

# Immigration Advocacy as Labor Advocacy

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*As immigration reform efforts continue to experience fits and starts in Congress, immigrant and non-immigrant workers have joined together to advocate for immigration reform at the federal level and to protest the surge of exclusionary immigration measures at the state and local levels. These advocacy efforts demonstrate that many workers connect immigration law to workplace conditions. This Article develops a comprehensive analytical framework for viewing immigration advocacy as labor advocacy, even though these two statutory regimes have completely separate policymaking processes. It uncovers the historical roots of the interplay between immigration law and labor issues. Similarly, it elaborates the ways that a workplace law, the National Labor Relations Act (NLRA), has the potential to protect a broad range of workers' immigration advocacy efforts. To date, scholars have largely focused on how restrictive aspects of immigration law narrow workplace protections, such as minimum wage and safety standards. In contrast, this Article shows how the interaction between immigration law and workplace law can broaden workplace protections in some circumstances. By constructing an analytical lens that views immigration law in relationship to workplace law, this Article illuminates why it is crucial to simultaneously consider these two statutory regimes. In doing so, it also reveals new opportunities for immigrant and worker advocates to come together around shared interests.*

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## IMMIGRATION ADVOCACY AS LABOR ADVOCACY<sup>1</sup>

### INTRODUCTION

As immigration reform efforts continue to experience fits and starts in Congress, millions of immigrant and non-immigrant workers have joined together both to advocate for immigration reform at the federal level and to protest the surge of exclusionary immigration measures at the state and local levels.<sup>2</sup> During the 2006 “Days Without Immigrants” campaign, thousands of immigrants missed work to join rallies across the country in order to demonstrate the importance of immigrants to the economy.<sup>3</sup> Many

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1. This title was inspired by the title of Professor Benjamin I. Sachs’ article, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008). Similar to Sachs’ article, this Article considers how two seemingly separate statutory regimes relate to each other in unexpected ways. For Sachs, the failures of labor law to protect collective action among workers created “a hydraulic effect,” whereby workers started to turn to employment law for protection of collective activity. *Id.* at 2687.

2. See, e.g., Julia Preston, *At Rally, Call for Urgency on Immigration Reform*, N.Y. TIMES, March 22, 2010, at A12 (“The crowd, overwhelmingly Latino immigrants, arrived on buses from California, Ohio, Texas, Michigan, Colorado and many other places. Unions brought thousands of members.”); Stephen Franklin, *May Day rally highlights connection between labor, immigrant causes*, CHI. TRIB., May 2, 2008, at C3 (“[Unions] have put out fliers and called on people to march, and they haven’t just called on immigrants.”); Laura Pulido, *A day without immigrants: the racial and class politics of immigrant exclusion*, ANTIPODE 39, Jan. 2007, at 1, 1-7 (2007) (estimating that over a million people participated in the 2006 rally).

3. See Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DEN. U. L. REV. 93, 93 n.1 (2007) [hereinafter *Days Without Immigrants*] (referring to “hundreds of thousands” participants); Rachel M. Simon, Comment, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor*

labor unions have joined these efforts, educating and mobilizing their members about the need for immigration reform from a workers' rights perspective.<sup>4</sup> Many unions, for instance, joined the campaign to "Reform Immigration FOR America," which "seeks to unite public and civic, religious, labor and business groups to advocate for just, humane, and comprehensive immigration reform legislation."<sup>5</sup> In June 2009, when Congress was actively considering immigration reform, the campaign organized 112 public events around the country.<sup>6</sup> Despite ongoing divisions, the two main labor congresses, the AFL-CIO and Change to Win, representing over sixteen million workers, recently came together to support a common immigration reform platform.<sup>7</sup>

These efforts illustrate that workers and unions recognize the "overlap between labor and immigrant issues."<sup>8</sup> In calling attention to this relationship, they remind us that immigration law<sup>9</sup> and the laws providing

*Relations Act*, 56 CATH. U. L. REV. 1273, 1274-75 (2007) ("Some employees asked for the day off ahead of time, others worked extra hours or switched shifts in order to make up the time, while another group of employees simply did not show up to work."); Wesley Kennedy & Angie M. Cowan, *A Touch of "Class": Immigration and the Intersection of Politics and Protected Section 7 Activity*, 23 LAB. LAW. 99, 102 (2007) (noting that the focus of these rallies was to "dramatize . . . the importance of immigrant workers to the economy").

4. See, e.g., Christopher Nulty, *From New England to the Southwest, SEIU Members Continue Push for Immigration Reform*, SEIU BLOG, June 4, 2010, available at <http://www.seiu.org/2010/06/from-new-england-to-the-southwest-seiu-members-continue-push-for-immigration-reform.php> (describing immigration efforts across the country); Philip Rucker, *Nation Digest*, WASH. POST, May 2, 2010, at A03 ("[O]ne of the nation's most politically powerful labor organizations [] is staging 16 demonstrations on Saturday."); AFL-CIO, *Immigration*, available at <http://www.aflcio.org/Issues/Immigration> (calling for immigration reform and stating that "immigration policy is a blueprint for employer manipulation and abuse, and both immigrant and American workers are suffering the consequences.").

5. *Over 200 Labor, Immigrant Groups Unite To Launch Immigration Legislation Campaign*, DAILY LAB. REP., June 4, 2009; *UFW group joins immigration effort*, THE CALIFORNIAN, June 1, 2009, at 2. See also AFL-CIO, *Immigration*, supra note 4 (providing a sample resolution which states, in part, "Whereas the labor movement is working with allies, including the Reform Immigration for America Campaign to promote comprehensive immigration reform . . . be it finally resolved [that] the . . . AFL-CIO will continue to work with allies to promote comprehensive immigration reform . . .").

6. *UFW group joins immigration effort*, THE CALIFORNIAN, June 1, 2009, at 2.

7. See AFL-CIO & Change To Win, *The Labor Movement's Framework for Comprehensive Immigration Reform* (2009) [hereinafter *The Labor Movement's Framework*], available at <http://www.aflcio.org/content/download/7389/79487/version/1/file/immigrationreform053111.pdf>.

8. Stephen Franklin, *May Day rally highlights connection between labor, immigrant causes*, CHI. TRIB., May 2, 2008, at C3. See also *Raids, I-9 Audits Undercut Worker Rights AFL-CIO Worker Groups Say in New Report*, DAILY LAB. REP., Oct. 28, 2009 (noting the AFL-CIO's view that "the division between labor and immigration enforcement has eroded."). While this article mainly focuses on national efforts, there are also sub-federal efforts. See, e.g., Elliot Spagat, *Massive rally in Los Angeles to protest Arizona's tough illegal immigrant law*, SAN JOSE MERCURY NEWS, May 1, 2010 (noting a union member's "need to protest the Arizona legislation").

9. While we refer broadly to "immigration law," some scholars distinguish between "immigration law" and "immigrant law." See, e.g., Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 133-36 (2008) (describing

employment protections to both documented and undocumented workers, interact in complex ways even though they have completely separate policymaking processes.<sup>10</sup> Much like worker advocates, scholars have begun to address the amalgamation of these two areas of law, or what one of our authors has dubbed *immigration law*.<sup>11</sup> To date, scholars have largely focused on the ways that immigration law operates to narrow workplace protections related to minimum wage, employment discrimination, health and safety standards, and labor organizing (collectively referred to as “workplace law”) for documented and undocumented workers alike.<sup>12</sup> One scholar, for instance, referred to immigration law’s effect as “devastating” to labor protections for workers.<sup>13</sup>

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immigration law as “elaborate classification schemes for determining which noncitizens will be allowed admission on a temporary or permanent basis” and characterizing immigrant law as efforts to “integrat[e] noncitizens into our community once they are here”).

10. 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, 740 (2003) [hereinafter *Ghost Workers*] (“Historically, immigration law and labor law have not been linked in the policymaking process.”). See also *id.* (stating that “this disconnect has led to a failure to see immigration as a labor issue and vice versa”); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1461 (2008) (“As the immigration debate unfolds in Congress, the media, and the public, labor advocates and scholars have critical insights and expertise to contribute. It is hard to imagine a positive outcome for low-wage workers without labor’s sustained engagement in the details of these proposals and unyielding insistence for fundamental worker protections.”).

11. See generally Kati L. Griffith, *Discovering ‘Immigration’ Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389 (2011) [hereinafter *Discovering ‘Immigration’ Law*].

12. For articles detailing these negative effects see Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L. J. 303 (2010) [hereinafter *Immigration Enforcement Versus Employment Law Enforcement*]; Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125 (2009) [hereinafter *U.S. Migrant Worker Law*]; Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 248 (2009); Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT’L L.J. 27, 46 (2008) [hereinafter *Fear of Discovery*]; Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

13. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CALIF. L. REV. 503, 538 n.122 (2007) (describing the U.S. Supreme Court’s interpretation of IRCA’s effects). See also Gerald L. Neuman, *The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law: Foreword: Dangerous Intersection*, 44 U.S.F. L. REV. 241 (2009) (describing the intersection of laws that affect undocumented workers as “dangerous”); Bill Ong Hing, *Asian Americans and Immigration Reform*, 17 ASIAN AM. L.J. 83, 104 (2010) (stating that “a close look” at workplace raids to enforce IRCA “reveals that employer sanctions have had disastrous effects on all workers”); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1107 (2009) (describing IRCA’s effects as “harsh” and stating that some employers “use their de facto immunity from sanctions to negotiate low wages, disregard workplace protections, and otherwise suppress worker dissent.”); Dennise A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 119 (2003) (exploring the “negative impact” of IRCA on labor law protections for undocumented workers).

While we largely agree with these characterizations, this Article highlights how the interaction between immigration law and workplace law can actually broaden protections for employees. In doing so, we illustrate a crucial, yet under-theorized, aspect of the evolving crossroads between immigration law and workplace law. As our prime illustration of this broadening, we demonstrate the National Labor Relations Act's (NLRA's) potential to protect a wide swath of employees' immigration advocacy efforts from employer interference. The NLRA grants private-sector employees, including undocumented employees,<sup>14</sup> the right to engage in certain forms of collective activity without employer interference.<sup>15</sup> Notably, the NLRA protects employees from adverse employment actions that result from their participation in efforts to influence judicial, executive, or legislative actors ("advocacy"), as long as the content of their message relates sufficiently to "employees' interests as employees."<sup>16</sup> As we will show, immigration law's potential negative and positive effects on employees' workplace experiences broaden the conventional scope of what constitutes employees' interests as employees and therefore the scope of the NLRA's protection of immigration advocacy.<sup>17</sup>

In this Article, we call for a comprehensive analytical framework that views immigration advocacy as labor advocacy. This framework has implications for the existing scholarship described above and for doctrinal analyses of legal cases relating to employees' immigration advocacy efforts. As we will more fully explore in Part III, it also has broader implications for social movement advocacy and worker solidarity moving forward. To set the stage for our proposed framework, Part I of this Article draws from

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14. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (concluding that undocumented workers are NLRA "employees"); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144-47 (2002) (assuming that undocumented workers are NLRA "employees").

15. See National Labor Relations Act (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

16. *Eastex, Inc. v. NLRB.*, 437 U.S. 556, 566-67 (1978). *But see* Benjamin Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2697 (2008) (noting the NLRA's "inability to deter or remedy coercive interference with the organizing efforts of employees who are entitled to the Act's protection").

17. See Gary W. Spring, *A New Methodology for Testing Permissible Political Communications in the Workplace*, 2008 *MICH. ST. L. REV.* 1023, 1033 (2008) (contending that NLRA's legislative history shows Congress' intent to broadly protect advocacy); Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 *TEX. L. REV.* 1, 4 (1981) (arguing for broad protection of advocacy and stating that courts and the NLRB need to realize that "political activity will increasingly supplement or supersede labor's traditional economic activity"). To realize this potential, labor must turn to the NLRA. See Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 *ME. L. REV.* 199, 236 (2010) ("[L]abor advocates must be willing to use what is left of the NLRA to push forward a pro-union agenda . . . . If anything, labor advocates . . . have nearly abandoned the NLRA. That would be an effective strategy if the NLRA did not have primary and often exclusive jurisdiction over labor-management disputes.").

immigration law history to provide a justification for why immigration advocacy should be considered labor advocacy. It exposes the intensifying interplay between the policies underlying these two seemingly separate statutory regimes. It also draws from the existing scholarship to highlight how immigration law—as interpreted by employers, workers, enforcement agents and courts—has narrowed employees’ workplace protections. Immigration law’s narrowing effects underscore why we should view immigration law as a labor issue.

