 U.S. at 904 n.13 (noting the existence of other remedies that can deter misconduct).
108. *Hoffman*, 535 U.S. at 152.
109. *Id.*
110. 29 U.S.C. § 160(c) (2006).
111. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–11 (1940); *see* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787–88 (1983) (noting that the NLRA is "heavily oriented toward the repair of harm inflicted on individual victims of antiunion action by employers").

NLRA, explicitly rejecting a deterrence rationale. In the touchstone case of *Republic Steel Corp. v. NLRB*,[112] the Court stated:

> [I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.[113]

Despite criticism of *Republic Steel*'s strict remedial line,[114] the Court has never strayed from its admonition that backpay awarded under the NLRA must primarily compensate, even if it serves an ancillary deterrence function.

In denying backpay to unauthorized immigrants, the *Hoffman* Court undermined the central goal of labor law remedies as defined by *Republic Steel*: making victims of discrimination whole.[115] According to the *Hoffman* Court, labor law can bear this restriction because unauthorized immigrants lose only those wages they never could have earned legally.[116] Even if the ban on backpay undermines the NLRA's secondary deterrence objective, cease and desist orders can achieve that end.[117]

In sum, the standard for statutory gutting turns on the relative importance of deterrence and compensation within the remedial scheme of each employment statute. Workplace protections that are designed mainly to compensate employees can tolerate a backpay ban because the restriction only impairs unauthorized immigrants' ability to recover compensation they never should have earned. In contrast, remedial restrictions that lower the price of misconduct for employers would do far greater harm to workplace protections that place greater emphasis on preventing illegal behavior.

2. Gutting antidiscrimination protections

Upon a finding of intentional discrimination, Title VII authorizes courts to award backpay, front pay, compensatory damages, punitive

112. 311 U.S. 7 (1940).
113. *Id.* at 12.
114. *See, e.g.*, Weiler, *supra* note 111, at 1788–90 (discussing deterrence under the NLRA); Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1590–94 (2005) (same).
115. *Republic Steel*, 311 U.S. at 12.
116. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 146–50 (2002).
117. *See id.* at 152 (noting that employers are subject to cease and desist orders even without backpay); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 n.13 (1984) (same).

damages, reinstatement, attorneys' fees, and injunctive relief.[118] Courts are unlikely to strip any monetary remedy other than backpay[119] from unauthorized immigrants. Compensatory damages for emotional distress, punitive damages, and attorneys' fees remain available because they do not constitute "wages that could not lawfully have been earned."[120] In contrast, reinstatement orders would force employers to hire unauthorized immigrants in violation of the IRCA, thus precluding the remedy.[121]

Those who support diminished rights take what I call an "anti-gutting" view of backpay restrictions in Title VII cases. Under this approach, Title VII can tolerate diminished rights because the loss of backpay leaves Title VII plaintiffs with a near-complete remedial arsenal.[122] According to the anti-gutting view, if the *Hoffman* Court could eliminate backpay—the *only* monetary remedy available to the NLRB—without gutting the NLRA, then certainly Title VII would maintain its vigor following a ban on backpay.[123]

The anti-gutting view assumes incorrectly that backpay occupies identical roles within the remedial schemes of Title VII and the NLRA. At first glance, the language of the two statutes appears to support this reading. The NLRA authorizes the NLRB "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter."[124] Under Title VII, a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."[125] Congress modeled Title VII's remedial language after the NLRA, and courts

118. 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1), (k) (2006).

119. For purposes of evaluating unauthorized workers' Title VII remedies, I treat "front pay" as conceptually identical to backpay given that both remedies involve compensation for a worker's lost employment. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846–50 (2001) (noting that backpay represents lost earnings from the time of discharge to judgment, while front pay represents lost earnings from the time of judgment to reinstatement).

120. *Hoffman*, 535 U.S. at 149. At oral argument, Hoffman's counsel agreed that compensatory damages would remain available in Title VII cases because they are "not dependent on the victims [sic] authorization to work in this country." Transcript of Oral Argument at *19–20, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-15952002), 2002 WL 77224.

121. 8 U.S.C. § 1324a(a)(2) (2006); *see* Griffith, *supra* note 28, at 130 n.26 (noting that court-ordered reinstatement would force employers to violate the IRCA).

122. *See, e.g.*, Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113, 173 (2008) (arguing that even without backpay, Title VII remedies are "far more substantial" than the limited equitable remedies left by *Hoffman*).

123. *Id.*

124. 29 U.S.C. § 160(c) (2006).

125. 42 U.S.C. § 2000e-5(g)(1) (2006).

have relied on the NLRA to define backpay under Title VII.[126] Given these parallels, it might appear perfectly logical to conclude that the loss of backpay under the NLRA should require the same outcome in Title VII cases.

Such an analysis, however, ignores the crucial role backpay plays in achieving Title VII's prophylactic objective, as compared to the NLRA. Although the NLRB cannot formulate backpay awards with the specific goal of preventing misconduct,[127] the Supreme Court has stated that Title VII remedies should *primarily* deter and that backpay serves that end.[128] The distinct nature of backpay under Title VII raises two critical issues: (1) whether courts can achieve the statute's deterrence objective without backpay; and, if not, (2) whether the loss of the deterrence objective would harm Title VII any more fundamentally than *Hoffman* harmed the NLRA. Fortunately, the Supreme Court has answered these questions.[129] Prior to the Civil Rights Act of 1991 (CRA),[130] backpay and attorneys' fees were the only monetary recoveries available to Title VII plaintiffs.[131] In the pre-CRA case of *Albemarle Paper Co. v. Moody*,[132] the Court considered how a loss of backpay would affect Title VII:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . .[133]

According to *Albemarle*, backpay awards are crucial to achieving Title VII's primary objective of deterring misconduct.[134] In contrast, backpay is not needed under the NLRA because of the law's ancillary

126. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 853 (2001); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).

127. Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940).

128. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) ("[Title VII's] primary objective is a prophylactic one; it aims, chiefly, not to provide redress but to avoid harm." (citations and internal quotation marks omitted)); Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (noting that the main objective of Title VII is to prevent the harm of unlawful employment discrimination).

129. *See Albemarle Paper*, 422 U.S. at 417–18 (maintaining that backpay has a significant deterrent effect on employers, and that, without it, they would have little incentive to avoid illegal practices).

130. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

131. 42 U.S.C. § 2000e-5(g)(1), (k) (2006); David J. Willbrand, Comment, *Better Late Than Never? The Function and Role of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 623 (1996).

132. 422 U.S. 405 (1975).

133. *Id.* at 417 (internal quotation marks omitted).

134. *Id.* at 417–18.

deterrence objectives. The *Hoffman* Court addressed this point explicitly, holding that the "spur and catalyst" provided by backpay in Title VII cases can be achieved through non-monetary remedies under the NLRA.[135]

Unfortunately, given subsequent changes to Title VII's remedial landscape, *Albemarle* provides only limited guidance to the current debate. The decision was written at a time when backpay and attorneys' fees were the only monetary recoveries available to Title VII plaintiffs. When Congress enacted the CRA, it found that "*additional* remedies under Federal law [were] needed to *deter* unlawful harassment and intentional discrimination in the workplace."[136] Under an anti-gutting view (which holds that backpay restrictions would not fundamentally harm Title VII), the CRA substituted compensatory and punitive damages for backpay as the primary means for achieving deterrence. The availability of compensatory and punitive damages "serve[s] as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole."[137] Accordingly, those who support diminished rights argue that removing backpay would not gut Title VII at all.[138] Rather, the threat of having to pay large sums of compensatory and punitive damages serves Title VII's prophylactic aims even in the absence of backpay awards.[139]

Although the anti-gutting argument provides some intuitive appeal, it relies on a flawed reading of legislative history. The purpose of adding compensatory and punitive damages to Title VII was to supplement, rather than to supplant, backpay in order to deter misconduct.[140] Congress believed that the threat of Title VII's *entire* complement of remedies would most effectively prevent potential acts of discrimination.[141]

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135. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 (1984)).

136. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (codified as amended in scattered sections of 42 U.S.C.) (emphasis added).

137. H.R. REP. NO. 102-40(I), at 69 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 607.

138. *See, e.g.*, Senn, *supra* note 122, at 172–73 (adopting an anti-gutting view of backpay limitations in Title VII cases).

139. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) (stating that Title VII is designed "chiefly[] not to provide redress but to avoid harm" (citation and internal quotation marks omitted)).

140. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001) (noting that Congress intended the new remedies to supplement the remedies previously available under Title VII).

141. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) (discussing deterrence under Title VII).

The fact that Congress intended backpay to work in conjunction with compensatory and punitive damages, however, does not necessarily lead to equalized rights in Title VII cases. It is just as clear that Congress intended to extend backpay and reinstatement to victims of labor law discrimination. Nonetheless, the Supreme Court believed that a backpay restriction would not fundamentally undermine the NLRA.[142] Thus, the question is not whether eliminating backpay would weaken Title VII's ability to achieve its deterrence objective—it would. The question is whether restricting backpay would gut Title VII altogether.

Proponents of diminished rights in Title VII cases argue that the "potentially lucrative remedies" of compensatory and punitive damages alone will effectively deter future Title VII violations.[143] The functional reality of Title VII litigation, however, suggests otherwise. Compensatory and punitive damages are not available for disparate impact claims;[144] therefore, a backpay limitation would completely gut Title VII in these cases. Even for plaintiffs claiming disparate treatment, backpay is often the only remedy available. An employer's conduct may not constitute the kind of malice or reckless indifference necessary to warrant punitive damages.[145] Compensatory damages for the embarrassment, humiliation, and emotional distress caused by an employer's discriminatory acts can be intangible and difficult to prove.[146] Although the *Albemarle* Court held that the "reasonably certain prospect of a backpay award" discourages illegal conduct, the speculative nature of compensatory and punitive damages cannot have the same effect.[147]

Finally, injunctive relief—the centerpiece of *Hoffman*'s claim that employers do not "get off 'scot-free'"—will rarely be available to unauthorized immigrants who sue under Title VII for intentional discrimination.[148] The IRCA bars unauthorized immigrants from

142. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002).
143. *See* Senn, *supra* note 122, at 172–73 (arguing that a backpay limitation leaves victims of discrimination with other effective remedies).
144. *See* 42 U.S.C. § 1981a(b) (2006) (limiting compensatory and punitive damages to cases of intentional discrimination); *see also* Panach, *supra* note 104, at 947–48 (discussing remedies available in disparate impact cases).
145. 42 U.S.C. § 1981a(b)(1) (2006).
146. *See* Ho & Chang, *supra* note 22, at 513 n.190 (describing emotional distress injuries as "notoriously intangible").
147. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).
148. *See* Schnapper, *supra* note 101, at 48 ("For an undocumented alien, monetary relief will usually be the only possible remedy.").

receiving reinstatement,[149] and courts have refused to grant injunctive relief to Title VII plaintiffs who fail to seek reinstatement.[150]

Reduced to its functional reality, a ban on backpay would leave unauthorized immigrants with no viable remedy in most Title VII cases. This outcome severely curtails the effective enforcement of antidiscrimination protections in the workplace—norms that benefit unauthorized workers and citizens alike.

Hoffman is less concerned with how remedial limitations harm unauthorized immigrants than with the damage done to the workplace protection at issue. The *Hoffman* Court found that national labor goals could be achieved even if certain employees were barred from recovering backpay.[151] The same cannot be said of Title VII. If the price of discrimination fluctuates based on a plaintiff's immigration status, Title VII cannot effectively deter employers from engaging in illegal conduct.

3. Gutting wage protections

Scholars generally share the view that *Hoffman* will not diminish unauthorized workers' ability to assert FLSA claims.[152] Nearly every judge to rule on the issue has agreed, holding that unauthorized immigrants remain covered by wage protections.[153] These courts note that backpay under the FLSA represents wages for work already performed, while backpay under the NLRA represents wages for work never performed because of an illegal discharge.[154] Although accurate, the distinction fails to explain why the former type of loss should be compensated while the latter should not. As explained below, an analysis based on statutory gutting provides a clearer basis for immunizing the FLSA from remedial limitations than a critique based on different statutory definitions of "backpay."

149. *See* Griffith, *supra* note 28, at 130 n.26 (discussing reinstatement of unauthorized workers).

150. *See, e.g.*, Cardenas v. Massey, 269 F.3d 251, 265 (3d Cir. 2001) (denying plaintiff's request for injunctive relief); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136 (11th Cir. 1984) (same).

151. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002).

152. *See* Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 606 (2004) (noting that immigrant advocates are concerned about *Hoffman*'s effect on Title VII, not the FLSA); Seitz, *supra* note 23, at 407–08 (same).

153. *See Part* I (discussing post-*Hoffman* decisions involving wage and discrimination claims).

154. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 323 (D.N.J. 2005); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501–03 (W.D. Mich. 2005); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 70 (Cal. Ct. App. 2007).

Backpay protects different interests, depending on the employment protection at issue. Under Title VII and the NLRA, backpay most commonly compensates employees for "lost future earnings"[155]—i.e., remunerable work lost because of an illegal discharge.[156] Under the FLSA, backpay compensates employees for wages earned but not paid.[157] The *Hoffman* Court refused "to award backpay to an illegal alien for years of work not performed."[158] Because plaintiffs in FLSA actions have already performed work, advocates assert that *Hoffman* is inapplicable to such cases. Although this is a sound basis to distinguish the facts of *Hoffman* from specific FLSA actions, the significance of the distinction remains unclear. In fact, even in cases involving lost work, such as an illegal discharge under the NLRA or Title VII, "backpay" compensates an employee for a cognizable loss, and a court that denies the remedy leaves a plaintiff less than whole.

FLSA plaintiffs undoubtedly suffer a tangible loss when they work for an employer without pay. But employees fired for union organizing also suffer a tangible harm: lost work due to the employer's anti-union animus.[159] Consistent with this principle, courts limit backpay awards under the NLRA to the employee's actual loss.[160] Just as a plaintiff's right to recover backpay under the FLSA accrues when an employer fails to tender compensation for work performed, the employee's right to recover backpay under the NLRA accrues when she is unemployed and seeking work following an illegal discharge.[161] By the time either employee appears in court, she has suffered a definite injury (unpaid work or unemployment). If the employee in the labor context can be left less than whole, why not the plaintiff who has worked without pay?

Perhaps the past work/lost work distinction carries more force when viewed from the perspective of the employer. It might appear that the FLSA violator enjoys a windfall of unpaid labor, while the

155. Griffith, *supra* note 28, at 130.
156. Smith et al., *supra* note 152, at 606.
157. *See, e.g.*, *id.* (distinguishing between the two types of backpay); Vu & Schwartz, *supra* note 96, at 45–46 (same).
158. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).
159. *See* Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 749–50 (2003) (noting that backpay serves as a proxy for the wages an employee would have earned in the absence of discrimination).
160. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (noting that all mitigating factors should be taken into account).
161. Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 30 N.Y.U. REV. L. & SOC. CHANGE 299, 312–13 (2006).

NLRA violator does not. But employers who commit unfair labor practices without having to pay for them enjoy "ill-gotten gains" as well.[162] The employer who violates the NLRA normally pays a price for the "benefit" of illegal discrimination in the form of backpay. If this price is reduced to zero, the employer can discriminate for free, putting him at a comparative advantage over nondiscriminating employers. Put another way, the NLRA diminishes a perfectly at-will relationship by reducing employers' freedom to hire and fire whom they please. Employers who violate the NLRA without cost enjoy greater freedom in making employment decisions. If courts eliminate backpay, the FLSA violator enjoys free labor and the NLRA violator enjoys free discrimination.

In comparison to the past work/lost work distinction, statutory gutting provides a more persuasive basis for preventing diminished rights in wage cases. The FLSA was designed to combat Depression-era wages by establishing minimum working standards that are "remedial, with a humanitarian end in view."[163] Those who support diminished rights might argue that remedial limitations under the FLSA are no different than restricting backpay under the NLRA—another workplace protection with a compensatory remedial scheme. Whether the unauthorized worker asserts a claim under the FLSA or NLRA, he seeks to recover "wages that could not lawfully have been earned . . . [from] a job obtained in the first instance by a criminal fraud."[164]

But the argument in favor of diminished rights ignores the difference between an employment statute's remedial scheme and its substantive purpose. The two are one and the same for the FLSA, but not for the NLRA. Although backpay under the NLRA is designed to serve compensatory ends in order to combat discrimination, the statute's primary function is to encourage collective bargaining through voluntary agreements.[165] In fact, the Supreme Court has explicitly barred the NLRB from imposing substantive working conditions on employers and unions.[166] The remedy of backpay—though undoubtedly compensatory in nature—ultimately serves the

162. *See* Rogers v. Loether, 467 F.2d 1110, 1121 (7th Cir. 1972) ("The retention of 'wages' which would have been paid but for the statutory violation (of improper discharge) might well be considered 'ill-gotten gains'; ultimate payment restores the situation to that which would have existed had the statute not been violated.").

163. *See* Charnesky, *supra* note 76, at 393–94 (quoting Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 56 (8th Cir. 1940)) (discussing the FLSA's goals).

164. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148–49 (2002).

165. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 401–02 (1952).

166. *Id.* at 402; Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–11 (1940).

NLRA's *procedural* goal of encouraging self-organization and collective bargaining.[167]

In contrast, the FLSA's remedies directly support the statute's substantive purpose, which is to improve working conditions by setting overtime and minimum wage rates. Thus, although the Supreme Court tolerated diminished rights in NLRA cases on the assumption that the objectives of national labor policy could be achieved even without backpay, the same is not true for wage protections. The connection between the FLSA's remedial scheme and its statutory purpose is evinced by the nondiscretionary nature of backpay under the FLSA, as compared to Title VII and the NLRA. Although the latter statutes leave backpay determinations to the equitable discretion of the courts,[168] the remedy is mandatory under the FLSA.[169] Thus, the FLSA leaves no room for any type of *Hoffman*-inspired balancing between federal labor and immigration objectives. A court that evaluates the effect that an award of unpaid wages would have on immigration-related incentives simply ignores the mandatory nature of the remedy under the FLSA. Thus, eliminating backpay under the FLSA would not only undermine the statute's ability to attain its stated purpose, it would blot out explicit statutory text requiring the remedy upon a finding of liability.

The few judges who have argued in favor of denying unauthorized immigrants the ability to recover minimum wages fail to address the issue of statutory gutting.[170] Rather than focus on the harm done to wage laws when backpay is denied, they focus on the harm done to immigration laws when backpay is awarded. Under this view, allowing unauthorized immigrants to recover unpaid wages trivializes the IRCA and encourages new border violations.[171] But an approach that

167. 29 U.S.C. § 151 (2006); *see also* NLRB v. Fin. Inst. Employees of Am., Local 1182, 475 U.S. 192, 208 (1986) (noting that the NLRA is designed to preserve industrial peace); Ho & Chang, *supra* note 22, at 509–10 (arguing that the NLRA's procedural framework is not designed to achieve substantive goals in bargaining).