Part II engages in doctrinal analysis to highlight the outer boundaries of the NLRA’s potential to protect a wide spectrum of employees’ immigration advocacy from employer interference. It contends that employees’ immigration advocacy can and should be treated as a type of labor advocacy which is protected under the law. We draw from existing case law to show that the ways that labor unions have framed the need for immigration reform in the recent past sufficiently relate to employees’ interests as employees.<sup>18</sup> Thus, we focus in particular on the threshold question of whether the NLRA protects employee advocacy messages, or “frames,” about the need for immigration reform.<sup>19</sup> The National Labor Relations Board (NLRB) has not fully addressed this issue to date,<sup>20</sup> creating uncertainty for employees and labor unions,<sup>21</sup> that are increasingly

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18. While we focus on labor’s recent statements, even labor’s more anti-immigrant statements about the need for immigration reform in the past would have been NLRA protected as long as they were sufficiently related to employees’ interests as employees.

19. For an article that discusses the NLRA’s protection of framing in the context of political activity see Paul E. Bateman, *Concerted Activity – The Intersection Between Political Activity and Section 7 Rights*, 23 LAB. LAW. 41 (2007).

20. In 2006, the NLRB General Counsel “assume[d], without deciding,” that employees’ support of immigration reform falls within the NLRA’s protection. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert W. Chester, Reg’l Dir., Region 18, NLRB, regarding Reliable Maint., Case 18-CA-18119, at \*1 (October 31, 2006). In 2008, the NLRB General Counsel signaled that some immigration advocacy is protected but did not elaborate. Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Regional Directors, NLRB, regarding Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, 7 (July 22, 2008) available at <https://www.nlr.gov/publications/general-counsel-memos> (Select “2008” from drop-down menu; then follow GC-08 hyperlink) (“In the immigration demonstration cases . . . we assumed, and therefore did not decide, that employee participation in the demonstrations was protected . . . Although it was not necessary to resolve the issue in those cases, it is clear from the analytical framework set forth above that participation in such demonstrations” was protected). See *Days Without Immigrants*, *supra* note 3, at 94 n.6 (stating that the NLRB’s “[a]dvice memoranda are documents that announce the willingness of the NLRB to pursue legal issues”).

21. See Spring, *supra* note 17, at 1023-24 (2008) (“[P]rivate employees have faced uncertainty as to what may be communicated”); Bateman, *supra* note 19, at 57 (stating that, due to the Board’s failure to clarify “how different political activity effectuates the stated policy goals of the Act, unions, employers, and employees alike are left to a case-by-case determination of the scope of [the NLRA’s] coverage of political activities”); Hyde, *supra* note 17, at 14 (suggesting that it can be problematic when employees are unsure about whether their political advocacy is NLRA protected).

confronted with these issues.<sup>22</sup> In this Article, we do not focus on the subsequent question of whether employees lose this protection given the types of activity they engage in to advance immigration advocacy messages—such as wearing immigration reform buttons at work or missing work to attend immigration rallies.<sup>23</sup> Scholars and commentators have thoroughly covered that area.<sup>24</sup> By illustrating that the interaction between immigration law and workplace law can expand employees' workplace protections, Part II's doctrinal analysis shows the limits of the prior scholarship's unilateral focus on the narrowing effects of immigration law.

Part III examines implications for our proposed immigration advocacy as labor advocacy framework in practice. It shows how the framework, while not a panacea from a workplace rights perspective, creates opportunities for enhanced worker solidarity between immigrants and non-immigrants and for workplace-based immigration advocacy by labor unions and immigrant-worker groups. It draws on studies of law and social movement advocacy to explore how the framework in general, and the NLRA in particular, could have practical and symbolic benefits that aid advocates who want to engage immigrant and non-immigrant workers in immigration advocacy efforts.

## I.

### IMMIGRATION LAW AS A LABOR ISSUE

Immigration advocacy should be viewed through a labor advocacy lens because immigration law has increasingly become a labor issue. In this

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22. See *Days Without Immigrants*, *supra* note 3, at 94 n.6 (“In light of present immigration trends, the emergence of immigration protest issues will likely continue.”).

23. After the 2006 immigration rallies, some employers took adverse employment actions against rally participants who missed work. See Bateman, *supra* note 19, at 42 (noting that “at least a dozen unfair labor practice charges were filed with the NLRB involving the discipline of workers who participated in the rallies”). In the NLRB cases that followed, the NLRB did not find any NLRA violations, concluding that the employers' actions were caused by something other than the employees' participation in the rallies. See, e.g., Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Irving E. Gottschalk, Reg'l Dir., Region 30, NLRB, regarding Marshall & Ilsley Corp., Case 30-CA-17442 (July 12, 2006); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Peter B. Hoffman, Reg'l Dir., Region 34, NLRB, regarding Gargiulo Constr. Co., Nos. 34-CA-11473 and 34-CA-11499, at \*1 (July 12, 2006); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Alan Reichard, Reg'l Dir., Region 32, NLRB, regarding El Cerrito Elec. Co., Case 32-CA-22661 (August 16, 2006); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Martha Kinard, Reg'l Dir., Region 16, NLRB, regarding Joe's Coffee Shop, Case 16-CA-25014, at \*1-2 (October 30, 2006); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Stephen M. Glasser, Reg'l Dir., Region 18, NLRB, regarding Discount Paper, Case 7-CA-49543, at \*1 (October 31, 2006).

24. See, e.g., *Days Without Immigrants*, *supra* note 3, at 93 n.3 (examining whether the NLRA protects employees from firing due to unexcused absences from work to attend rallies); Simon, *supra* note 3, at 1273 (same); Kennedy & Cowan, *supra* note 3, at 99 (same).

Part, we first expose the interplay between immigration law and workplace law, two otherwise separate statutory regimes whose relationship grew closer in the early twentieth century and again in the mid-1980s. This review illustrates Congress's intent for immigration law to expand, rather than constrain, workplace protections for employees. We then describe the existing scholarship on the crossroads between immigration law and workplace law, which is dominated by labor-related critiques that stress immigration law's harmful effects in practice. These critiques about negative effects on employees' workplace protections further demonstrate why advocacy targeting immigration law should be considered labor advocacy.

### A. *The Long and Intensifying Interplay*

The close relationship between immigration law and labor issues is apparent given how immigration law, at various historical moments, has acknowledged perceived labor market needs, directly incorporated workplace protections for employees, and focused on the workplace as a primary site for immigration enforcement. In these ways, immigration laws have covered some of the same subject matter as workplace law. "Open borders" as well as "closed borders" immigration policies have always been associated with perceived labor market conditions.<sup>25</sup> The Chinese Exclusion Act of 1882 provides an early example.<sup>26</sup> In the mid-nineteenth century, the United States encouraged Chinese laborers to migrate to the United States to work. Racism against these laborers intensified, however, during the deep recession of the 1870s. As a result, the 1882 Act restricted Chinese laborers from coming to the United States for ten years.<sup>27</sup>

The perception that the United States did not need additional laborers also led to restrictive immigration measures that emerged in the early twentieth century. By 1920, there was "no longer [a] need [for] the same

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25. See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND ALIEN CITIZENS AND THE MAKING OF MODERN AMERICA* 19 (2004). See also *Ghost Workers*, *supra* note 10, at 765 (stating that immigration to the United States and work "have been intertwined phenomena throughout history").

26. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Magnuson Act of 1943, ch. 344, § 1, 57 Stat. 600. Some scholars have noted that the policy of slavery was the first form of labor immigration. See Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 276 (2009) (describing slavery as the first form of labor immigration and showing that, as a result of forced labor migration, the U.S. immigration system has been "inculcated with the notion of a permanent, quasi-citizen-worker underclass and privileged white ethnics under naturalization law").

27. See MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION & IMMIGRANTS: SETTING THE RECORD STRAIGHT* 9 (1994) ("Chinese immigrants had been imported to work during the labor shortages of the 1840s, but became increasingly reviled during the recessionary times of the 1870s. In response to popular pressure, the Chinese Exclusion Act suspended immigration of Chinese laborers for 10 years . . .").

levels of mass migration.”<sup>28</sup> The restrictive Immigration Act of 1924 thus came about, at least in part, because “industrial capitalism had matured to the point where economic growth could come more from technological advances in mass production than from a continued expansion of the manufacturing workforce.”<sup>29</sup> Similarly, due to high unemployment rates, the United States repatriated hundreds of thousands of Mexicans back to Mexico during the Great Depression.<sup>30</sup> Congress’s response to these perceived labor market needs through immigration law continues in modern temporary visa programs for unskilled workers (“guest worker programs”). The H visa program,<sup>31</sup> for instance, contains labor market tests. Their purpose is to ensure that there is not a surplus of foreign workers that would negatively affect domestic workers.<sup>32</sup>

Along with labor market demands, immigration law has acknowledged the centrality of workplace issues through the formal inclusion of workplace protections for foreign laborers within immigration policy. This was the case for the first notable guest worker program, which ran from 1917<sup>33</sup> until 1922 as a national emergency response to labor shortages during World War I.<sup>34</sup> It was an exception to the restrictive Immigration Act of 1917 and contained “elaborate rules” to protect both United States and Mexican workers.<sup>35</sup> The “Bracero Program,” which ran from 1942 until 1964,<sup>36</sup> similarly illustrates the formal inclusion of workplace protections in an immigration law. A bilateral agreement between the United States and Mexico, the Bracero Program was originally created as a

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28. See NGAI, *supra* note 25, at 19.

29. *Id.*

30. See generally Francisco E. Balderrama & Raymond Rodriguez, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (rev. ed. 2006) (describing the repatriation program).

31. The H visa program started in 1952 but was not widely used until after the Bracero Program ended in 1964. See 8 U.S.C. §§ 1101(a)(15)(H) (2006); Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J. L. & POL’Y 79, 86 (2004).

32. See *U.S. Migrant Worker Law*, *supra* note 12, at 130 (“The labor market tests, which are not very rigorous, are intended to ensure that the influx of foreign labor does not displace or adversely affect the wages and working conditions of domestic workers.”).

33. The U.S. encouraged laborers from China and Japan before 1917 as well. See Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 425-27 (2005) (describing the move away from Chinese and Japanese labor and toward Mexican labor with the Immigration Act of 1917).

34. Prior to this time, the use of guest workers was infrequent. See NGAI, *supra* note 25, at 137 (“The United States had outlawed foreign contract labor in 1885” because it was viewed as “the antithesis of free labor, upon which democracy depended.”).

35. Vernon M. Briggs, Jr., *Guestworker Programs: Lessons from the Past and Warnings for the Future* 1 (2004), available at <http://www.cis.org/articles/2004/back304.pdf>. See NGAI, *supra* note 25, at 19 (referring to the 1917 law as “the most stringent immigration law to date.”).

36. Guest workers from the British West Indies also came during this period. See NGAI, *supra* note 25, at 138. The British West Indies program required employers to pay the travel and recruitment costs of the guest workers. See Briggs, *supra* note 35, at 3.

wartime emergency measure to deal with labor shortages.<sup>37</sup> It required expansive protections for workers concerning wages, housing, meals, and transportation to the work site.<sup>38</sup> Under the Bracero Program, for instance, employers were required to pay for employee transportation from their homes in Mexico to their workplaces in the United States.<sup>39</sup>

Both the current guest worker program and the Immigration Reform and Control Act of 1986 (IRCA)<sup>40</sup> similarly include formal workplace protections for employees. Guest worker programs require employers to pay a certain level of wages and provide specified benefits to their guest workers.<sup>41</sup> The H visa agricultural guest worker program, for example, requires employers to offer housing to guest workers at no cost.<sup>42</sup> Moreover, IRCA, the federal government's workplace-based immigration enforcement strategy, has an anti-discrimination provision which prohibits employers from discriminating against guest workers based on their national origin or citizenship status.<sup>43</sup> It also appropriates funding for the U.S. Department of Labor to enhance enforcement of federal wage and hour protections on behalf of undocumented employees.<sup>44</sup> In fact, IRCA's legislative history is replete with examples of Congress's intent—albeit

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37. Until 1951, the Program existed “through a series of agreements between the United States and Mexico” until it was included in statutory law in 1951. Catherine L. Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L. J. 409, 420 n.78 (1988). See also Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 418 n.146 (2008) [hereafter *Globalizing U.S. Employment Statutes*] (describing the Bracero Program's legal basis over time); Howard R. Rosenberg, *Snapshots in a Farm Labor Tradition*, 3 LAB. MGMT. Dec. 1 (1993), available at [http://are.berkeley.edu/~howardrr/pubs/lmd/html/winterspring\\_93/snapshots.html](http://are.berkeley.edu/~howardrr/pubs/lmd/html/winterspring_93/snapshots.html) (same).

38. See NGAI, *supra* note 25, at 140 (describing braceros' rights and the bi-national investigation procedures intended to vindicate those rights).

39. See *Globalizing U.S. Employment Statutes*, *supra* note 37, at 416-18 (describing this transportation protection during various phases of the Bracero Program).

40. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C. (2006)).