168. *See* Willbrand, *supra* note 131, at 642 n.152 (discussing mandatory and permissive nature of backpay awards under different statutes). *Compare* 29 U.S.C. § 216(b) (2006) ("shall" in the FLSA), *with* 42 U.S.C. § 2000e-5(g)(1) (2006) ("may" in Title VII), *and* 29 U.S.C. § 160(c) (2006) ("may" in the NLRA).

169. 29 U.S.C. § 216(b) (2006).

170. *See, e.g.*, *In re* Reyes, 814 F.2d 168, 171 (5th Cir. 1987) (Jones, J., dissenting) (discussing the immigration-related justifications for denying unauthorized immigrants the ability to recover unpaid wages); Patel v. Sumani Corp., 660 F. Supp. 1528, 1531 (N.D. Ala. 1987), *rev'd sub nom.* Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1988) (holding that the FLSA's wage protections conflict with the INA); Ulloa v. Al's All Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (noting in dicta that "*Hoffman* would require that the wage claim be disallowed in its entirety").

171. *In re* Reyes, 814 F.2d at 172 (Jones, J., dissenting); *Ulloa*, 768 N.Y.S.2d at 558.

fails to consider the effect remedial limitations have on workplace protections ignores *Hoffman*'s central point. The Supreme Court limited remedies in NLRA cases precisely because labor law would remain relatively unblemished in the wake of such losses. A different outcome is required in wage cases, however, because stripping backpay from the FLSA is equivalent to eliminating the FLSA itself.

III. INCENTIVES FOR ILLEGAL IMMIGRATION

The future rights of unauthorized workers will depend not only on the functional concerns discussed above, but also on the impact equalized rights have on immigration policy. In its jurisprudence on unauthorized workers, the Supreme Court has considered whether extending employment protections encourages illegal immigration. The *Sure-Tan* and *Hoffman* Courts approached the subject from very different vantages and, not surprisingly, came to different results. In *Sure-Tan*, the Court focused almost exclusively on the employer-related incentives created by denying coverage under the NLRA.[172] The Court stated:

> If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.[173]

Under the *Sure-Tan* Court's approach, an employee's incentive to immigrate is subordinate to the more important factors that influence an employer's hiring decisions. A business will be less likely to employ an unauthorized worker who can assert claims for workplace violations; the drop in employer demand created by equalized rights will have the secondary effect of impacting the immigration-related decisions of foreign nationals. By diminishing an immigrant's exploitability, work law serves immigration law.[174]

Hoffman moves from an employer-based framework to one centered on the choices made by unauthorized immigrants. The employee in *Hoffman* admitted to tendering false documents in order to obtain employment.[175] Awarding the employee backpay

172. 467 U.S. 883, 893–94 (1984).
173. *Id.*
174. Although the Supreme Court considered whether a backpay award would cause the five Sure-Tan workers to cross the border illegally, *id.* at 893–94, the Court never engaged in a broad analysis of immigration-related incentives from the perspective of immigrants generally.
175. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 141 (2002).

"would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[176] According to the *Hoffman* Court, a ban on backpay discourages immigrants from crossing the border, obtaining employment, and remaining in the country.[177]

Both *Sure-Tan* and *Hoffman* rely on the questionable assumption that employment law remedies impact the stakeholders' incentives. Causes that more directly affect illegal immigration include poverty in countries of origin,[178] globalization,[179] and underenforcement of the IRCA.[180] Unauthorized immigrants rarely know their employment rights.[181] If they are willing to risk injury and death to come to the United States, the Supreme Court's decisions will not dampen their determination.

In contrast to the negligible effect they have on a noncitizen's decision to immigrate illegally, changes in employment law could theoretically alter an employer's calculus. Congress focused on employer conduct when it designed the IRCA.[182] Believing that "[e]mployment is the magnet that attracts aliens here illegally,"[183] Congress attempted to diminish employers' economic incentives to hire unauthorized immigrants through the IRCA's work verification system.[184] Both the *Sure-Tan* Court and the IRCA attempted to raise

176. *Id.* at 151.

177. *See id.* (holding that awarding backpay would encourage illegal border crossing).

178. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 990 (1988) (describing American demand for low-wage, low-skilled labor as one of many causes of illegal immigration); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protections and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 358 (2001) (discussing economic disparities between the United States and sending countries).

179. *See* Nessel, *supra* note 178, at 358 (discussing global factors influencing international migration).

180. *See* Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 997 (2008) (discussing the need for greater enforcement of the IRCA).

181. *See* Ontiveros, *supra* note 86, at 630 (challenging the contention that workplace protections encourage unauthorized immigrants to come to the United States).

182. *See* Catherine L. Fisk & Michael J. Wishnie, *The Story of* Hoffman Plastic Compounds, Inc. v. NLRB*: Labor Rights Without Remedies for Undocumented Immigrants*, *in* LABOR LAW STORIES 399, 406 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (discussing the IRCA's focus on punishing employers that hire unauthorized immigrants).

183. H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50.

184. *See* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 55–58 (2d Cir. 1997) (noting that "IRCA was passed to reduce the incentives for employers to hire illegal aliens").

the costs of hiring unauthorized immigrants—*Sure-Tan* by extending labor law protections to all workers and the IRCA by fining employers who hire unauthorized immigrants.

Given the IRCA's legislative backdrop and *Sure-Tan*'s employer-based frame, it is remarkable that the *Hoffman* Court focused exclusively on the illegal conduct of immigrant employees.[185] Critiques of *Hoffman* have failed to account for this crucial analytical shift from employer- to employee-based incentives. Instead, most judges and scholars critical of *Hoffman* argue that backpay limitations increase the likelihood that businesses will hire these employees.[186] Despite its cogency, the argument fails to provide a basis for limiting *Hoffman*.[187] The Supreme Court cited but rejected the contention that remedial restrictions make unauthorized immigrants relatively more attractive to employers.[188] Rather, *Hoffman* focuses on the choices of immigrants "who themselves ha[ve] committed serious criminal acts."[189] It is time to consider the Court's analytical frame and examine the role played by employee-based incentives in other statutory contexts.

A. Rewarding Illegal Behavior

The Supreme Court's discourse on unauthorized immigrants takes a decidedly moralistic tone when workplace rights are at issue. *Hoffman* speaks of "condon[ing]" unauthorized immigrants' past crimes.[190] Rather than discussing the employer's admitted unfair labor practices, *Hoffman* elaborates on the employee's "criminal fraud."[191] Granting backpay to such a worker would "reward[]" his past misbehavior.[192]

185. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

186. *See, e.g.*, Flores v. Limehouse, No. 2:04-1295-CWH, 2006 WL 1328762, at *2 (D.S.C. May 11, 2006) (arguing that a ban on backpay provides employers with "incentives to hire unauthorized aliens thereby defeating IRCA's purpose of reducing employment opportunities for unauthorized aliens"); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 77 (Cal. Ct. App. 2007) (noting that employers often know when they are hiring unauthorized immigrants); Cameron, *supra* note 61, at 31–32 (noting that a backpay limitation likely invokes fear of deportation in undocumented workers and precludes them from pursuing actions against employers); Ho & Chang, *supra* note 22, at 489–90 (discussing employers' incentives to hire unauthorized immigrants).

187. *See* Vu & Schwartz, *supra* note 96, at 43 ("Seeing as this logic has been considered and rejected by the Court, restating it cannot serve as a valid way to distinguish *Hoffman*.").

188. *Hoffman*, 535 U.S. at 152.

189. *Id.* at 143.

190. *Id.* at 151.

191. *Id.* at 149.

192. *Id.* at 145.

The first step in deciding whether backpay under Title VII or the FLSA might constitute a similar reward is to determine the specific illegal behavior at issue in *Hoffman*. When the *Hoffman* Court wrote about condoning Jose Castro's "serious misconduct,"[193] exactly what misconduct was the Court seeking to curb? If the objectionable behavior was Mr. Castro's unauthorized presence in the United States, then the rewards rationale could apply broadly to unauthorized immigrants asserting wage and discrimination claims as well. The INA permits the removal of foreign nationals who have entered the United States without inspection or overstayed their visas, among other grounds.[194] By definition, an unauthorized immigrant who sues under Title VII or the FLSA has committed some sort of INA violation.[195] If he continues to stay in the country while prosecuting workplace claims, he successfully evades apprehension by immigration authorities.[196] Thus, the most expansive view of the rewards rationale would bar claims brought by any person present in the country illegally.

But there is little support for such a wide reading of the Court's discourse on incentives. Nothing in the case law suggests that unauthorized immigrants should be denied access to courts, and *Hoffman* itself assumes the continued coverage of unauthorized immigrants under the NLRA.[197] The *Hoffman* Court focused not on Mr. Castro's illegal presence in the United States, but on "a legal landscape now significantly changed" by the IRCA.[198] The Court stated, "IRCA forcefully made combating the employment of illegal aliens central to [t]he policy of immigration law."[199] Thus, it was Mr. Castro's document fraud (and not his illegal presence) that was the primary focus of the Court's rewards critique.[200]

If an unauthorized immigrant obtains employment in the same way as Mr. Castro and proceeds to sue under Title VII or the FLSA,

193. *Id.* at 146.
194. *See* 8 U.S.C. § 1227 (2006) (listing various classes of deportable aliens); *see also* Legomsky, *supra* note 25, at 487, 499 (2007) (discussing immigration-related violations).
195. Many unauthorized immigrants—up to forty percent of the population—commit the non-criminal INA violation of overstaying their visa. PASSEL, *supra* note 1, at 1; Smith et al., *supra* note 152, at 625 n.184.
196. *See Hoffman*, 535 U.S. at 149 (expressing concern that "alien-employee[s] would . . . successfully evad[e] apprehension by immigration authorities").
197. *See* Schnapper, *supra* note 101, at 49 (arguing against *Hoffman*'s application to other claims); *see also supra* Part III.C (discussing the "wider lens" of incentives).
198. *Hoffman*, 535 U.S. at 147.
199. *Id.* (citations and quotation marks omitted).
200. *See id.* at 149 (discussing the importance of the employment verification system).

similar rewards concerns are present. For example, a backpay award given to an unauthorized immigrant who is the victim of racial discrimination could be viewed as sanctioning the plaintiff's illegal use of documents to obtain employment in the first instance.

The analysis might change if a plaintiff's culpability were less than Mr. Castro's or an employer's culpability were greater than the employer in *Hoffman*. The IRCA forbids immigrants from obtaining employment fraudulently[201] and employers from knowingly hiring these workers.[202] *Hoffman* involved a guilty-worker/innocent-employer scenario because Mr. Castro tendered fraudulent documents without Hoffman's knowledge.[203] But what if an employer knowingly hires an unauthorized worker? Several judges and commentators have argued that a diminished rights outcome should not occur in cases involving such "guilty employers."[204] There are two possible guilty-employer scenarios, one involving an innocent job applicant and one in which both parties commit document fraud together. Consistent with the rewards rationale, employers who engage in document fraud alone should not receive backpay immunity. The cases the *Hoffman* Court relied on to strike labor remedies for unauthorized workers involved employees who committed crimes at worksites.[205] In an innocent-worker/guilty-employer scenario, there is no employee misconduct to reward; only the employer has violated the IRCA.

But the innocent-worker/guilty-employer scenario is somewhat unusual. The IRCA prohibits an employer from knowingly hiring an unauthorized immigrant, failing to review a job applicant's paperwork, and continuing to employ a worker with the knowledge that she is an unauthorized immigrant.[206] The only situation in which a worker is "innocent" and an employer is "guilty" occurs when a business fails to request any paperwork from a new hire

201. 8 U.S.C. § 1324c (2006).
202. 8 U.S.C. § 1324a (2006).
203. *Hoffman*, 535 U.S. at 141.
204. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 236–37 (2d Cir. 2006) (attempting to limit *Hoffman* based on the guilty-employer distinction); Singh v. Jutla, 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002) (same); O'Donovan, *supra* note 161, at 315–16 (arguing that backpay immunity should apply only to unknowing employers); Senn, *supra* note 122, at 158–59 (contending that Congress intended only to punish undocumented workers who obtained work through fraudulent means); Wishnie, *supra* note 10, at 511–12 (discussing the guilty-employer distinction).
205. *See* Southern S.S. Co. v. NLRB, 316 U.S. 31, 46–47 (1942) (denying reinstatement to employees who violated a federal mutiny statute); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257–58 (1939) (denying reinstatement to employees who engaged in an illegal seizure of a building).
206. 8 U.S.C. § 1324a (2006).

(the employee does not violate the IRCA here because she has not tendered fraudulent documents).[207] But the IRCA's structure provides employers with few incentives to ignore documents altogether. Employers can hire unauthorized workers and comply with the IRCA by simply accepting social security cards that appear genuine.[208] The relative ease of compliance means that even employers who seek to hire unauthorized immigrants will be much more likely to give a cursory review of employee-provided paperwork rather than fail to ask for documents at all.[209]

If both parties commit document fraud, courts face the choice of rewarding the employee's misconduct with backpay or rewarding the employer's IRCA violation with backpay immunity. By extending the backpay limitation to knowing employers, courts would create a direct incentive to hire unauthorized immigrants. Employers would weigh the reduction in employment liability gained by hiring unauthorized workers against the risk of IRCA fines. Given the improbability of actual prosecution by immigration authorities,[210] many employers might seek to hire unauthorized workers as an explicit management strategy. The moral hazard created by granting backpay immunity to guilty employers (even when employees also violate the IRCA) would pose a direct threat to the system of work verification that the Supreme Court has characterized as "crucial" to national immigration policy.[211]

B. Encouraging Future Violations

Although *Hoffman*'s rewards rationale speaks of "condon[ing] *prior* violations,"[212] the decision has a future-oriented bent as well. A reward for past misconduct creates incentives for other immigrants to violate immigration laws.[213] By limiting backpay under the NLRA,

207. *See* Linton Joaquin & Charles Wheeler, *Document Fraud Enforcement the Second Time Around: Will the Right Lessons Be Learned?*, 78 INTERPRETER RELEASES 473, 474 (Mar. 12, 2001) (discussing IRCA violations).

208. 8 U.S.C. § 1324a(b)(1)(A) (2006).

209. *See* Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 554 (9th Cir. 1991) (recognizing congressional intent to make the verification process relatively easy for employers).

210. *See* Gonzalez, *supra* note 180, at 997 (discussing the low number of sanctions imposed on employers for violations of the IRCA).

211. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147–48 (2002); *see also* Schnapper, *supra* note 101, at 47 (arguing against extending backpay immunity to knowing employers).

212. *Hoffman*, 535 U.S. at 151 (emphasis added).

213. *Id.* at 150 (recognizing that "awarding backpay . . . condones and encourages future violations"); *see also* Martinez, *supra* note 54, at 677–78 (discussing the application of the Supreme Court's incentives-based rationales in later cases).

the Supreme Court has attempted to discourage several types of misconduct, including entering the country illegally, evading apprehension once inside the country, and obtaining new employment through additional IRCA violations.[214] As explained below, restricting remedies in wage and discrimination cases will not discourage any of the three behaviors the Supreme Court sought to curtail.

Consider the incentive to immigrate illegally. The *Hoffman* Court created a fiction whereby the denial of remedies under the NLRA would discourage people from immigrating illegally. Given all of the factors driving a person's decision to immigrate to the United States, the Court could not actually have believed that the speculative hope of recovering backpay from a labor law violation would alter an immigrant's calculus. The same fiction applies to Title VII. Foreign nationals do not immigrate to the country illegally in order to win sexual harassment lawsuits.[215]

The goal of discouraging border violations is only slightly less unrealistic in the FLSA context. Given immigrants' desire for higher-paying jobs, a loss of the federal minimum wage might dissuade a few people from entering the United States illegally.[216] But this is a questionable assumption given that unauthorized immigrants who currently enjoy minimum wage protections rarely assert this right even when they are paid below required levels.[217] With the ability to earn wages in the United States that are up to ten times higher than in Mexico and Central America, unauthorized immigrants might still find American workplaces attractive even without minimum wage protections.[218] Therefore, to have any real impact on border-crossing incentives, average wage rates for unauthorized immigrants would have to fall well below federally defined floors.

Just as they fail to influence a worker's decision to cross the border illegally, employment law remedies create no incentive to seek

214. *Hoffman*, 535 U.S. at 150–52; *see* Seitz, *supra* note 23, at 396 (discussing the *Hoffman* Court's contention that backpay awards incentivize further illegal activity).

215. *See Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting) (arguing that the possibility of future backpay awards does not create an incentive to immigrate); *see also* Griffith, *supra* note 28, at 136 (criticizing *Hoffman*'s incentives analysis).

216. *See* Neil A. Friedman, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1742 (1986) (arguing that unauthorized immigrants are not likely to "base their immigration decisions on legal niceties").

217. *See* Bosniak, *supra* note 178, at 986 (discussing unauthorized immigrants' unwillingness to assert workplace claims); William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 669 (2003) (describing immigrants who assert workplace claims following *Hoffman* as "audacious").

218. Sylvia R. Lazos, *Emerging Latina/o Nation and Anti-Immigrant Backlash*, 7 NEV. L.J. 685, 695 n.68 (2007).

employment following an illegal discharge. Nonetheless, the Supreme Court's incentives-based rationale assumes that immigrants' mitigation efforts encourage them to obtain additional work, thereby triggering more IRCA violations.[219]

The Court's reading of the mitigation principle is wrong both as a matter of theory and practice. There is no "duty" to mitigate in that plaintiffs who fail to mitigate are not exposed to liability or barred from asserting their claims.[220] Rather, employers have the burden of proving an employee's failure to mitigate and can limit a plaintiff's recovery by carrying this burden. Courts reduce backpay awards by the wages an employee earned or should have earned following termination.[221] Under this standard method for calculating backpay, an employee's recovery should be exactly the same whether or not she obtains new employment[222] because her award is reduced by the amount she earns in reality or earns hypothetically with reasonable diligence.[223]

Although the Court is correct that unauthorized immigrants will likely obtain new employment following illegal discharges,[224] the incentive flows from their need to replace wages, not from the mitigation principle.[225] Most unauthorized immigrants earn

219. *See Hoffman*, 535 U.S. at 150–51 ("Castro cannot mitigate damages, a duty our cases require, without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers." (citations omitted)).

220. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.12, at 807 (3d ed. 1999) ("[T]he injured party incurs no liability to the party in breach by failing to take such steps."); Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact*, 69 U. CIN. L. REV. 7, 9 n.3 (2000) (preferring the term "mitigation principle").

221. *See, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197–98 (1941) (reducing backpay by "amounts which the workers failed without excuse to earn" (internal quotation marks omitted)); Fisk & Wishnie, *supra* note 182, at 404 (discussing mitigation in relation to backpay under the NLRA).

222. *See* 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1039, at 242 (1964) ("[The] recovery against the defendant will be exactly the same whether [the plaintiff] makes the effort and mitigates his loss, or not . . . .").

223. Given the discretionary nature of the remedy, a court may refuse to award *any* backpay to employees who do nothing to find replacement work. But this should occur only if the wages the employees would have earned with reasonable diligence equal or exceed their actual lost wages. Any reduction beyond that amount would conflict with the make-whole goal of Title VII and the NLRA. *See* Ho & Chang, *supra* note 22, at 511 (discussing Title VII's compensatory function).