41. *U.S. Migrant Worker Law*, *supra* note 12, at 136 (“An H-2A employer is required to pay the highest of the minimum wage, prevailing hourly wage, and the Adverse Effect Wage Rate (AEWR)” and “an H-2B employer must promise to pay the prevailing wage for the occupation.”); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-subordination Approach to the Labor-Based Admission of Non-professional Foreign Nationals*, 21 GEO. IMMIGR. L. J. 521, 546 (2007) (describing the worker protections contained in the H-2B Program); See Baker, *supra* note 31, at 89-91 (describing the worker protections contained in the H-2A program).

42. See Ruth Ellen Wasem, CONG. RESEARCH SERV., RL33977, IMMIGRATION OF FOREIGN WORKERS: LABOR MARKET TESTS AND PROTECTIONS 12-14 (2007).

43. See 8 U.S.C. § 1324b(a)(1).

44. IRCA § 111(d).

often not realized in practice—to support workplace law policy goals within an immigration statute.<sup>45</sup>

Congress's enactment of IRCA in 1986 further intensified the relationship between immigration law and workplace law<sup>46</sup>—and therefore the relationship between immigration advocacy and labor advocacy—by bringing immigration enforcement directly into the workplace.<sup>47</sup> Located within the Immigration and Nationality Act,<sup>48</sup> IRCA is undoubtedly an immigration law. Similar to workplace law, however, it targets the workplace as the site of enforcement and, as described above, contains explicit workplace protections for employees. IRCA imposes civil and, in more serious cases, criminal sanctions on employers who knowingly employ undocumented immigrants and on employees who knowingly use fraudulent documents to gain employment.<sup>49</sup> It charges employers with verifying the immigration status of their prospective employees through the I-9 verification process or the E-Verify electronic verification system.<sup>50</sup> It thereby places a good deal of immigration enforcement into private hands, particularly the hands of employers.<sup>51</sup> IRCA is enforced through government audits of employer records and workplace-based immigration raids.<sup>52</sup> Acknowledging the intersection of IRCA's workplace-based

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45. See, e.g., 132 CONG. REC. 21,29993 (1986). See generally Kati L. Griffith, *ICE Was Not Meant to be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137, 1145-54 (2011) [hereinafter *ICE Was Not Meant to be Cold*] (citing IRCA legislative history which shows Congress's intent to protect employees' workplace protections).

46. See *Discovering 'Immigration' Law*, *supra* note 11, at 402-06 (describing the various ways that IRCA is a "hybrid" because it implicates both immigration law and workplace law).

47. For many decades, U.S. immigration law ignored the workplace as a site of enforcement and, instead, focused on "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas v. Bica*, 424 U.S. 351, 359 (1976). However, in 1986 "IRCA 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (emphasis added) (quoting and citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991)).

48. 8 U.S.C. § 1101-1537.

49. 8 U.S.C. § 1324a.

50. *Id.*

51. See Lee, *supra* note 13, at 1104-05 (focusing "on . . . one particularly problematic set of immigration screeners: the workplace and our nation's employers"); *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 12, at 306 ("With the passage of the IRCA, Congress determined that employers would become both targets and allies in border control and enforcement activities."). IRCA does not make it illegal for an undocumented worker to engage in work, but it does impose sanctions on employees who knowingly use fraudulent documents to gain employment. See 8 U.S.C. § 1324c(a).

52. Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 896-98 (2008) [hereinafter *A New "U"*]. See also Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 271-72 (2010) ("When enforcement actions do occur, they can take the form of pre-planned workplace raids, or, as the Obama administration has preferred of late, behind-the-

immigration enforcement and workplace law enforcement, federal immigration and labor agencies recently signed a Memorandum of Understanding.<sup>53</sup> However, formal inclusions of employee protections within immigration law historically and workplace-based immigration enforcement are not the only reasons to consider immigration law as a labor issue.

### B. Labor-Related Critiques of Immigration Law

Previous scholarship, which often critiques immigration law from a workers' rights perspective, also bolsters the view that immigration and labor advocacy are intertwined.<sup>54</sup> Indeed, the main critiques of guest worker programs have focused on labor issues. They identify employers' mistreatment of guest workers despite formal legal protections and sometimes highlight unfair labor market competition between domestic workers and guest workers. According to one scholar, for instance, the worker protections in the 1917 guest worker program were simply not enforced.<sup>55</sup> Moreover, some critics claim that a continuation of the program until 1922 was unnecessary, "but that greedy employers wanted the program to continue so that they could continue to tap a cheap source of docile workers."<sup>56</sup> Similarly, scholars contend that the Bracero Program's

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scenes audits of employment records that result in the termination of employees."); Kim, *supra* note 12, at 268 (describing immigration authorities' "heightened worksite enforcement" through workplace raids).

53. See Revised Memorandum of Understanding Between the Dept's of Homeland Security and Labor Concerning Enforcement Activities at Worksites (March 31, 2011), *available at* [http://www.dol.gov/\\_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf](http://www.dol.gov/_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf).

54. Immigration law's negative effects on employees' workplace protections are perhaps not all that surprising given that immigration law and workplace law have "sometimes contradictory legislative impulses." Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 400 (Laura J. Cooper & Catherine L. Fisk eds., 2005). Immigration law commonly "privileges legal immigrants over undocumented ones," *id.* at 399, and workplace law "views the equal and wide application of the rights of employees as necessary" to avoid the expansion of an easily-exploitable subclass of workers. *U.S. Migrant Worker Law*, *supra* note 12, at 129. See also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 *HARV. C.R.-C.L. L. REV.* 345, 348 (2001) (referring to IRCA and noting that the "overlap of immigration and labor laws in the employment setting highlights the tension between the nation's broad national labor goals and restrictionist immigration policy"). Moreover, immigration law and workplace law have "contrasting enforcement mechanisms." Kim, *supra* note 12, at 248. Immigration law is "largely enforced by public bodies" and workplace laws are largely enforced "by private actors" via employee-led complaints. *Id.*; Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 *N.Y.U. J. LEGIS. & PUB. POL'Y* 131, 136 (2002).

55. See Briggs, Jr., *supra* note 35, at 1.

56. *Id.* at 2.

elaborate workplace protections “were either ignored or circumvented.”<sup>57</sup> According to some critics, the program depressed wages in certain regions of the United States and reduced the duration of employment for domestic workers.<sup>58</sup>

Moreover, the existing H-2 guest worker programs, while intended to be an improvement from the guest worker programs of the past, have continued to face criticism that they narrow employees’ workplace protections in practice. These programs are considered problematic because “workers are totally dependent on their employers.”<sup>59</sup> This is the case, at least in part, because under no circumstances are guest workers allowed to switch employers once they are in the United States. They must return to their country of origin if they leave the employment of their sponsoring employers. Critics argue that tying low-wage H-2 workers to a single employer restricts their ability to complain when their rights as workers are violated.<sup>60</sup> In accordance with the criticisms of past guest worker programs, critics contend that the H-2 program has had damaging effects on employees’ workplace protections, with some likening the program to “indentured servitude.”<sup>61</sup>

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57. *Id.* See also Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 2-3 (2003) (“Braceros were really indentured servants. They were routinely paid as little as twenty cents an hour, subjected to hazardous working conditions, and fired if they dared so much as to speak with labor organizers. They were promised pensions and benefits that they never received.”); Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 122 (2001) (stating that there was “increasing evidence of abuses of bracero workers by employers” in the 1950s).

58. Briggs, Jr., *supra* note 35, at 2-4 (referring to the downward pressure on wages and other negative effects on jobs). See also NGAI, *supra* note 25, at 143 (“The [negative] effect of imported contract labor on domestic wages was unmistakable.”). For other labor-related critiques of the program, see KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY, AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA, 1942-1960* (1964).

59. Briggs, Jr., *supra* note 35 at 4. See also Emily B. White, Note, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 278 (2007) (referring to H-2A workers as “easy to coerce.”); Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 431 (2007) (“The ability of employers to blacklist workers who make complaints, and to deny re-entry with temporary worker visas, is a critical flaw of the H-2 program because it vests employers with an overwhelming ability to control workforces subject to recruitment.”).

60. White, *supra* note 59, at 279 (making this criticism in the H-2A context); Read, *supra* note 59, at 430-32 (making this criticism in the H-2B context); Maria Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 938-39 (2007) (stating that guest workers must be able to stay in the U.S. during the whole term of their visas, even if they no longer work for their sponsoring employer, to accord with the Thirteenth Amendment).

61. See, e.g., Bryce W. Ashby, Note, *Indentured Guests - How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U.

Labor-related critiques of IRCA are also bountiful.<sup>62</sup> Indeed, most observers see the interplay between immigration law—IRCA—and employees' workplace protections as destructive from a workplace law perspective. While IRCA contains some employee protections and immigration law has the policy goal of enhancing the working conditions and wages of all workers,<sup>63</sup> commentators, advocates, and workplace law scholars have convincingly argued that, in practice, IRCA and U.S. Supreme Court interpretations of IRCA have often been in conflict with many of the fundamental employee protections that workplace law provides.

Many critics argue that IRCA has deleterious effects on employee protections during union organizing efforts and other types of workers' collective activity.<sup>64</sup> This critique is largely based on the Supreme Court's interpretation of IRCA's relationship to the NLRA in *Hoffman Plastic Compounds v. NLRB*.<sup>65</sup> In 2002, the *Hoffman* Court concluded that IRCA restricts an undocumented employee's access to an NLRA backpay remedy, which is payment for work the employee would have performed if the employer had not illegally fired the employee for union organizing.<sup>66</sup> In *Hoffman*, it was undisputed that the employer illegally fired an

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MEM. L. REV. 893, 895 (2008) (noting that the “de-facto indentured servitude that these workers face is all too common among H-2A and H-2B guest workers”). Baker, *supra* note 31, at 98 (“The H-2A program, therefore, has not succeeded in preserving jobs, wages, or working conditions for domestic farmworkers.”).

62. See, e.g., Kim, *supra* note 12, at 252 (describing “the goals of immigration enforcement” as “supersed[ing] those of civil rights enforcement”); Annie Decker, Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 YALE L. J. 2193, 2193 (2006) (“Immigration and labor law can be uncomfortable bedfellows.”).

63. See Kennedy & Cowan, *supra* note 3, at 102.

64. See *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 12, at 305 n.1 (“[T]he Supreme Court interpreted immigration enforcement policy goals as essentially trumping the enforcement goals against unfair labor practices in labor cases”); Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126, 143 n.95 (2010) (“[T]he Supreme Court's decision in [*Hoffman*] further limited unauthorized workers' right to an effective remedy for violation of their freedom of association”); Rathod, *supra* note 52, at 269 (“[*Hoffman*] limited relief available to undocumented workers under federal labor law.”); Cameron, *supra* note 57, at 2 (“The decision effectively gives domestic employers carte blanche to hire at the lowest wages possible the mostly Latino immigrants who now form the backbone of our economy, and to get rid of them at the first sign they might demand a better deal through collective bargaining—all without fear of being called to account for violating federal labor law.”).

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

66. *Id.* at 147-49. For a critique of this decision, see *Ghost Workers*, *supra* note 10, at 739 (“In deciding *Hoffman*, the Court had an opportunity to reconcile immigration and labor law in a way that would benefit all workers, but it instead highlighted the ineffectiveness of immigration law, and labor law's inability to protect all workers.”). See also *id.* at 765 (discussing *Hoffman* and stating that it “is an example of how the privileging of one body of law (immigration) over another (labor law) can be detrimental to the interests of immigrants, workers of color, and, ultimately, all workers”).

undocumented employee for engaging in a union-organizing drive.<sup>67</sup> The Court determined, however, that providing the undocumented employee with NLRA backpay to remedy the employer's NLRA violation would condone prior violations of immigration law and would encourage future violations.<sup>68</sup> The *Hoffman* dissent contended that failing to award NLRA backpay would further weaken the NLRA's protections.<sup>69</sup> In this way, "[t]he decision represented a collision at the crossroads of two bodies of law—labor law and immigration law"<sup>70</sup>—and has served as a catalyst "to understand the interrelatedness of immigration and labor laws to a greater extent."<sup>71</sup>

Although *Hoffman* solely addressed IRCA's effects on the NLRA, scholars have exposed that IRCA, as interpreted by some courts, has had negative effects on the remedies available pursuant to other workplace laws<sup>72</sup> and on employee-led enforcement of workplace protections. Indeed, following the post-*Hoffman* "cascade of litigation,"<sup>73</sup> courts have been unwilling to reinstate undocumented employees back into their jobs even if they have been fired in violation of a workplace law.<sup>74</sup> Moreover, a few

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67. In 1984, the Supreme Court in *Sure Tan* had concluded that undocumented workers are NLRA employees. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

68. *Hoffman*, 535 U.S. at 150. See also *Ghost Workers*, *supra* note 10, at 739 ("Critical legal scholars have powerfully argued that this fragmentary approach to legal interpretation has adversely affected people of color in a variety of different legal contexts.").

69. *Hoffman*, 535 U.S. at 153-60.

70. *Ghost Workers*, *supra* note 10, at 739.

71. Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 103, 134 (2009). See also Michael C. Duff, *Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace*, 30 BERKELEY J. EMPL. & LAB. L. 133 (2009) [hereinafter *Embracing Paradox*] (discussing *Hoffman*'s impact on the NLRA's protection of bargaining in good faith over mandatory subjects).

72. See, e.g., Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1363-64 (2009) (noting the decline in remedies and stating that "women in New Jersey who are unauthorized immigrants can no longer recover backpay for pregnancy discrimination. The same is true for sexual harassment claims in Texas, workplace injury claims in Michigan, and wage retaliation claims in Illinois."). *Id.* at 1370 ("Actions outside the courts suggest that Title VII remains somewhat vulnerable to remedial losses . . ."). But see Cameron, *supra* note 57, at 5 ("The ill effects of *Hoffman* will be confined mostly to the ever shrinking world of the National Labor Relations Act (NLRA)."). Many courts have kept *Hoffman*'s effects on employment law remedies minimal. In fact, at least one district court did not allow an employer, in the midst of a Title VII case, to suddenly comply with his IRCA requirements by requesting immigration documentation from his employees. As the judge put it, "the court is not persuaded by [the employer's] sudden declaration of patriotic motivation" to comply with IRCA after his employees sued him under Title VII. *EEOC v. City of Joliet*, 239 F.R.D. 490, 493 (N.D. Ill. 2006).

73. Rathod, *supra* note 52, at 273. See also *id.* ("*Hoffman Plastic Compounds* tacitly invited employers to test the significance of immigration status in other areas of employment and labor law.").

74. See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 505 (2004) (stating that reinstatement is no longer available to an undocumented worker post-IRCA unless the worker gains work authorization).

courts have scaled back the remedies available to victims of employment law violations.<sup>75</sup> In one Title VII case, for instance, the federal district court viewed *Hoffman* as applicable to all backpay remedies, regardless of which workplace law was at issue.<sup>76</sup> Along with these “*Hoffman* effects,” critics contend that IRCA has fostered disincentives for workers who may otherwise come forward to expose workplace law abuses.<sup>77</sup> Employees’ fear of coming forward is particularly problematic in a system such as ours that relies so heavily on private employee complaints to regulate employees’ workplace conditions, rather than government-initiated inquiries.<sup>78</sup>

Given the historical intersection of immigration law and labor issues, and the labor-related critiques of immigration law, immigration law is a labor issue. Therefore, advocacy related to immigration law should be considered labor advocacy. Part II further builds our proposed immigration-advocacy-as-labor-advocacy framework by illustrating that the

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75. See, e.g., *Rodriguez v. ACL Farms, Inc.*, 2010 U.S. Dist. LEXIS 125885, at \*10-11 (E.D. Wash. Nov. 12, 2010) (“This court concludes immigration status is relevant to determination of actual damages [under the Migrant and Seasonal Agricultural Worker Protection Act] and does not place an undue burden on those Plaintiffs who elect to pursue such damages. In order to avoid any chilling of Plaintiffs’ efforts to pursue liability and statutory damages, however, the court will bifurcate the case so that liability and statutory damages are resolved in the initial phase.”). See Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285, 293 (2007) (referring to *Hoffman*’s effects and stating that “some state courts have refused to accord undocumented workers compensation for wages lost due to work-related injuries and on-the-job discrimination”).

76. See *Colindres v. Quietflex Mfg.*, 2004 U.S. Dist. LEXIS 27982 (S.D. Tex. Apr. 19, 2004).

77. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (refusing discovery into immigration status during the liability phase of a post-*Hoffman* Title VII case and describing barriers to coming forward which affect documented and undocumented workers); *Discovering ‘Immemployment’ Law*, *supra* note 11, at 437-40 (describing the existing case law and literature on this issue); Jennifer Gordon, Editorial, *Workers Without Borders*, N.Y. TIMES, Mar. 9, 2009, at A27 (“Raids terrorize immigrants but do not make them go home.”); Kim, *supra* note 12, at 258 (“The constant threat of deportation alienates workers with precarious immigration status from access to justice for workplace violations.”); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2069 (2008) (stating that to the “constant threat can make workers’ lives precarious—always reminding them that they are powerless”); *Fear of Discovery*, *supra* note 12, at 46 (“Without an effective strategy for answering the status-based question born of *Hoffman*, immigrants will continue to opt out of civil litigation, unwilling to assert even the strongest claims for workplace violations.”); *A New ‘U,’* *supra* note 52, at 914-35 (describing how the use of the U visa could make employees feel safer, thereby increasing the reporting of workplace law abuses); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 669 (2003) (stating that undocumented immigrant workers are unlikely “to report their harsh working conditions for fear they will attract the attention of immigration authorities”); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2183 (1994) (describing how the fear of deportation further reduces the likelihood that immigrant workers will complain about abuses in the workplace). See Rathod, *supra* note 52 (contending that more research needs to be done about the wide array of circumstances that affect immigrant worker behavior).

78. *Discovering ‘Immemployment’ Law*, *supra* note 11, at 431-36 (describing FLSA and Title VII legislative history showing the dependence on employee-led complaints).

NLRA could protect a broad swath of employees' collective immigration advocacy efforts. In other words, a good deal of immigration advocacy is protected labor advocacy.

## II.

### IMMIGRATION ADVOCACY AS PROTECTED LABOR ADVOCACY

In this Part, we further establish that immigration advocacy is labor advocacy by showing that employees' collective immigration advocacy efforts fall within the NLRA's broad legal protections of employees' collective activity. Immigration law, therefore, is a labor issue not only because of immigration law history and because of the labor-based critiques of immigration law described in Part I, but also because the relationship between immigration law and labor law can sometimes lead to a more expansive view of legal protections for employees.

Unlike NLRA protections that relate to employees who are engaged in disputes with their employers at particular workplaces, the NLRA's protection of employees' advocacy efforts operates at a broader level and encompasses collective employee efforts to affect workplace issues at the municipal, state, and national levels ("advocacy," "labor advocacy" or "employee advocacy"). In this Part, we describe the overarching legal standard for determining when the NLRA protects employees' collective advocacy which aims to achieve broader policy goals.

To demonstrate the NLRA's expansive protection of employees' immigration advocacy from employer interference, we then present three types of NLRA-protected advocacy messages or "frames," gleaned from the relevant case law in other contexts. Frames are the ways that individuals justify the need for legal reform or a change in governmental actions with respect to a particular issue. We then apply these frames to labor unions' recent advocacy statements about immigration reform. The analysis uses the statements of the two main labor congresses, the AFL-CIO and Change to Win, as examples because of their active involvement in recent immigration advocacy efforts. While not all local unions or employees agree with the views of the two congresses, the statements of the congresses provide a good indicator of a significant portion of the labor movement ("labor"). Finally, we describe advocacy frames that do not fall within the NLRA's protection to show the outer boundaries of the NLRA's protection of immigration advocacy as labor advocacy.

#### *A. The Overarching Legal Standard for Protected Labor Advocacy*

One of the three crucial requirements for NLRA protection of advocacy relates to the framing of employees' advocacy efforts. While we

focus exclusively on the framing issue, the other two requirements merit brief mention here because they are potentially relevant in all NLRB advocacy cases. First, employees can lose NLRA protection if the NLRB views the employer's action as justified<sup>79</sup>—for example, employer firings of immigration rally participants for their unexcused absences from work<sup>80</sup>—or the employees' communication is “so disloyal, reckless or maliciously untrue that it loses the Act's protection.”<sup>81</sup> Second, the NLRA requires employees to be engaged in some form of “concerted activity.”<sup>82</sup> Concerted activity includes activity intended to instigate group action and activity that is engaged in “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”<sup>83</sup> Because these two NLRA requirements have been addressed by other scholars, this Article will not address these issues. Instead, the remainder of the Article focuses on the NLRA's third requirement—that employees' advocacy is framed in such a way that it is for employees' “mutual aid or protection.”<sup>84</sup>

The Supreme Court's 1978 decision in *Eastex, Inc. v. NLRB* established that the key inquiry for determining whether employee

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79. See, e.g., *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661 (9th Cir. 1981) (finding employer had a legitimate business justification in preserving the peace in light of the employees' advocacy of “violent revolution,” “destruction of all bosses,” and “armed revolution of all the working class”).

80. In a 2006 Advice Memorandum from the NLRB's Associate General Counsel, the NLRB noted that employees can lose NLRA protection if they “miss[] work without permission simply to participate in” immigration rallies. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert W. Chester, Reg'l Dir., Region 18, NLRB, regarding Reliable Maint., Case 18-CA-18119, at \*1 (October 31, 2006). In this context, the memorandum boldly went on to state that “economic pressure directed at an employer that has no control over the demonstration's subject matter is also not protected.” Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert W. Chester, Reg'l Dir., Region 18, NLRB, regarding Reliable Maint., Case 18-CA-18119, at \*1 (October 31, 2006).

81. *Emarco, Inc.*, 284 N.L.R.B. 832, 834 (1987).

82. 29 U.S.C. § 157 (2006); *Eastex v. NLRB*, 437 U.S. 556, 565 n.14 (1978) (“Congress modeled the language of § 7 after that found in § 2 of the Norris-LaGuardia Act . . . which declares that it is the public policy of the United States that workers ‘shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .’”). See *id.* (“This section of the Norris-LaGuardia Act expresses Congress' recognition of the ‘right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally . . . .’”) (emphasis supplied) (citation omitted).

83. *Meyers Industries Inc.* (“Meyers I”), 268 N.L.R.B. 493, 497 (1984) (expressing that the activity must “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself”); *Meyers Industries Inc.* (“Meyers II”), 281 N.L.R.B. 882, 884 (1986) (stating that the Act “requires some linkage to group action in order for conduct to be deemed ‘concerted’ within the meaning of Section 7”); *Pennant Foods Co.*, 347 N.L.R.B. 460 (2006) (reviewing the history of *Meyers I* and *II*, and applying Court and Board law to find an employee's actions concerted, despite the fact that he had acted alone during some portion of the concerted activity).

84. 29 U.S.C. § 157 (2006) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”).

advocacy is for “mutual aid or protection” is whether the framing of employee advocacy to influence judicial, executive, or legislative bodies sufficiently relates to “employees’ interests as employees.”<sup>85</sup> In *Eastex*, the Court considered whether two parts of a union newsletter were protected under the NLRA.<sup>86</sup> One part encouraged employees to contact their legislators to oppose the incorporation of Texas’s existing right-to-work statute into the state constitution. Another part criticized President Nixon’s veto of an increase in the federal minimum wage and urged employees to register to vote.<sup>87</sup> The employer prohibited the union from distributing this newsletter during non-working time in non-working areas of the workplace. The *Eastex* Court concluded that the employer’s prohibition violated the NLRA because the distribution of the newsletter constituted protected labor advocacy.<sup>88</sup> According to the Court, all aspects of the newsletter were reasonably related to “employees’ interests as employees” and therefore fell within the NLRA’s mutual aid or protection clause. This was the case even though the advocacy did not directly relate to employment relations at this particular workplace.<sup>89</sup>

While the *Eastex* Court set forth a broad legal standard for determining whether the NLRA protects employee advocacy to influence judicial,

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85. *Eastex*, 437 U.S. at 567.

86. *Id.* at 558. The newsletter had four sections. The first and fourth sections urged employees to support the union and union solidarity. *Id.* at 559. There was no dispute as to whether such literature was protected by the NLRA. *Id.* at 561.

87. *Id.* at 577-78.

88. For instance, the Court reasoned that the newsletter’s request that employees write to their legislators to oppose the constitutional incorporation of a right-to-work statute was protected because union security is “central to the union concept of strength through solidarity” and “a mandatory subject of bargaining in other than right-to-work states.” *Id.* at 569.

89. *Id.* at 556, 561-63. In noting that “mutual aid or protection” is broader than “self-organization” or “collective bargaining,” the *Eastex* Court pointed to a number of cases in which the NLRB had protected conduct outside of that dealing with specific issues at the employees’ own facility, or on behalf of the employer’s own employees. *Id.* at 565. This included advocacy before a broad level of political institutions, including appeals “to administrative and judicial forums” as well as legislators to protect their interests as employees. *See id.* at 566 n.16 (citing a string of NLRB cases for this proposition). *See also* Bateman, *supra* note 19, at 43 (noting that advocacy can still be protected even when it does not focus on employees’ own working conditions). Demonstrating the wide scope of the NLRA’s “mutual aid or protection” clause, the *Eastex* Court rejected the employer’s argument that in order to fall under the protection of Section 7, the conduct must relate to a specific dispute between employees and their own employer “over an issue which the employer has the right or power to affect.” *Eastex*, 437 U.S. at 563, 564-65. *See also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (concluding that employees did not need to make specific demands on an employer to receive protection under the NLRA); 29 U.S.C. § 152(9) (2006) (defining “labor dispute” broadly as “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee”) (emphasis added).

executive, or legislative bodies, the Court did limit it to some extent. The Court stated that:

[S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes *so attenuated* that an activity cannot fairly be deemed to come within the mutual aid or protection clause.<sup>90</sup>

However, the *Eastex* Court refused to further delineate the scope of labor advocacy that is protected under the NLRA's mutual aid or protection clause.<sup>91</sup> Instead, it concluded that the NLRB should consider the scope of protected labor advocacy on a case-by-case basis.<sup>92</sup>

In the wake of *Eastex*, the NLRB considers the "purpose and subject matter of the advocacy" to determine whether employees' advocacy efforts are protected under Section 7.<sup>93</sup> It requires "a direct nexus between employment-related concerns and the specific issues that are the subject of the advocacy."<sup>94</sup> While drawing the line between protected and unprotected labor advocacy has been difficult<sup>95</sup> and there has been some inconsistency in the NLRB's jurisprudence,<sup>96</sup> the NLRB's case law illustrates a continuum of protected and unprotected labor advocacy.<sup>97</sup>

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90. *Eastex*, 437 U.S. at 567-68 (emphasis added).

91. See Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 691 (1985) (stating that the *Eastex* Court "failed to decide how much action is protected regarding even those political issues that the Court believes are closely linked to workers' interests as employees").

92. *Eastex*, 437 U.S. at 568-70.

93. Meisburg, *supra* note 20.

94. *Id.* Similarly, the NLRB requires that the content of each communication be "sufficiently related to the . . . terms and conditions of employment." *Five Star Transportation, Inc.*, 349 N.L.R.B. 42, 44 (2007). As the U.S. Court of Appeals for the Sixth Circuit has stated, employee advocacy to legislators that "bears a sufficiently close relationship to the employees' wages and working conditions" is protected by NLRA Section 7. *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983).

95. See, e.g., Meisburg, *supra* note 20, at 1 ("The important question of where, and on what basis, to draw the line between protected concerted activity and unprotected political activity can be a difficult one.").

96. Compare *Eastex*, 437 U.S. at 577-78 (protecting union statements asking employees to vote for labor's "friends") with *Caterpillar, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 1997 N.L.R.B. LEXIS 192, at \*30-31 (1997) (finding a Clinton/Gore sticker on a toolbox to be "purely political"). See also Kennedy & Cowan, *supra* note 3, at 112 (noting the "tension between *Eastex's* recognition that concerted employee activity is broader than the individual employment relationship and the effort in some portions of the Act to confine labor relations to that specific employment relationship").

97. See, e.g., Bateman, *supra* note 19, at 54 (citing *Firestone Steel Products Co.*, 244 N.L.R.B. 826, 826 (1979) and stating that the NLRB was trying to locate "union 'political' communication along a continuum, placing at one end literature dominantly aimed at inducing votes for specific candidates, and at the other, literature designed principally to educate employees on political issues that may impinge on their employment conditions."). See also *Local 174 International Union v. NLRB*, 645 F.2d 1151, 1155 (D.C. Cir. 1981) ("[T]he Board states that it is attempting to range union 'political' communication along a continuum, placing at one end literature dominantly aimed at inducing votes for

On one side of the continuum are advocacy frames that are traditionally considered protected, such as labor advocacy to gain workplace rights, improve wages and working conditions, and enhance job opportunities and security.<sup>98</sup> On the other side are unprotected advocacy frames, which advocate primarily on behalf of a specific political candidate or political party, without a sufficient connection to employees' interests as employees.<sup>99</sup> If advocacy statements include both protected and unprotected frames—sometimes referred to as “mixed material”—the NLRB determines which frames dominate.<sup>100</sup> According to the NLRB, when advocacy statements are set forth using primarily job-related frames, they will be protected against employer interference during employees' non-work time, in non-work areas.<sup>101</sup> If unprotected frames dominate, the NLRA will not protect the advocacy.<sup>102</sup> The following subsections draw

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specific candidates, and at the other, literature designed principally to educate employees on political issues that may impinge on their employment conditions. We find this approach to be consistent with the Supreme Court's statements in *Eastex* that § 7 protection may depend upon the object or context of the activity.”). For a discussion of another continuum between NLRA protected and unprotected activity, see Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 357 (1990) (describing picketing as lying on a “continuum [between Section 7 protection and Section 8 prohibition] which Congress has regulated in its entirety”).

98. See, e.g., *Kenworth Truck Co., Inc.*, 327 N.L.R.B. 497, 501 (1999) (protecting labor advocacy to repeal a statute substantially limiting available employee benefits in Ohio); *Red Food Stores, Inc.*, 296 N.L.R.B. 450, 450-53 (1989) (protecting labor advocacy against a foreign-owned employer which alleged that the employer paid inferior benefits and wages).

99. See, e.g., *Bateman*, *supra* note 19, at 56 (“The current decisions seem to suggest that if placed on a continuum, those activities that would be deemed not within the scope of section 7 would be those that merely tout a political candidate or party in an election. At the other end of the spectrum activity that would seem to almost always garner section 7 coverage are direct appeals by unions and employees to legislators over issues of general workplace concern.”).

100. See Memorandum from General Counsel, NLRB, to Samuel M. Kaynard, Reg'l Dir., Region 29, NLRB, regarding *Eagle Electric Mfg. Co.*, Case 29-CA-10504, 29-CA-15012-1, 29-CA-15012-3, at \*6-7, 1983 WL 29378 at \*2 (November 3, 1983) (recommending that support for a union activist facing deportation was primarily aimed at protesting the deportation of a Mexican political activist who sought asylum and that the otherwise protected labor advocacy was “*de minimus*” when compared with the literature in its entirety).

101. *Samsonite Corp.*, 206 N.L.R.B. 343, 346 (1973).

102. In *Mead Corp.*, a union distributed a handbill that stated in the top half of the flyer, “AL GORE DOES NOT WANT TO TAKE AWAY YOUR GUN, BUT GEORGE W. BUSH WANTS TO TAKE AWAY YOUR UNION.” The bottom half of the flyer cited several newspaper editorials that discussed Bush's position on several general labor concerns, including right-to-work laws, overtime pay, minimum wage, prevailing wage and the privatization of government jobs. The handbill contained an insignia of the union's nationwide campaign to educate workers on how to vote. The NLRB concluded that the distribution of the handbill was unprotected labor advocacy, finding the content of the handbill to be too “remotely related” to employees' interests as employees to be for “mutual aid or protection.” *Mead Corp.*, 2001 N.L.R.B. LEXIS 429, at \*7-10 (2001). In *Firestone* the employer refused to allow the union to distribute literature during non-working time and in non-working areas. The literature supported candidates for the Michigan Supreme Court, Governor of the State of Michigan, and the U.S. Senate. The NLRB concluded that the literature did not make any connection to employment concerns and instead focused on individual candidates for office. *Firestone Steel Products Co.*, 244 N.L.R.B. 826,

from existing case law to describe each of the protected and unprotected advocacy frames and to apply these frames to labor's recent immigration advocacy statements. The analysis illuminates the broad, albeit circumscribed, scope of the NLRA's protection of immigration advocacy as labor advocacy.

### B. Protected Frames

The NLRA has protected advocacy frames related to a variety of policy arenas as long as the issue is sufficiently framed as a (1) workplace rights, (2) wages and working conditions, or (3) job opportunities and job security issue. Applying the existing case law to recent trade union advocacy statements about immigration reform shows the NLRA's potential to broadly protect labor's framing of the issue.

#### i. The Workplace Rights Frame

Given the NLRB's post-*Eastex* case law, advocacy that broadly frames the issue as a workplace rights issue falls within the NLRA's protective scope. The NLRB's *Kenworth Truck Company, Inc.*<sup>103</sup> case, which involved employee advocacy on behalf of increased workers' compensation rights, illustrates that the NLRB has protected employees' advocacy on behalf of political issues when the issue was framed as a workplace rights issue. In *Kenworth*, an employee agreed to distribute an AFL-CIO-sponsored handbill among employees for the purpose of repealing a statute that reduced the benefits available for workplace injuries pursuant to Ohio's Workmen's Compensation system.<sup>104</sup> Although there was no reference to a labor concern at any specific employer, the NLRB found that *Eastex* was controlling and that the handbill was protected labor advocacy. The NLRB stated that "the handbilling overtly was accomplished by union members for a union sponsored purpose."<sup>105</sup> Therefore, the employer's surveillance and intimidation of the employees' handbilling, and its termination of one of the employees who was active in the advocacy effort, violated the NLRA.

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826-27 (1979). See also *Local 174 International Union v. NLRB*, 645 F.2d 1151, 1154 (D.C. Cir. 1981) ("Preceding the candidate identification, the handout lists an assortment of issues of general concern to workers, but discussion of the listed issues is sparse. The dominant message conveyed by the leaflet is to vote for the endorsed individuals . . . ."); *Educ. Minn. Lakeville v. Ind. Sch. Dist. No 194*, 341 F.Supp.2d 1070, 1080 (D. Minn. 2004) (refusing to acknowledge NLRA's jurisdiction because the "principal thrust" of the 4-page John Kerry leaflet was to encourage employees to vote for specific candidates rather than to educate them about issues that relate to employees' interests as employees).

103. *Kenworth Truck Co., Inc.*, 327 N.L.R.B. 497 (1999).

104. *Id.* at 497-98.

105. *Id.* at 501.

The NLRB's *Union Carbide* case, which involved employee advocacy to pressure the government to expand its enforcement of existing collective bargaining rights, similarly shows that the workplace rights advocacy frame falls within the scope of protected labor advocacy.<sup>106</sup> In *Union Carbide*, an employee brought a petition to the employee lunchroom, which was located on the employer's property. The petition, entitled "Taxpayers' Petition," stated:

We, the undersigned, object to Union Carbide corporation's use of our tax dollars for anti-union activities. The United States Government is officially in favor of collective bargaining. We therefore call upon congress and the president to investigate and stop this improper use of our taxes.<sup>107</sup>

After the union collected signatures for three or four days, the employer confiscated the petition and would not return it to the employees or union.<sup>108</sup> The NLRB concluded that the employer's act was an NLRA violation.<sup>109</sup> In other words, national-level labor advocacy on behalf of enforcing collective bargaining rights, which was conducted in non-working areas during non-working time, was protected labor advocacy.<sup>110</sup>

Applying these precedents to labor's recent immigration advocacy statements illustrates that many of these statements fall within the workplace rights frame. Namely, labor has often framed its comprehensive immigration reform advocacy and specific proposals as grounded in the pursuit of enhanced workplace rights, and thereby in pursuit of employees' interests as employees. The AFL-CIO/Change to Win joint platform on immigration, for example, claims that a comprehensive immigration reform agenda is important because "all workers" need "full and complete access to the protection of labor, health and safety, and other laws."<sup>111</sup> Referring to the joint platform, former AFL-CIO President John Sweeney stated that the

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106. 259 N.L.R.B. 974, 977 (1982). *Union Carbide* was enforced in relevant part and set aside in part by the Sixth Circuit, *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983).

107. *Union Carbide*, 259 N.L.R.B. at 977.

108. *Id.*

109. *Id.*

110. Similarly, the NLRB protects advocacy aimed at repealing right-to-work laws. *See, e.g., Griffin Pipe Products Co. and USW*, 1999 N.L.R.B. LEXIS 129, at \*21-22 (1999) ("It is now well settled that such union activity related to the repea[l] of right-to-work laws, though arguably political in character, falls within 'mutual aid and protection' clause in Section 7 that it is generally protected"); *Hesse Corp.*, 244 N.L.R.B. 985, 987 (1979) (finding that employer, who told employees to remove their bumper stickers in protest of right-to-work legislation and then suspended them for refusing to do so, was an NLRA violation). *See also Satterfield v. Western Elec.*, 758 F.2d 1252, 1253 (8th Cir. 1985) (concluding that employee who was fired for "distributing right-to-work literature to union members" suffered an NLRA violation).