224. *Hoffman*, 535 U.S. at 150–51.

225. Employees who fail to mitigate properly are distinct from those who make themselves "unavailable" for work by leaving the labor market. The former group remains eligible for backpay, less mitigation, while the latter group's backpay claims are tolled during the period of unavailability. *See, e.g.*, Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985) (denying backpay after the plaintiff left the job market to attend law school); Lundy Packing Co., 286 N.L.R.B. 141, 164 (1987) (tolling the plaintiff's backpay award for the period of time when the plaintiff was incarcerated);

extremely low wages.[226] If they are fired, these workers will find new work in order to feed themselves and their families, not out of a desire to properly mitigate losses for a future lawsuit.[227]

The same critique applies in the Title VII context. Title VII's backpay limitation states, "Interim earnings *or amounts earnable* with reasonable diligence by the person or persons discriminated against shall operate to *reduce* the back pay otherwise allowable."[228] The employer defending a Title VII case must prove that the plaintiff failed to adequately obtain substantially equivalent employment.[229] But if the employer carries this burden, the plaintiff recovers the same amount (often nothing) as she would have received had she mitigated properly.[230] As with the NLRA, Title VII's mitigation principle does not encourage an unauthorized immigrant to find new work because the plaintiff's post-termination conduct does not affect her backpay recovery.[231]

The incentives created by hypothetical mitigation, tenuous as they are in labor and discrimination cases, are completely absent in wage cases because there is no duty to mitigate. A plaintiff seeking unpaid wages under the FLSA has already performed services and cannot

see also A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 412 (1995) (discussing the availability doctrine as it applies to unauthorized immigrants). The Sure-Tan employees who resided in Mexico had left the American job market and were unavailable for work. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 (1984). *Hoffman* did not state whether the unauthorized immigration status of workers residing in the United States makes them unavailable for work. *See Hoffman*, 535 U.S. at 159 (Breyer, J., dissenting) ("The Court, however, does not rely upon [the availability doctrine] as determining its conclusion.").

226. JEFFREY S. PASSEL, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 34 (2005), *available at* http://pewhispanic.org/files/reports/46.pdf; *see also* Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 16–17 (2006) (discussing wages of unauthorized immigrants in relation to national averages).

227. *See* PASSEL, *supra* note 226, at 30–35 (illustrating the dynamics of immigrant families and the demands on unauthorized immigrants as providers for their families).

228. 42 U.S.C. § 2000e-5(g)(1) (2006) (emphasis added).

229. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982); Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1044 (7th Cir. 1994).

230. *See* Booker v. Taylor Milk Co., Inc., 64 F.3d 860, 866 (3d Cir. 1985) ("The plain language of section 2000e-5 shows that amounts that could have been earned with reasonable diligence should be used to *reduce or decrease* a backpay award, not to wholly cut off the right to any backpay."). *But see* Sellers v. Delgado Coll., 902 F.2d 1189, 1196 (5th Cir. 1990) (denying backpay altogether for the plaintiff's failure to mitigate).

231. Although a court may be disinclined to award backpay to employees who fail to search for work, any reduction that exceeds what was reasonably earnable conflicts with Title VII's text requiring a "reduction" based on "earnable" wages. *See supra* notes 223–230 and accompanying text.

reduce her losses by working for another employer.[232] The wage claim does not encourage future violations of the IRCA because the plaintiff is not required to find new work.[233]

In sum, employment law remedies do not cause workers to come to the United States or stay, despite the Supreme Court's assumptions about the factors driving illegal immigration.

C. The Wider Lens of Incentives

The Supreme Court has stated that the goal of discouraging illegal immigration should be seen "through a wider lens."[234] Viewed uncritically, this statement could lead to diminished rights in all cases.

When courts focus on the "wider lens" of incentives, rather than on the specific functional and policy-based arguments discussed above, they often compare unauthorized immigrants' employment relationships to illegal contracts.[235] But the comparison ignores the rules governing the enforcement of illegal contracts. Although courts generally refuse to give effect to contracts formed with an illegal purpose, the finding of "illegality" does not end the inquiry. For example, courts are more likely to enforce illegal contracts when failure to do so would result in disproportionate forfeiture.[236] Such forfeiture would certainly occur if an unauthorized immigrant could not recover wages for work performed.

Further, a contract that is made illegal by a particular regulation or statute may still be enforced if one of the contracting parties is a member of the class of persons protected by the statute.[237] Although the IRCA bars the employment of unauthorized immigrants, Congress sought to protect the rights of unauthorized immigrants should they ultimately obtain employment.[238] Thus, the finding of

232. *See* Vu & Schwartz, *supra* note 96, at 47 (noting that FLSA plaintiffs cannot reduce their losses by obtaining alterative employment).

233. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 243 (2d Cir. 2006) (noting that a backpay award under the FLSA does not condone prior immigration violations or continue them); Flores v. Albertsons, Inc., No. CV0100515AHM (SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (noting that successful FLSA claims do not cause employees to violate the IRCA).

234. Hoffman Plastics Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

235. *See, e.g.*, Rivera v. NIBCO, Inc., 384 F.3d 822, 833 (9th Cir. 2004) (Bea, J., dissenting) ("It is axiomatic that a contract with an illegal purpose bars enforcement of such contract; no damages are incurred by its breach." (citations omitted)); Ulloa v. Al's All Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (stating that an employment contract with an unauthorized immigrant is "tainted with illegality").

236. RESTATEMENT (SECOND) OF CONTRACTS § 197 (1979).

237. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 156–58 (1988).

238. *See* Part II.A (discussing the IRCA's text and history).

illegality is only the starting point of the analysis, even if a wider lens is used.

Detached from the language or purpose of the IRCA, the wider lens approach becomes a Rorschach test for judges. Those strongly opposed to illegal immigration focus exclusively on the illegality of the employment relationship.[239] Because the Supreme Court has announced many factors relevant to cases involving unauthorized workers without formulating a hierarchy of factors, a plaintiff's unauthorized status becomes the sole focus of the analysis.[240] Viewed broadly, the wider lens approach threatens not only the remedy of backpay, but also the ability of unauthorized workers to assert workplace claims at all.

Although still among the minority, several judges have utilized a wider lens to argue that unauthorized workers should enjoy fewer rights under federal wage[241] and antidiscrimination[242] statutes. These outcomes contradict most post-*Hoffman* decisions that continue to favor unauthorized workers' rights and remedies.[243] They also ignore *Hoffman*'s central premise, which is that courts may restrict remedies only to the extent that the underlying workplace protections remain intact. Nonetheless, the wider lens view offers an attractively simplistic analysis: denying recovery altogether discourages illegal employment relationships and supports national immigration objectives.

IV. DIMINISHED RIGHTS, DECLINING CITIZENSHIP

To this point, I have considered the rights of unauthorized workers in terms of statutory purpose and immigration policy. By applying

239. *See* Martinez, *supra* note 54, at 665 (arguing that the "wider lens" approach has "shifted the focus from protecting the rights of workers" to the workers' immigration status).

240. Vu & Schwartz, *supra* note 96, at 47.

241. *See, e.g.*, *In re* Reyes, 814 F.2d 168, 171 (5th Cir. 1987) (Jones, J., dissenting) (arguing in favor of distinguishing between citizens and unauthorized workers in FLSA cases); Patel v. Sumani Corp., 660 F. Supp. 1528, 1531 (N.D. Ala. 1987), *rev'd sub nom.* Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1988) (questioning whether an unauthorized immigrant is "an individual," as defined by the FLSA).

242. *See, e.g.*, Rivera v. NIBCO, Inc., 384 F.3d 822, 834–35 (9th Cir. 2004) (Bea, J., dissenting) (rejecting the idea that antidiscrimination policies outweigh immigration policies); Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186–87 (4th Cir. 1998) (en banc) (per curiam) (rejecting a Title VII claim brought by an unauthorized immigrant); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896–98 (S.D. Tex. 2003) (dismissing a Title VII claim based on the plaintiff's immigration status); Crespo v. Evergro Corp., 841 A.2d 471, 472 (N.J. Super. Ct. App. Div. 2004) (dismissing a state discrimination claim based on the plaintiff's immigration status).

243. *See* Part I (discussing the courts' treatment of unauthorized workers' rights following *Hoffman*).

these criteria to wage and antidiscrimination protections, I have explained why the diminished rights outcome should not occur, but could. Although the future rights of unauthorized immigrants will depend largely on how courts determine these issues of purpose and policy, the consequences of diminished rights are equally important. Here, I explain why reducing workplace protections harms both unauthorized immigrants and citizens.

At its core, the Supreme Court's denial of basic workplace remedies to unauthorized immigrants is rooted in notions of communitarianism. A philosophy debated among political scientists and immigration theorists, communitarianism explains how fixed borders define the community and preserve scarce resources.[244] From this perspective, extending membership rights to outsiders who have violated the country's borders threatens democracy and membership for those lawfully present.[245]

The Supreme Court's jurisprudence on unauthorized workers implicitly fashions a communitarian vision of the workplace. The *Hoffman* Court denied Jose Castro the ability to recover monetary remedies for his illegal discharge because he had knowingly violated the nation's immigration laws.[246] If foreign nationals can cross the border at will, tender fraudulent documents, and assert workplace claims on par with citizens, then our nation's "critical" system of verifying who belongs at the workplace would be undermined.[247] In order to reinforce the border—the nation's primary mechanism for defining membership—employment protections cannot extend fully to outsiders. Thus, *Hoffman* constructs a world in which citizens are allowed to seek redress for incidents of discrimination, relegating unauthorized workers to a lawless remedial realm to match their lawless existence in the community.

Here I offer a theoretical response to the communitarian rationale for denying workplace rights to unauthorized immigrants. I argue that employment protections are "rights of partial inclusion" because they reflect a distinctive sphere—the workplace—where unauthorized immigrants should be placed on par with citizens in

244. Gordon & Lenhardt, *supra* note 9, at 2501. *See generally* WALZER, *supra* note 19, at 31–63 (considering how communities determine membership and the benefits that arise from such membership).

245. *See* Bosniak, *supra* note 178, at 1002–03 (discussing the liberal exclusionist view of immigration policy).

246. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149–50 (2002).

247. *Id.* at 151.

vindicating collective rights.[248] Because of the communal nature of workplace rights that ensure better working conditions for all employees, I assert that employment protections are unlike other rights commonly discussed among communitarians, such as public benefits and legal status. I explain why enforcing wage and antidiscrimination rights, even if only on an individual basis, constitutes collective action that ensures better working conditions for immigrants and citizens alike. In contrast to arguments that favor restricting resources to lawful residents, I explain how, if applied broadly, employment protections can preserve community identity.

A. Rights of Partial Inclusion

What does it mean to work without rights? What are the consequences of the ambiguous and diminished rights outcomes for citizens and immigrants? The current decline in rights represents an upheaval of fundamental notions of citizenship. Although the understanding of what constitutes "citizenship" varies widely across disciplines, sociologists, political theorists, and legal theorists generally describe citizenship in terms of "membership."[249] To be a citizen is to belong to a broader community. The bonds that create membership are described disparately in terms of legal status, rights, political engagement, and self-identification.[250]

Unauthorized immigrants do not fit neatly into any of these descriptions. At first glance, it appears rather oxymoronic to refer to an "unauthorized immigrant citizen." This reaction derives largely from our status-based understanding of citizenship. Citizenship is associated primarily with legally recognized membership in the political community. By definition, unauthorized immigrants are excluded from this group.[251]

But exclusion from one category of citizenship does not necessarily lead to exclusion from all others. For example, one can be a rights-based citizen—that is, enjoy some degree of civil and social rights—without occupying any level of status citizenship. The experiences of women and minorities in this country demonstrate that the converse

248. I do not mean to suggest that by equalizing employment rights, unauthorized workers will enjoy the same wages, working conditions, or ability to assert those rights as citizens. There is a large difference between possessing workplace rights and having the ability to assert them. *See infra* text accompanying note 329 (discussing the limits of equalized rights).

249. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 18–20 (2006) (discussing theories of citizenship).

250. *Id.* at 20; *see also* Gordon & Lenhardt, *supra* note 9, at 2500 (noting that "the term 'citizenship' is not a unitary concept").

251. Bosniak, *supra* note 8, at 461–62.

is true: many status citizens have lacked basic political and social rights throughout American history.[252] Likewise, unauthorized immigrants' lack of formal citizenship does not necessarily implicate their standing as rights-based citizens. In fact, until recently, employment law extended equal rights to unauthorized immigrants.[253]

The notion of partial inclusion derives from theories of social citizenship and equal citizenship discussed among political scientists and social theorists. T.H. Marshall's essay, *Citizenship and Social Class*,[254] introduced the theory of rights-based citizenship.[255] Marshall asserted that individuals must possess a complete collection of rights—civil rights, political rights, and social rights—in order to enjoy full citizenship.[256] According to Marshall, the ability to exercise all of these rights imbues in the holder "a direct sense of community membership based on loyalty to a civilization which is a common possession."[257]

Similar to the manner in which Marshall's discourse on citizenship has influenced social and political thought, Kenneth Karst's notion of citizenship as "belonging"[258] has greatly impacted citizenship talk among legal theorists.[259] Karst states, "The principle of equal citizenship presumptively insists that the organized society treats each individual as a person, one who is worthy of respect, one who

252. *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1185–86 (2008) (noting that status citizens can lack civil and social rights).

253. There has never been perfect "equality" of employment rights between citizens and immigrants. Some states restrict unemployment and workers' compensation benefits to citizens or lawful residents. Likewise, government employment may depend on immigration status. *See generally* 1 A. PETER MUTHARIKA, *Access to Economic Activity*, *in* THE ALIEN UNDER AMERICAN LAW (1980 & Supp. 1984). However, with few exceptions, nearly every jurisdiction extended the core wage and antidiscrimination protections discussed here to unauthorized immigrants prior to *Hoffman*. *See* Part I (discussing the historical development of employment rights for unauthorized immigrants).

254. T.H. Marshall, *Citizenship and Social Class*, *in* THE CITIZENSHIP DEBATES: A READER 93 (Gershon Shafir ed., 1998).

255. Bosniak, *supra* note 8, at 464.

256. *See* Joel F. Handler, *The Paradox of Inclusion: Social Citizenship and Active Labor Market Policies* 6 (Univ. of Cal., L.A. Law Sch. Pub. Law Research Paper No. 01-20, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=290927 (discussing Marshall's division of citizenship into three categories of rights).

257. T.H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 92 (1964).

258. Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1976) [hereinafter Karst, *Equal Citizenship*]. *See generally* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

259. *See, e.g.*, Gordon & Lenhardt, *supra* note 252, at 1186 (citing numerous writings by Karst to explain the application of the term "belonging" in discussing citizenship).

'belongs.'"[260] Equal constitutional and civil rights are key components of Karst's belonging equation because "they nourish a vision of American society that emphasizes tolerance and the value of belonging."[261] Equal citizenship has both individual and collective components. Civil rights allow the individual to pursue economic opportunities and cultural choices previously closed to him.[262] At the same time, the individual's decision to assert those rights serves society's anti-caste ethic, while encouraging greater participation in public life and private markets.[263]

Rights of partial inclusion, as I describe them, share many of the social and affective qualities of equal citizenship. Those persons who hold rights of partial inclusion enjoy greater levels of acceptance and belonging within their communities.[264] However, the theories of Marshall and Karst have only limited salience here because they concern the rights of formal citizens, not unauthorized immigrants.[265] The theory of partial inclusion is not as broad as Karst's "ideal of equality" and "full membership."[266] By having the ability to assert employment rights, unauthorized immigrants further the community endeavor of ensuring fair treatment of all workers, but remain excluded from other matters. For example, their rights of political participation are severely constrained, and they remain vulnerable to the reach of immigration law at all times.

As a normative matter, I do not mean to suggest that *partial* inclusion should be the endpoint in defining the sphere of membership. This is not an endorsement, but rather an acknowledgment of the second-class citizenship of unauthorized immigrants. As Linda Bosniak has argued, even though advocates of "equal citizenship" characterize the denial of full rights as presumptively illegitimate, their focus remains on status citizens.[267] With unauthorized immigrants, the focus on universality falls away; the scholarship on equal citizenship either ignores the group altogether or implicitly endorses distinctions between formal citizens

260. Karst, *Equal Citizenship*, *supra* note 258, at 6.
261. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337 (1986).
262. *Id.*
263. *Id.* at 337–38.
264. *See* Gordon & Lenhardt, *supra* note 252, at 1187 (describing citizenship as "full acceptance within the local and national community").
265. *See id.* at 1196–98 (arguing that scholarship on rights-based citizenship never "seriously engage[s] with immigration as a factor in the contemporary workplace").
266. Karst, *supra* note 261, at 371.
267. *See* Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. & COM. REG. 497, 500 (2000) (contrasting the negative connotation associated with second-class citizenship with the neutral classifications contained within status citizenship).

and aliens.[268] Noncitizens are undoubtedly "partial members" of the community.[269] The fact that they are subject to deportation—a threat citizens never face—means that unauthorized immigrants cannot enjoy the form of equal citizenship envisioned by Karst and others.[270]

Acknowledging the second-class citizenship of unauthorized immigrants does not cede the argument over the extent of rights afforded to the group; there are gradations of second-class citizenship.[271] Between having no rights and some rights, partial inclusion is a more palatable alternative to a growing trend of pure exclusion. The concept of immigrant as "outlaw" is making a comeback.[272] This movement, as reflected in the Supreme Court's recent jurisprudence on unauthorized workers, is the result of a vacuum created by immigration law. By defining who is "in" and who is "out," immigration law leaves open the question of how to treat those who should be "out" but nevertheless make it "in."

One response is to deny all rights to members of the group so as to discourage their entry and encourage their swift departure. The partial inclusion theory presented here offers an alternative method for filling the void. It argues that both the immigrant and larger community (including status citizens) benefit from a broad application of workplace protections.

The communal nature of workplace protections extends beyond the protections afforded by traditional labor law—such as the right to join a union and bargain collectively—to wage and antidiscrimination protections. In fact, in some instances, the so called "individual rights" afforded by wage and antidiscrimination statutes can be more effective vehicles for achieving collective ends than traditional labor law currently allows.[273] For example, by enabling unauthorized

268. *Id.* at 500–51 (discussing the application of rights-based citizenship to the subject of work).

269. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 271 (1997).

270. *See id.* (arguing that aliens are partial members of the community).

271. Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995).

272. *See* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 86–87 (1985) (discussing the outlaw concept); *see also* Moreau v. Oppenheim, 663 F.2d 1300, 1307–08 (5th Cir. 1981) ("We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability."); Neuman, *supra* note 271, at 1441 (criticizing the outlaw perspective).