111. AFL-CIO, *The Labor Movement's Framework*, *supra* note 7, at 1.

“unified labor position” is one that is “centered on workers’ rights” for documented and undocumented workers alike.<sup>112</sup>

According to labor, “legalization” of currently undocumented workers is a workplace rights issue and therefore an important immigration reform proposal. The AFL-CIO claims that employers have used immigration status to “divide workers . . . in the last decade.”<sup>113</sup> A legalization program would, by definition, provide these workers with a wide range of rights that documented individuals enjoy.<sup>114</sup> Labor’s view is that a new legalization program could improve the workplace rights of undocumented employees because, among other things, they would no longer “lack full labor rights in the American workforce.”<sup>115</sup> In this way, legalization would counter the growing population of what labor often refers to as an easily exploitable “secondary class” of workers.<sup>116</sup>

Specifically, as newly “legalized” workers, undocumented workers would no longer be subject to the Supreme Court’s oft-criticized *Hoffman*

112. Change to Win, *Change to Win and AFL-CIO Unveil Unified Immigration Reform Framework* (2009) [hereinafter *Unified Immigration Reform Framework*], available at <http://www.changetowin.org/news/change-win-and-afl-cio-unveil-unified-immigration-reform-framework>. Similarly, Arturo Rodriguez, president of the United Farm Workers, stated that labor’s advocacy for comprehensive immigration reform is in pursuit of rights and to address exploitation of all workers. He referred to the “dire need” for immigration reform due to the exploitation of immigrant and domestic workers alike. *Id.* Unions have not always been so eager to support the rights of immigrant workers. See Stephen Franklin, *Labor, Immigrants Find Common Ground; May Day Rally Helps Link Workers from Both Groups*, CHI. TRIB., May 2, 2008, at C3 (referring to “organized labor’s growing willingness to link with immigrant workers.”). See also *id.* (“[U]nions have come a long way in recognizing that ‘immigrant workers are workers.’”).

113. AFL-CIO, *Q & As on AFL-CIO’s Immigration Policy 1* [hereinafter *AFL-CIO Q & As*], available at <http://www.cpw.com/pdfs/Q&As%20on%20AFLCIO’s%20Immigration%20Policy.pdf>.

114. The AFL-CIO, for instance, has framed its proposal for a path to legalization as “an important worker protection,” which benefits all workers. AFL-CIO, *Responsible Reform of Immigration Laws Must Protect Working Conditions for All Workers in the U.S.* (2006) [hereinafter *AFL-CIO Responsible Reform of Immigration Laws*], available at <http://www.aflcio.org/About/Exec-Council/EC-Statements/Responsible-Reform-of-Immigration-Laws-Must-Protect-Working-Conditions-for-all-Workers-in-the-U.S.>

115. Simon, *supra* note 3, at 1300.

116. AFL-CIO *Q & As*, *supra* note 113. See also *The Labor Movement’s Framework*, *supra* note 7, at 2 (claiming that undocumented workers need to be legalized because they are exploitable and do not have “basic protections”); AFL-CIO *Q & As*, *supra* note 113, at 3 (stating that immigration reform “must provide a real path to legalization” so that undocumented workers can “exercise their labor rights.”); AFL-CIO *Q & As*, *supra* note 113, at 4 (“[D]ividing workers into different ‘classes’ only benefits employers.” If we do not legalize, “we will only be supporting the creation of a class of workers who have absolutely no incentive to engage in the long-term fight for good jobs with decent benefits, including health care and pensions.”); Michelle Amber, *Trumka Says Fixing Immigration Should be “Crucial Element” of Broad Economic Strategy*, DAILY LAB. REP., June 21, 2010 (stating that “a pathway must be built that allows immigrants to be securely part of our country from day one—able to assert their legal rights, including the right to organize, without fear of retaliation”). The only way, according to the AFL-CIO, to “remove the economic incentive to exploit workers—and thus diminish illegal immigration—is to ensure that all workers have full labor rights.” AFL-CIO *Q & As*, *supra* note 113, at 2. In other words, immigration reform should “treat all workers as workers.” *Id.* at 1

*Plastic Compounds* decision, described in Part I. The *Hoffman* Court concluded that an undocumented worker who violated IRCA did not have access to NLRA backpay to remedy the employer's NLRA violation.<sup>117</sup> Similar to the four dissenters, the AFL-CIO views the Supreme Court's *Hoffman* decision as providing "a powerful new incentive" for employers to hire undocumented workers.<sup>118</sup> According to the AFL-CIO, now that employers do not have to pay NLRA backpay to remedy their NLRA violations against undocumented workers, "the cost of exploiting immigrants [is] insignificant."<sup>119</sup>

Indeed, labor's call for legalizing undocumented workers has been grounded in its critique of *Hoffman*'s aftershocks on the workplace rights of employees. A United Food and Commercial Workers (UFCW) union representative asserted that "[u]nscrupulous employers are willfully interpreting the court's decision to intimidate and coerce immigrants from standing up for their rights."<sup>120</sup> As a poignant example, the AFL-CIO recounts the story of an undocumented construction worker in New York who was physically incapacitated during work due to his employer's negligence. Unlike documented workers, this construction worker could not receive his lost earnings based on New York wage standards. Instead, the employer was required to pay lost wages based on what the undocumented worker would have earned if he had performed the work in his home country. According to the AFL-CIO, "[e]ssentially, employers and contractors now are able to import the workplace standards of developing countries into the United States."<sup>121</sup>

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

118. AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114. See also Diane E. Lewis, *Decision Stirs Labor Movement: Some Fear High Court's Ruling for Firm Will Hurt Undocumented Workers*, BOS. GLOBE, April 14, 2002, at G1 (stating that *Hoffman* decision had the "labor movement up in arms"); *id.* ("[T]he UFCW this month called on Congress to immediately reverse the decision with legislation that would protect the rights of undocumented and documented workers and offer uniform penalties against employers who wrongfully fire employees.").

119. AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114. See also AFL-CIO *Q & As*, *supra* note 113, at 2 (describing *Hoffman* as creating "yet another economic incentive to recruit and employ undocumented workers"); Testimony of Jonathon P. Hiatt before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (May 24, 2007) 3, available at [http://www.fairus.org/site/DocServer/Hiatt\\_Test.pdf?docID=5321](http://www.fairus.org/site/DocServer/Hiatt_Test.pdf?docID=5321) (referring to the *Hoffman* decision and stating that the "holding has, in practice, made it much more difficult, and in some cases impossible, for an entire class of workers to exercise the right to join a union and bargain collectively"); Simon, *supra* note 3, at 1299 ("Another proffered connection between immigration law and labor standards is that workers' undocumented status forecloses the availability of certain remedies under the NLRA.").

120. *Food and Commercial Workers Condemn Court Decision on Immigrant Workers*, PR NEWSWIRE, April 2, 2002, available at <http://www.prnewswire.com/news-releases/food-and-commercial-workers-condemn-court-decision-on-immigrant-workers-76740602.html>.

121. AFL-CIO *Q & As*, *supra* note 113, at 2.

Labor has also framed its immigration reform demands for improvements to labor and employment law enforcement as a workplace rights issue.<sup>122</sup> Many unions view employer exploitation of undocumented workers' rights as connected to the inadequate enforcement of the labor and employment protections that are already on the books.<sup>123</sup> As a response, the AFL-CIO/Change to Win joint platform calls for improved labor and employment law enforcement on behalf of all workers.<sup>124</sup> Moreover, in an effort to spur comprehensive immigration reform, the labor federations' platform urged the Obama administration and Congress to work to address concerns over the "fuel[ing] of discrimination and exploitation of workers."<sup>125</sup> To combat these workers' rights issues, the labor federations advocated for immigration reform "centered on workers' rights."<sup>126</sup>

Additionally, labor has connected its specific proposal for improving the guest worker program to enhancing workplace rights.<sup>127</sup> To critique the

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122. See, e.g., AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114 ("[I]mmigration reform law *must* provide real and enforceable remedies for labor and employment law violations that are available to *all* workers, regardless of their immigration status.").

123. AFL-CIO, *Recognizing Our Common Bonds*, available at <http://www.rnsworkingtogether.net/aboutus/thisistheafcio/publications/magazine/commonbonds.cfm> ("[T]he AFL-CIO has played a key role in strengthening workplace rights in the enforcement of immigration laws, including persuading the Labor Department to stop inspecting workers' immigration papers while examining complaints of labor standards abuses.").

124. *The Labor Movement's Framework*, *supra* note 7, at 1.

125. *Unified Immigration Reform Framework*, *supra* note 112.

126. *Id.* See also Change to Win, *Statement by Change to Win Chair Anna Burger on Immigration Reform Bill Approved by the Senate Judiciary Committee* (2006) [hereinafter *Statement by Anna Burger*], available at <http://www.changetowin.org/news/statement-change-win-chair-anna-burger-immigration-reform-bill-approved-senate-judiciary> (stating that we need improved worker protections "to ensure that all employees are treated fairly and have the same legal protections, regardless of their immigration status"). While reminding rally supporters that unions were founded by immigrants, Change to Win Chair Anna Burger framed immigration advocacy in terms of working conditions such as a "job with a paycheck that supports a family, affordable health care, and a retirement with dignity." Change to Win, *Remarks for Immigration Rally on Capitol Steps by Change to Win Chair Anna Burger* (2006) [hereinafter *Remarks on Capitol Steps*], available at <http://www.changetowin.org/news/remarks-immigration-rally-capitol-steps-change-win-chair-anna-burger>. In the same way, the AFL-CIO has declared that it "will continue to support effective, credible and enforceable rights for all workers, regardless of their country of origin or immigration status," including enforceable remedies for labor and employment law violations. AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114.

127. See, e.g., AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114 ("Workers around the country are witnessing the transformation of formerly well-paying, permanent jobs into temporary jobs with little or no benefits, which employers are staffing with vulnerable foreign workers who have no real enforceable rights through the guestworker programs."); AFL-CIO, *In Support of Statement on Immigration Reform* (2003) [hereinafter *AFL-CIO Statement on Immigration Reform*], available at <http://www.aflcio.org/About/Exec-Council/EC-Statements/In-Support-of-Statement-on-Immigration-Reform> ("Legally and practically, guestworkers have never been afforded the same workplace protections as domestic workers . . . The vulnerability of these workers inescapably leads to severe and frequent instances of employer abuse and government neglect. The current guestworker programs should be reformed to provide essential labor market and workplace protections for both immigrant and non-immigrant workers.").

inadequacies of modern guest worker programs, labor sometimes evokes the history of guest worker programs, described in Part I. Referring to the Bracero Program, the AFL-CIO has stated that, “[w]e know from experience that [guest worker] programs have created an exploitable and exploited cheap labor force.”<sup>128</sup> Noting that current guest worker programs have fewer workplace protections than the Bracero Program, the AFL-CIO asserts that, despite extensive protections, “Braceros experienced numerous abuses, including racial oppression, economic hardship and mistreatment by employers” and “had a well-documented downward effect on the wages of U.S. citizen farm workers.”<sup>129</sup> Because of current “substandard” conditions for guest workers, labor claims that immigration reform must provide adequate workplace protections for guest workers.<sup>130</sup> Moreover, labor asserts that an independent labor market commission, which would better control the flow of foreign workers, is essential because “it is not good policy for a democracy to admit large numbers of workers with limited civil and employment rights.”<sup>131</sup>

According to labor, workplace rights would also be enhanced if immigration reform contained changes to existing restrictive immigration measures. These changes, labor contends, might include more effective

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128. AFL-CIO, *AFL-CIO's Model for "Future Flow": Foreign Workers Must Have Full Rights 2*, [http://fcnl.org/assets/model\\_for\\_future\\_flow.pdf](http://fcnl.org/assets/model_for_future_flow.pdf). See also AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114 (stating that there were “abuses” against braceros that “are well documented”); AFL-CIO *Statement on Immigration Reform*, *supra* note 127 (“Current foreign worker programs contain many of the same shortcomings as the notorious *bracero* program, which began in 1943 as a wartime emergency program but continued amid great controversy until 1964. Legally and practically, guestworkers have never been afforded the same workplace protections as domestic workers, and, as non-immigrants, they have been denied the democratic rights and economic bargaining power of immigrants and citizens.”).

129. Testimony of Jonathon P. Hiatt before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International law 8 (May 24, 2007), available at [http://www.aflcio.org/issues/civilrights/immigration/upload/Hiatt\\_Test.pdf](http://www.aflcio.org/issues/civilrights/immigration/upload/Hiatt_Test.pdf); *id.* at 7 (referring to the 1917 guest worker program and stating that “[t]he United States has been experimenting with temporary worker programs for almost a century without a single success”). Testimony of UFCW before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International law (May 24, 2007), available at [http://www.ufcw.org/issues/immigration/ufcw\\_political\\_involvement/mjw\\_testimony.cfm](http://www.ufcw.org/issues/immigration/ufcw_political_involvement/mjw_testimony.cfm) (“The post-World War II Bracero program was synonymous with worker abuse. Modern versions of the same . . . have had similar negative effects.”).

130. AFL-CIO *Q & As*, *supra* note 113, at 3 (stating that immigration reform “must guarantee that new foreign workers will be able to fully exercise their labor rights”); Anna Burger, *Immigration Letter from Anna Burger to Arlen Specter* (2006) [hereinafter *Immigration Letter to Senator Specter*], available at <http://www.changetowin.org/news/immigration-letter-anna-burger-arlen-specter> (noting that temporary guest worker programs must “mandate fair wages and working conditions for all workers”). According to the AFL-CIO, guest workers “are unlikely to complain about substandard working conditions because if they do they could lose their jobs and face deportation.” AFL-CIO *Q & As*, *supra* note 113, at 3.