273. *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2721–44 (2007) (explaining how employment protections can serve as a locus for collective action among workers). This approach contrasts with the typical characterization of employment protections as individual rights. *See, e.g.*, James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 1026–27 (1996) (describing the proliferation of federal

immigrant women to sue for sexual harassment and recover appropriate remedies, Title VII grants plaintiffs partial membership rights in a community comprised of formal citizens and other employees. Not only does the plaintiff defend her individual autonomy and personal dignity, she stands with other workers in pursuing the shared objective of attaining a discrimination-free workplace. The individual enforcement of workplace norms benefits several groups of workers, including the plaintiff, her coworkers, and future employees who join a workplace reformed (hopefully) by their predecessor's actions. This collective endeavor—forming identity (i.e., "who we are") and preserving rights (i.e., "what we have")—is the precise undertaking of the communitarians.

B. Preserving Community

Communitarians defend the nation-state's right to bounded citizenship. In his seminal work, *Spheres of Justice*, Michael Walzer argues that countries may exclude outsiders in order to preserve national identities.[274] Walzer notes that theories of distributive justice presuppose the existence of "a bounded world, a community within which distributions take place, a group of people committed to dividing, exchanging, and sharing, first of all among themselves."[275] Hard borders preserve scarce benefits and define the community.[276] Walzer's defense of bounded citizenship has both psychological and sociological qualities. The nation-state's fixed borders instill a feeling of belonging in those who reside within, while allowing them to protect the community's rights and resources collectively. If those who violate the border can make a claim on the community's rights, society is less able to define its common purpose and pursue liberal values.[277]

Much of the debate over borders comes down to what Peter Spiro describes as the "citizenship dilemma," in which extending formal citizenship to more persons dilutes national identity.[278] Spiro argues

statutes focused on individually enforced rights); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 329 (2005) (discussing the rise of the individual rights model in response to the limitations of the collective bargaining model).

274. WALZER, *supra* note 19, at 31–63.

275. Michael Walzer, *The Distribution of Membership*, *in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1 (Peter G. Brown & Henry Shue eds., 1981).

276. *See* Gordon & Lenhardt, *supra* note 9, at 2501 (noting scholarly critiques of communitarian arguments).

277. *See* Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 88–89 (1984) (describing communitarian values as reflecting "vague, even circular, notions of social expectations and relationships").

278. Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 599 (1999).

that as residents develop increasing loyalties to nonstate communities, America becomes "inclusive but inevitably weak."[279] The theory of partial inclusion demonstrates how arguments over status citizenship fail to delineate the bounds of rights-based citizenship. Even if granting formal citizenship to more residents diminishes national identity (a questionable assumption), extending rights of partial inclusion to unauthorized immigrants does just the opposite. When unauthorized immigrants possess the formal power to challenge exploitation at the workplace, the notion of who "we" are is strengthened. Conversely, when courts relegate residents to a lawless working subclass—as in *Hoffman*—a nation cannot seriously define itself in egalitarian terms, even if only aspirationally.[280]

Communitarian dialogue often glosses over the precise "rights" and "benefits" bounded citizenship preserves. The most fundamental benefit at stake, of course, is immigration status itself. Formal status is a scarce resource in the sense that only a certain number of people can enter the country before residents lose faith in the purpose of national boundaries. The tradeoff has been characterized as an "admissions-status" dynamic, in which the expansion of immigrant rights reduces support for large-scale immigration.[281] The more the state formally recognizes immigrants, the less likely citizens will tolerate increased admissions.[282] This dynamic played out in the 1980s when Congress granted legal status to over two million unauthorized immigrants in exchange for increased border protection and workplace enforcement.[283] The same tradeoff is present in today's immigration reform proposals that require the government to seal the border in exchange for a large-scale legalization program.[284]

Employment protections do not require the same kind of tradeoff as represented by the admissions-status dynamic. Immigrants constitute a crucial portion of the workforce needed to enforce

279. *See id.* at 601 (noting that the thinning of the American identity is "perhaps . . . not a bad thing").

280. *See* Maria Pabón López, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 BRANDEIS L.J. 611, 615–17 (2006) (arguing that the national commitment to equality and fairness does not always extend to noncitizen workers who face exploitative working conditions).

281. Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1122 (2008).

282. *Id.*

283. Kobach, *supra* note 27, at 1330; Osuna, *supra* note 82, at 331.

284. *See* Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1446–48 (2008) (discussing immigration reform).

employment laws.[285] As the number of unauthorized workers increases,[286] their exclusion from employment protections diminishes the group of would-be workplace enforcers. With citizens standing alone as rights-holders, they become relatively more costly to employ, thereby diminishing employer demand for their services.[287] In contrast to the admissions-status dynamic, citizens should support workplace rights for unauthorized immigrants in order to equalize the labor market and enable all employees to secure protections reserved for the community.

As with the comparison to status citizenship, employment rights cannot be analogized to public benefits—another scarce resource communitarians seek to protect.[288] For example, political scientist Gary Freeman argues, "The welfare state . . . seeks to take care of its own, and its ability to do so is premised on its ability to construct a kind of safe house in which to shelter its members from the outside world."[289] The calculus is presented as a zero-sum game in which the rights of citizens decline at a rate proportionate to the gains made by unauthorized immigrants.[290] Because natural and social resources are finite, the argument goes, a nation must distribute those items only to those who have obtained the community's permission to enter.[291]

The theory of partial inclusion highlights the error of applying such distributive justice rationales to workplace rights. Although society generally accepts the premise that when times are tight, the nation's redistributive aims should serve its own,[292] employment

285. *See* RANDY CAPPS ET AL., URBAN INST., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf (estimating that immigrants comprise fourteen percent of the workforce and twenty percent of the low-wage workforce).

286. *See* PASSEL, *supra* note 1, at i (estimating that 500,000 new unauthorized immigrants come to the United States each year).

287. *See* Cunningham-Parmeter, *supra* note 4, at 45 (discussing the competitive advantage immigrants gain in the labor market because of their unwillingness to assert workplace claims).

288. *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 92–95 (1985) (discussing birthright citizenship and the welfare state).

289. Gary Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS AM. ACAD. POL. & SOC. SCI. 51, 54 (1986).

290. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1518 (1995) (listing the societal costs of restricting benefits); *see also* Bosniak, *supra* note 178, at 1000 (summarizing the argument that extending rights to noncitizens undermines immigration enforcement).

291. *See* Bosniak, *supra* note 178, at 1001 (discussing protectionist view that immigrants drain societal resources).

292. Rodríguez, *supra* note 281, at 1124 (discussing the apparent conflict between a nation-state's redistributive objectives and providing noncitizens with greater levels of status).

protections are not limited goods. For example, the notion of what it means to work in America is not diluted when unauthorized immigrants can sue for sexual harassment. In fact, the exact opposite is true: workplace identity is diluted when only a subset of the workforce can claim the bounty of employment protections. Title VII expressly places plaintiffs in the role of private attorneys general in order to redress not only their "own injury but also [to] vindicate[] the important congressional policy against discriminatory employment practices."[293] This is a *national* project "of the highest priority."[294]

Likewise, the EEOC relies on "a broad sample of claims" from which to investigate and prosecute charges of discrimination.[295] A rule that diminishes this pool impairs the agency's ability to achieve the collective goal of combating unlawful employment practices. The same is true for wage and labor protections, which depend on individual complaints in order to ensure better working conditions for all employees.[296] Employment rights are not scarce resources. By limiting these rights—thereby creating false scarcity—the Supreme Court diminishes their value.

C. Fostering Belonging

The various notions of citizenship share the idea that, at its core, citizenship represents "belonging."[297] The feeling of belonging has both personal and social attributes. Identity-based citizenship shapes the individual's self-definition, while fostering solidarities within the nation-state among its members.[298] Much of the current hostility toward unauthorized immigrants can be traced to identity-based citizenship. There is a growing perception among Americans that unauthorized immigrants do not belong and do not want to belong.[299]

Unauthorized immigrants increasingly live multiple lives, speak multiple languages, live in multiple countries, and form social, economic, and cultural ties to countries and non-state

293. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).
294. *See* N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–17 (1978)).
295. EEOC v. Waffle House, Inc., 534 U.S. 279, 296 n.11 (2002).
296. NLRB v. Scrivener, 405 U.S. 117, 122 (1972); *see also* Wishnie, *supra* note 10, at 518 n.111 (discussing FLSA complaints).
297. BOSNIAK, *supra* note 249, at 20 (noting the role "belonging" plays in the discourse on citizenship).
298. *See* Bosniak, *supra* note 8, at 480–81 (summarizing scholarly discourse on the emotional aspects of citizenship).
299. *See* JACOBSEN, *supra* note 2, at 42 (discussing public attitudes toward illegal immigration).

communities.[300] Initially viewing their stay in the United States as temporary, international migrants often see work in the United States as a way to attain economic and political benefits at home.[301] They experience a "life without clear boundaries and without secure or singular identities,"[302] giving rise to mixed loyalties.[303]

Several immigration scholars have examined the "belonging" of noncitizens.[304] For example, Adam Cox and Eric Posner have evaluated the issue in light of asymmetric information and the economics of contracts.[305] Cox and Posner argue that noncitizens are less likely to make "country-specific investments," such as developing relationships or learning new languages, if host countries do not commit to the immigrants' continued residence.[306] The more tenuous the nation-state's commitment to the immigrant, the less likely she invests in the country.[307] As a normative matter, Cox and Posner contend that, all things being equal, it is better for immigrants to make country-specific investments because they enhance the value of the relationship for countries and immigrants alike.[308]

Cristina Rodríguez has explored the issue of belonging in light of increasing transnationalism.[309] She argues that the new global order heightens the state's need to create frameworks for belonging, even among immigrants who maintain a temporary intent to stay.[310] This is true because what often begins as an intended short-term visit to the

300. *See* Alejandro Portes, *Global Villagers: The Rise of Transnational Communities*, AM. PROSPECT, Mar. 1, 1996, at 77 (describing the cross-national communities of many immigrants).

301. *See* Gordon & Lenhardt, *supra* note 252, at 1220–21 (arguing that immigrants enjoy citizenship gains at home from work performed in the United States).

302. MICHAEL WALZER, ON TOLERATION 87 (1997).

303. Spiro, *supra* note 278, at 619–21; *see also* T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 MICH. J. RACE & L. 241, 241–42 (1999) (discussing the rise of sub-national and supra-national identities).

304. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 168–88 (2008) (discussing the need for more inclusive visions of citizenship for immigrants); Aleinikoff, *supra* note 303, at 241–43 (discussing migrants and national membership); Gordon & Lenhardt, *supra* note 252, at 1185–90 (describing work as a pathway to citizenship); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 210–19 (1983) (assessing the differential due process protections granted in accordance with the degree of membership held); Neuman, *supra* note 271, at 1427–28 (discussing noncitizens' "indicia of membership").

305. Adam B. Cox & Eric Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 833 (2007).

306. *Id.* at 834.

307. *Id.* at 827–28.

308. *Id.*

309. Rodríguez, *supra* note 281, at 1119.

310. *Id.*

United States becomes permanent as an immigrant forms ties to employers, social networks, and citizens.[311] But even for those immigrants who never relinquish their intent to stay temporarily, American society should create opportunities for social investment.[312] Without any affiliation to the host country, immigrants become "a laboring class with a minimal stake in the long-term prosperity of the society."[313] This outcome undermines the state's interest in encouraging residents to be good social actors.[314]

Although Cox, Posner, and Rodríguez generally share the same objective of encouraging belonging among noncitizens, their methods for achieving that goal are discussed exclusively in terms of immigration policy. Cox and Posner argue that countries can encourage country-specific investments through "ex ante" screening, which means offering some form of immigration status to "a particular immigrant on the basis of pre-entry information" early in the immigration process.[315] Rodríguez contends that host countries can build "ties that anchor even the highly mobile migrant" through more liberal visa policies.[316]

The theory of partial inclusion offers an additional method for encouraging identity-based citizenship through employment law. It explains how work and the enforcement of workplace rights provide unauthorized immigrants with meaningful connections to the communities in which they reside. These connections benefit citizens by ensuring that all residents have a stake in the welfare of their society.

Because it provides people with dignity, achievement, and personal identity, work itself can serve as a crucial pathway to citizenship.[317] The workplace is one of the few remaining centers of integration in the United States where people of different races, ethnicities, and

311. *See* Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 267 (2007) (noting that "intentions can and do change"); *see also* Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 923 (2007) (arguing that even immigrants who intend to reside in the United States temporarily form ties to the host country).

312. Rodríguez, *supra* note 311, at 265–66.

313. *Id.* at 267.

314. *Id.* at 266; *see also* Martin, *supra* note 304, at 195 (discussing the need for residents to recognize and fulfill reciprocal obligations).

315. Cox & Posner, *supra* note 305, at 812 (emphasis omitted).

316. Rodríguez, *supra* note 311, at 266–67.

317. *See* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1–2 (1991) (discussing citizenship as "standing," which is defined in part by one's ability to receive remuneration for labor).

statuses have the opportunity to engage in a shared experience.[318] Through employment, immigrants strengthen their associations with coworkers and worksites. Viewed from this vantage, employment is not only a magnet drawing immigrants to the United States; it is a crucial anchor tying them to the community.

Perhaps somewhat paradoxically, even immigration restrictionists should support extending rights of partial inclusion to nonmembers. As discussed above, the availability of employment rights does not affect a worker's immigration-related incentives.[319] Assuming that a large class of unauthorized immigrants will continue to reside in the country,[320] the question becomes: Does the community gain from legal restrictions that isolate this group or from mechanisms that encourage participation? Undoubtedly, both citizens and immigrants gain when all residents have opportunities to invest in the community with a shared sense of common purpose. Because such opportunities remain rare for unauthorized immigrants in other areas, the worksite is a unique place where this type of loyalty formation can take place.

In addition to fostering a "feeling" of belonging, rights of partial inclusion encourage unauthorized immigrants to take actions that inure to the benefit of the entire workforce. Immigration and constitutional scholars often describe civic republicanism as citizenship's central virtue.[321] Those who engage in a country's political life are considered "good citizens[]."[322] Although the discourse on this type of citizenship usually explains how the polity benefits from active participation, it also relates to identity formation. "We" belong because of our shared commitment to democratic principles and engagement in self-government. In its strictest form, political citizenship does not apply to unauthorized immigrants. After all, they cannot vote in elections and have next to no political voice.[323] Likewise, the notion of "workplace citizenship"—having an active voice in workplace governance—seems somewhat ill-fitting.[324]

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318. *See* Gordon & Lenhardt, *supra* note 252, at 1191 (arguing that the workplace enables people to develop citizenship skills across racial and ethnic lines); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1885 (2000) (arguing that a more democratized vision of work can reshape social life).

319. *See* Part III (discussing the limited effect employment rights have on immigration trends).

320. *See* Wishnie, *supra* note 284, at 1458–59 (discussing the "enduring undocumented population").

321. *See* Bosniak, *supra* note 267, at 501 (discussing scholarship on "equal citizenship").

322. *Id.*

323. *See* Johnson, *supra* note 269, at 265 (noting the limited political rights of noncitizens).

324. *See* BOSNIAK, *supra* note 249, at 197 n.1 (discussing "workplace citizenship").

Although unauthorized immigrants can join worker centers, unions, and employee committees,[325] their lack of status often inhibits the kind of forceful participation described by the self-governance model.[326]

Rights of partial inclusion offer another avenue for unauthorized immigrants to actively engage in the workplace. The immigrant improves conditions for all workers by opposing illegal employment practices. As with more traditional expressions of workplace citizenship, however, the fear of retaliation limits the immigrant's willingness to exercise those rights. The difference between rights of partial inclusion and traditional notions of workplace citizenship (i.e., workplace governance) relates to the timing of the citizenship activity. Although actions such as joining unions or worker committees typically occur while the immigrant is still an employee, unauthorized immigrants need not exercise rights of partial inclusion until *after* the employment relationship has ended. For example, if an employer fails to pay overtime to a group of unauthorized immigrants, the workers can delay suing for the unpaid wages until they have left the business that has committed the wage violation. Though the threat of deportation remains ever-present, the immigrant is somewhat more willing to exercise rights of partial inclusion given that the threat of retaliatory discharge no longer exists.

In addition to timing, there is a difference in scale. Traditional notions of workplace citizenship rely on a critical mass of immigrant workers exercising their voices collectively. Although this is certainly possible,[327] it remains a somewhat unlikely proposition given the highly stratified, low-wage sectors occupied by most unauthorized workers.[328] In contrast, rights of partial inclusion do not require a large group of employees to act in order to bring about profound changes to the workplace. For example, a single lawsuit brought by an unauthorized worker, whether individually or as a representative of a larger class, can drastically alter industry-wide practices in hiring,

325. *See* Gordon & Lenhardt, *supra* note 252, at 1217 (explaining how workplace participation encourages loyalty formation).

326. *See* Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 865–66 (2007) (discussing unauthorized immigrants' incentives for investing in host countries).

327. *See, e.g.*, Andrew Martin, *Burger King Grants Raise to Pickers*, N.Y. TIMES, May 24, 2008, at C1 (describing the successful protest of tomato harvesters in southwest Florida).

328. *See* Gordon & Lenhardt, *supra* note 252, at 1197–98 (citing language as one barrier that low-wage, immigrant workers may face in attempting to engage in deliberations with coworkers who are longtime residents and citizens).

promotion, and wage payments that affect both citizen and noncitizen employees.

Even as they are marginalized in other social and political spheres, unauthorized immigrants "belong" to the workplace. As such, rights of partial inclusion create avenues for participation among workers who will continue to reside in the country regardless of the employment protections they enjoy.

CONCLUSION

The rights of unauthorized workers remain in doubt. Although functional arguments—administrative competence, remedial purpose, and statutory gutting—tend toward equalized rights, the conflict between employment inclusion and border exclusion remains. The malleability of the Supreme Court's incentives-based critique means that, at its most basic level, any employment remedy can be characterized as a "reward" for illegal behavior. If the rewards rationale takes hold, the rights of unauthorized workers, which are now recognized in the breach, will not be recognized at all. This outcome should be evaluated with caution because it profoundly impacts our contemporary understanding of community.

By describing the function workplace protections can serve in fostering belonging and participation among noncitizens, I recognize the limits of employment rights. Abstract discussions of citizenship's inclusiveness can mask the real-life exploitation and hardship many unauthorized workers endure.[329] Indeed, even when the state recognizes the rights of unauthorized workers, the threat of deportation will always prevent a great many immigrants from exercising those formal rights. Nonetheless, the movement toward exclusion—as reflected in the Supreme Court's recent jurisprudence on unauthorized workers—does even greater damage to the lives of immigrants and the communities in which they live and work.

Just as immigration law defines the nation's borders in order to prevent outsiders from accessing limited resources, the Supreme Court has attempted to restrict the fruits of workplace protections to law-abiding citizens. But the workplace border does not serve the same goals as the national border. In fact, the Court's line-drawing harms those within the circle precisely because unauthorized immigrants are not allowed to enter. By extending employment

329. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 481 (2005) (discussing the limits of citizenship).

protections to all workers, partial inclusion furthers the community's self-definition, while providing unauthorized immigrants with a sense of belonging in a world increasingly focused on their exclusion.