131. Elizabeth Kenigsberg, *Labor Coalition Outlines Immigration Reform Plan*, CONGRESSNOW, April 14, 2009.

border control efforts and improvements to IRCA's worker authorization system. The AFL-CIO, for instance, supports the imposition of new restrictive immigration measures at the U.S.-Mexico border to deter future undocumented immigration because it believes that the current immigration system allows employers to exploit these unregulated workers.<sup>132</sup> With respect to IRCA's worker authorization measures, labor's joint platform asserts that federal immigration authorities must check immigration status "accurately while providing maximum protection for workers."<sup>133</sup> Similarly, the UFCW has stated that IRCA's "employment verification system is inaccurate, inefficient, and easily manipulated by employers eager to take advantage of cheap foreign labor."<sup>134</sup> Along similar lines, the AFL-CIO has contended that IRCA's audits of employers and workplace-immigration raids have "undermined efforts to protect workers' rights."<sup>135</sup>

*ii. The Wages and Working Conditions Frame*

In addition to protecting employees' advocacy framed as a general call for workplace rights, the NLRA's mutual aid or protection clause protects advocacy that is connected to wages and working conditions that exceed baseline workplace rights.<sup>136</sup> The *Eastex* Court, for instance, protected labor advocacy related to the national minimum wage even though the advocating workers were not minimum-wage employees.<sup>137</sup> According to the Court, "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum."<sup>138</sup> Similarly, the

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132. See, e.g., AFL-CIO *Q & As*, *supra* note 113, at 4 ("An 'open borders' policy would play into the hands of corporations that would like nothing better than to treat workers as commodities.").

133. *The Labor Movement's Framework*, *supra* note 7, at 1.

134. Testimony of UFCW before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (May 24, 2007), available at [http://www.ufcw.org/issues/immigration/ufcw\\_political\\_involvement/mjw\\_testimony.cfm](http://www.ufcw.org/issues/immigration/ufcw_political_involvement/mjw_testimony.cfm).

135. See *Raids, I-9 Audits Undercut Worker Rights* AFL-CIO, *Worker Groups Say in New Report*, DAILY LAB. REP., Oct. 28, 2009 ("The Department of Homeland Security's immigration enforcement efforts, including workplace raids and I-9 audits, have undermined efforts to protect workers' rights, according to a report released Oct. 27 by the AFL-CIO, American Rights at Work, and the National Employment Law Project."); see also *id.* ("The groups called on the Obama administration to vigorously enforce labor laws and ensure that workplace enforcement of immigration laws does not interfere with workers' rights.").

136. See, e.g., *Remarks on Capitol Steps*, *supra* note 126 (stating, at a rally, that "[w]e all know too well that our broken immigration system allows employers to exploit undocumented workers and drive down pay and benefits for all workers in this country"); *Statement by Anna Burger*, *supra* note 126 (stating that immigration reform will ensure that employers "pay fair wages").

137. *Eastex*, 437 U.S. 556, 569-70 (1978) (stating "[t]he union's call . . . for [] employees to back persons who support an increase in the minimum wage, and to oppose those who oppose it, fairly is characterized as concerted activity for the 'mutual aid or protection' of petitioner's employees and of employees generally").

138. *Id.* at 569 (1978) (quoting *Eastex, Inc.*, 215 N.L.R.B. 271, 274 (1974)).

*Eastex* Court reasoned that there was a sufficient connection between the advocacy and employees' interests as employees because "concern by [] employees for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer."<sup>139</sup>

Post-*Eastex* case law confirms that advocacy which relates sufficiently to other kinds of enhanced working conditions is protected labor advocacy.<sup>140</sup> The NLRB, for instance, has deemed employee advocacy related to worker safety to be protected labor advocacy. In *Riverboat Services of Indiana*, the NLRB protected employee advocacy aimed at ensuring that future engineers would have sufficient experience to safely operate maritime vessels.<sup>141</sup> According to the NLRB in that case, the NLRA prohibited the employer from firing employees for writing a letter to the Coast Guard because there was a direct nexus between the advocacy and worker safety.<sup>142</sup> In *GHR Energy Corporation*, the NLRB protected employee testimony before state and federal legislatures regarding environmental law reform. The employer had threatened a lawsuit against the employees in retaliation for the testimony.<sup>143</sup> The NLRB concluded that there was a sufficient connection between the advocacy and the working conditions of employees who handle toxic materials, including "not only [] the Respondent's employees but [] employees generally."<sup>144</sup>

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139. *Eastex*, 437 U.S. at 569 (citing 215 N.L.R.B. at 274). *But see* *Holling Press, Inc.*, 343 N.L.R.B. 301, 302-03 (2004) (holding that an employee's pursuit of co-worker support for her state sexual harassment claim against the employer was personal, and therefore not for mutual aid or protection, because the complaint was "individual in nature" and her actions were "not made to accomplish a collective goal").

140. For instance, the NLRB has protected employees who took action in protest of a judicial settlement that affected their retirement benefits. *See* *Southern California Gas Company and Utility Workers Union of America, AFL-CIO, Local 132*, 321 N.L.R.B. 551, 556 (1996) ("[W]hen employees whose collectively negotiated wages and benefits include the right to participate in a retirement plan under which they necessarily will become PE shareholders, and whose payout value to the employees on retirement will thus necessarily depend on the value of PE stock, those employees have not merely a 'shareholder's interest' in the outcome of a lawsuit affecting the value of PE's corporate treasury (and in turn, the value of its stock), but a very real stake as employees of the Respondent in the value of their retirement benefit plan.").

141. *Riverboat Services of Indiana*, 345 N.L.R.B. 1286 (2005).

142. *Id.* at 1294.

143. *GHR Energy Corp.*, 294 N.L.R.B. 1011, 1014 (1989).

144. *Id.* The *Motorola, Inc.* case is another example. *Motorola* refused to allow distribution of literature in support of a city ordinance that would prohibit employee drug testing "in nonworking areas [of the employer's] property during nonworking time" and argued that these communications were unprotected "purely political tracts." *Motorola, Inc.*, 305 N.L.R.B. 580, 585 (1991). The literature contained a membership application that incorporated the organization's position statement on the back, asserting, among other things, that it opposed drug testing. It also included a document entitled "Stop Random Drug Testing," which, among other things, asked the Austin City Council to "vote against random drug testing." *Id.* at 583. Although neither of the disputed documents referenced *Motorola* specifically, or any labor dispute occurring there, the NLRB rejected the employer's argument. *Id.* at 585. The NLRB held that the documents constituted appeals to legislators to protect employees'

Many of labor's immigration advocacy messages fall within the wages and working conditions frame, as interpreted by the NLRB and courts. It is very common for labor to view immigration reform as an issue that affects not only employees' legal rights to a minimum level of wages and working conditions, but also employees' access to wages and working conditions that are, or have been historically, superior to the legal minimums. The AFL-CIO/Change to Win platform, for instance, connects the need for comprehensive immigration reform to the goals of "limiting wage competition" and "strengthening labor standards."<sup>145</sup>

Moreover, labor unions link their specific calls for a legalization program as part of comprehensive immigration reform to the fate of heightened wages and working conditions of employees. For example, in the AFL-CIO/Change to Win platform, labor explains its rationale for a legalization program in the following way:

if these immigrants are not given adequate incentive to 'come out of the shadows' to adjust their status, we will continue to have a large pool of unauthorized workers whom employers will continue to exploit to drive down wages and other standards to the detriment of *all* workers.<sup>146</sup>

Unions have similarly connected wages and working conditions to immigration proposals for the enhancement of labor and employment law enforcement and for improvements to the guest worker program. The AFL-CIO/Change to Win platform states, for example, that improved labor and employment law enforcement would "ensure that immigration does not depress wages and working conditions or encourage marginal low-wage industries that depend heavily on substandard wages."<sup>147</sup> According to the

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interests as employees. According to the NLRB, they were "directly related to the working conditions of [Motorola's] employees, who faced the implementation of mandatory drug testing." *Id.* at 580. The U.S. Court of Appeals, however, failed to enforce the Board's order, finding that employees that are acting as members of outside political organizations do not have the same NLRA rights as employees engaged in "self-organization, collective bargaining, or in self-representation in disputes with management . . ." *NLRB v. Motorola, Inc.*, 991 F.2d 278, 285 (5th Cir. 1993).

145. *The Labor Movement's Framework*, *supra* note 7, at 1. Similarly, Richard Trumka, president of the AFL-CIO, has proclaimed that "immigration reform must be based on the principle that U.S. workers deserve to share in the wealth they create and that wages should increase with productivity." Michelle Amber, *Trumka Says Fixing Immigration Should be "Crucial Element" of Broad Economic Strategy*, DAILY LAB. REP., June 21, 2010.

146. *The Labor Movement's Framework*, *supra* note 7, at 2. Similarly, the AFL-CIO has asserted that without the proposed legalization program, "the economic incentive to hire and exploit the undocumented will remain, to the detriment of U.S. workers who labor in the same industries as the undocumented, because all workers will see their working conditions plummet." *AFL-CIO Responsible Reform of Immigration Laws*, *supra* note 114.

147. *The Labor Movement's Framework*, *supra* note 7, at 1. *See id.* (asserting that limiting wage competition requires a reduction in the exploitation of undocumented workers and that exploited unauthorized workers allow employers to drive down wages of all workers).

AFL-CIO, enforcing workplace law is “[t]he only way to remedy” declines in wages and working conditions.<sup>148</sup>

Similarly, Change to Win has advocated for changes to the guest worker program that would “mandate fair wages . . . for all workers, U.S. native and immigrant” and would not “undermine the wages and working conditions of Americans.”<sup>149</sup> With respect to greater controls on the inflow of foreign workers each year, Change to Win has stated that if we “protect our borders and control the flow of immigration,” undocumented workers are less likely to be “used as fodder in the corporate push to drive down wages and working conditions.”<sup>150</sup> The wages and working conditions frame thus provides employees and labor unions with significant latitude to frame their immigration advocacy messages.

### *iii. The Job Opportunities and Security Frame*

Immigration law as a job creation<sup>151</sup> and job security issue<sup>152</sup> is another broad advocacy frame that falls within the scope of the NLRA’s mutual aid or protection clause. Similar to the workplace rights frame and the wages and working conditions frame, the job opportunities and security frame is protected labor advocacy because it sufficiently relates to employees’ interest as employees.<sup>153</sup>

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148. AFL-CIO *Q & As*, *supra* note 113, at 4.

149. *Immigration Letter to Senator Specter*, *supra* note 130.

150. Community Alliance, *Change to Win’s Agenda for Restoring the American Dream* 8 (2006), available at [http://www.fresnoalliance.com/home/magazine/2006/2006\\_CA\\_DEC\\_8-14.pdf](http://www.fresnoalliance.com/home/magazine/2006/2006_CA_DEC_8-14.pdf). With respect to labor market tests associated with the guest worker program, labor has advocated changes so that they more accurately portray labor shortages and thereby improve employees’ wages and working conditions. *The Labor Movement’s Framework*, *supra* note 7, at 2 (commenting that the labor market commission will create a new methodology that will “examine the impact of immigration on the economy, wages, the workforce and business”); *Immigration Letter to Senator Specter*, *supra* note 130 (noting that temporary guest worker programs must “ensure that the program does not undermine the wages and working conditions of Americans”).

151. Michelle Amber, *Trumka Says Fixing Immigration Should be “Crucial Element” of Broad Economic Strategy*, DAILY LAB. REP., June 21, 2010.

152. Parks, James, *Trumka: Immigration Reform Crucial for New Economy* (2010), available at <http://blog.aflcio.org/2010/06/18/trumka-immigration-reform-crucial-for-new-economy/> (citing Rich Trumka as stating, “[o]ur immigration system makes a mockery of the American dream. The people doing the hardest work for the least money have no legal protections, no ability to send their children to college, no real right to form a union, no economic or legal security.”). See also *Days Without Immigrants*, *supra* note 3, at 94 (“[C]ongressional legislation likely to lead to the loss of immigrant workers’ jobs—through increasingly aggressive enforcement of immigration laws—can be readily conceived as both ‘work’ disputes and mass political protests over immigration policy.”).

153. See, e.g., *Tradesmen Int’l, Inc.*, 332 N.L.R.B. 1158 (2000) (*enforcement denied* 275 F.3d 1137 (D.C. Cir. 2002)) (finding a nexus between concerted attempt to secure the employer’s compliance with a city bonding ordinance and protecting employees’ job opportunities); *Motorola*, 305 N.L.R.B. 580 (1991) (finding a nexus between mandatory drug testing and potential loss of jobs for refusing drug testing).

The NLRB's decision in *Kaiser Engineers*, which was upheld by the U.S. Court of Appeals for the Ninth Circuit, demonstrates this trend specifically in the context of employees' immigration advocacy during the 1970s.<sup>154</sup> In *Kaiser*, employees wrote letters to persuade legislators to "prevent the increased influx of alien engineers [for the] mutual aid or protection" of engineers and other union members.<sup>155</sup> One of the employees found out that his employer's competitor applied to the U.S. Department of Labor to increase visas for foreign engineers.<sup>156</sup> After employees sent letters to their legislators during non-work time to oppose this immigration policy change, their employer interrogated them and constructively discharged them because of the letters.<sup>157</sup>

The NLRB and the Ninth Circuit in *Kaiser* reasoned that the employees' immigration advocacy was sufficiently connected to employees' interests as employees.<sup>158</sup> They, thus, concluded that this advocacy was protected labor advocacy. Because the advocacy's purpose was to oppose the influx of foreign engineers who could threaten U.S. engineers' job security, it was for the "mutual aid or protection" of the Kaiser engineers specifically, as well as "fellow engineers in the profession" generally.<sup>159</sup> The employees believed that the immigration policy changes would affect their job security and the job security of other engineers.<sup>160</sup> The court concluded "that the concerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for 'mutual aid or protection' within the meaning of [the NLRA]."<sup>161</sup>

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154. *Kaiser Engineers*, 213 N.L.R.B. 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976).

155. *Id.* at 755.

156. *Id.* at 754.

157. *Id.*

158. The Supreme Court in *Eastex, Inc.* "cited the NLRB's decision in *Kaiser* twice with apparent approval" of *Kaiser's* rule that employee legislative appeals regarding immigration policy that affects job security is within the scope of the protection of Section 7's "mutual aid or protection" clause. *Days Without Immigrants*, *supra* note 3, at 102. See *Eastex*, 437 U.S. 556, 565-66 (1978) (citing *Kaiser* for the proposition that "[I]t has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause."). For other cases that cite *Kaiser* with approval see *NLRB v. Browning-Ferris Industries*, 700 F.2d 385, 387 (7th Cir. 1983) (citing *Kaiser* to state "that lobbying in opposition to proposed changes in the immigration laws was protected activity") and *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981) (citing *Kaiser* for the proposition that "Section 7 protects employees' concerted lobbying for changes in national policy regarding job security").

159. *Kaiser*, 213 N.L.R.B. at 755.

160. *Id.*

161. *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (1974).

While labor unions today are notably more pro-immigrant than the labor movement of the 1970s, labor's immigration advocacy message nonetheless continues to relate to employees' job opportunities and job security. Recently, the AFL-CIO has said that "[its] top priority is jobs, jobs, jobs" and that "you can't get there unless you address" immigration reform.<sup>162</sup> Moreover, labor has communicated that an underlying motivation for its support of comprehensive immigration reform is "protecting the employment status of immigrant workers" who are already here<sup>163</sup> and "reduc[ing] employers' incentive to hire undocumented workers rather than U.S. workers."<sup>164</sup>

Proposals that call for the legalization of undocumented employees relate, by definition, to job security. If the status of undocumented employees is adjusted, formerly undocumented employees cannot lose their jobs due to immigration enforcement efforts. Moreover, labor has connected the proposals for an independent labor commission to the job prospects of employees. Specifically, labor has proposed a better connection between immigrant worker inflow into the guest worker program and U.S. labor market supply and demand.<sup>165</sup> For example, the AFL-CIO has advocated for the quantity of available employment-based visas to be based more accurately on "macroeconomic indicators and the needs of particular industries."<sup>166</sup>

Likewise, labor has opposed the expansion of temporary guest worker programs, with their insufficient workplace protections for guest workers, because of job security concerns. Labor claims that "formerly well-paying, permanent jobs" are being turned "into temporary jobs with little or no

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162. Michelle Amber, *Trumka Says Fixing Immigration Should be "Crucial Element" of Broad Economic Strategy*, DAILY LAB. REP., June 21, 2010.

163. Change to Win, *Change to Win Helps Uphold Immigrant Workers' Rights* (2006), available at <http://www.changetowin.org/news/change-win-helps-uphold-immigrant-workers-rights> (detailing settlement agreements reached with the agreement of the NLRB with respect to unfair labor practice allegations filed by the union on behalf of workers who were fired for participating in immigration rallies). See also *Days Without Immigrants*, *supra* note 3, at 94, 106 (describing labor as "protest[ing] congressional legislation likely to lead to the loss of immigrant workers' jobs—through increasingly aggressive enforcement of immigration laws" and "those changes would operate to suspend the employment relationship altogether").

164. *The Labor Movement's Framework*, *supra* note 7, at 1.

165. *Id.* at 2 (calling the "arbitrarily" set level of employment-based immigration "one of the greatest failures of our current employment-based immigration system," and advocating that the number of available employment visas be determined by an independent commission, using a Congressionally-approved methodology to determine numbers based on labor market needs). AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114 (opposing any legislative expansion of temporary guestworker programs and calling for a link between available visas and established labor market needs).

166. AFL-CIO, *AFL-CIO's Model for "Future Flow": Foreign Workers Must Have Full Rights 2*, [http://fcnl.org/assets/model\\_for\\_future\\_flow.pdf](http://fcnl.org/assets/model_for_future_flow.pdf).

benefits, which employers are staffing with vulnerable foreign workers who have no real enforceable rights.”<sup>167</sup> Labor has also connected job security and opportunities to restrictive immigration measures. Change to Win, for instance, has urged Congress not to target undocumented workers who are already in the United States and working in low-wage jobs. Instead, immigration reform should improve border control “to prevent illegal immigration” in the future and should not target “dishwashers, janitors, farmworkers, and nursing home or construction workers” who are laboring in our economy.<sup>168</sup>

The NLRA has the potential to protect a broad range of immigration advocacy, including concerted activity on behalf of comprehensive immigration reform. If the advocacy is primarily framed as a workplace rights, wages and working conditions, job opportunities or job security issue, the NLRA would protect immigration advocacy the same way it would protect other forms of protected labor advocacy. Thus, it would generally protect immigration advocacy reflected on solidarity buttons or ribbons worn in working areas<sup>169</sup> of the employer’s property, as well as solicitation and distribution of literature taking place in non-working areas<sup>170</sup> of the employer’s property, such as the break room<sup>171</sup> or parking lot.

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167. AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114; Amber McKinney, *AFL-CIO Pitted Against Chamber in Debate Over Future Flow of Immigrants*, *Commission*, DAILY LAB. REP., March 16, 2010 (criticizing guestworker program and stating that “American workers are facing a prolonged job crisis and nearly 10 percent unemployment”); *New H-2B Wage Rules an Improvement, but Delay Hurts Workers* (January 18, 2011), <http://www.aflcio.org/Blog/Political-Action-Legislation/New-H-2B-Wage-Rules-an-Improvement-But-Delay-Hurts-Workers> (“[I]n the future, U.S. workers will be first in line for jobs that currently go to temporary foreign workers. But the administration’s decision to delay implementation means the change won’t come soon enough for unemployed workers who need jobs now.”); AFL-CIO *Q & As*, *supra* note 113, at 3 (“Guest worker programs allow corporations to turn permanent jobs into temporary jobs staffed by foreign workers who often are unable to exercise their labor rights.”). Labor has similarly fought against the conversion of “tens of thousands of permanent, well-paying jobs in the United States into temporary jobs through the use of various guestworker programs.” AFL-CIO *Responsible Reform of Immigration Laws*, *supra* note 114. See also AFL-CIO, *Reform the H-1B and L-1 Guest Worker Visa Programs* (2003), available at <http://www.aflcio.org/aboutus/thisistheaficio/ecouncil/ec08062003e.cfm> (linking the unemployment of “a growing number of well-educated and highly skilled U.S. professional and technical workers” to “dysfunctional U.S. guest worker policies”).

168. *Statement by Anna Burger*, *supra* note 126

169. Employees generally have the right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). The Board may limit or ban the wearing of insignia if there are special circumstances that outweigh the impact on employees’ Section 7 rights. See *Albis Plastics*, 335 N.L.R.B. 923, 924 (2001); *Mack’s Supermarkets*, 288 N.L.R.B. 1082, 1098 (1988).

170. Employee’s Section 7 rights in non-work areas on non-work time vary based on whether the communication is determined to be a solicitation or a distribution. The Board has held that that employees may engage in *distribution* on nonworking time in nonwork areas, *Stoddard-Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962), while employer rules that limit employee *solicitation* in the workplace require a balancing test between the employees’ Section 7 rights and the employer’s interest in maintaining discipline. *Republic Aviation*, 324 U.S. at 793.

It would also generally protect concerted immigration advocacy during non-working time,<sup>172</sup> including employees' participation at immigration reform activities and employee communications via Facebook,<sup>173</sup> email,<sup>174</sup> or some other means of communication.<sup>175</sup>

While we focused Part II's doctrinal analysis primarily on labor unions' statements, the NLRA has the potential to protect collective immigration advocacy efforts in non-unionized settings as well. The NLRA merely requires the existence of collective activity among employees for their "mutual aid or protection"—it does not require the involvement of a

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171. *Extencicare Homes, Inc.*, 348 N.L.R.B. 1062, 1062 n.4 (November 3, 2006) (holding that an employer interferes with employees' Section 7 rights if it removes union literature from a bulletin board in the employee break room while continuing to allow employees to post nonwork-related material on the same bulletin board).

172. Absent the disruption of production or interference with the employers' ability to maintain discipline, an employer cannot discipline workers for engaging in work-related advocacy during nonwork time in nonwork areas. See *Eastex v. NLRB*, 437 U.S. 556, 572-76 (1978); *Union Carbide*, 259 N.L.R.B. at 977; *Republic Aviation* 324 U.S. at 798. See also GC Memo 08-10 at 8-9.

173. In three recent decisions issued by Administrative Law Judges, employee complaints via Facebook were protected because they involved employee conversations over their terms and conditions of employment. In *Three D, LLC*, 2012 N.L.R.B. Lexis 13 (2012), employees wrote about problems at their workplace on Facebook. In *Knauz BMW*, 2011 N.L.R.B. Lexis 554 (2011), an employee posted photos and comments criticizing the food the employer served to customers of the dealership. In *Hispanics United of Buffalo*, one worker's criticism of other employees and their response on Facebook was protected concerted activity because it involved employee conversation over their terms and conditions of employment. See 2011 N.L.R.B. Lexis 503 (2011). For more information on cases before the NLRB involving employee use of all types of social media, see Memorandum from Anne Purcell, Associate General Counsel, NLRB, to All Reg'l Dir., Officers-in-Charge and Resident Officers, *Report of the Acting General Counsel Concerning Social Media Cases* (August 18, 2011).

174. In *Guard Publishing Co.*, 351 N.L.R.B. 1110, 1110-1114 (December 2007), the Board held that employees have no statutory right to use an employer's email system for Section 7 purposes, unless the restrictions are enforced discriminatorily. In support of its decision, the Board cites a long line of cases that employees lack a statutory right to use an employer's equipment or media, absent discriminatory restrictions. See e.g. *Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000) (no statutory right to use the television in the respondent's break room to show a pro-union campaign video). In addition, a rule prohibiting personal emails that would cause "embarrassment to the company" does not violate 8(a)(1). *Lafayette Park*, 326 N.L.R.B. 824 (1998), enforced 203 F.3d 52 (D.C. Cir. 1999) (holding that rules precluding harm to an employer's reputation are lawful if they would not be construed by employees as prohibiting Section 7 activity).

175. In general, employee website postings relating to terms or conditions of employment or a labor dispute have been protected. See *Valley Hospital*, 351 N.L.R.B. 1250, 1252 (2007), enforced *sub nom Nevada Service Employees Union, Local 1107 v. NLRB*, 2009 U.S. App. Lexis 25204 (9th Cir. 2009) (protecting employee website statements concerning patient staffing levels because they were related to terms and conditions of employment, and not "so disloyal, reckless or maliciously untrue" to lose protection); *Endicott Interconnect Technologies, Inc.*, 345 N.L.R.B. 448, 450 (2005), enforcement denied, 453 F.3d 532 (D.C. Cir. 2006) (protecting employee website statements that the employer was "being tanked by a group of people that have no good ability to manage it" because of the "requisite nexus" between the statements and an ongoing labor dispute). However, the Board has not protected website conduct that is not linked to working conditions. See *Amcast Automotive*, 348 N.L.R.B. 836, 838-40 (2006) (finding that without evidence of a "direct impact" on terms and conditions of employment, Section 7 does not extend to website conduct regarding the ownership of the employer).

labor union.<sup>176</sup> As long as the employees frame their immigration advocacy messages in ways that fall within the NLRA's protective scope, the NLRA could encompass and protect the immigration advocacy of nascent non-union worker groups, as well as other collective advocacy efforts of non-unionized employees.<sup>177</sup>

### C. Unprotected Frames

Although the NLRA's protection of immigration advocacy may be broader than expected, it is not limitless. Under existing case law, if employees were to primarily frame immigration advocacy in either of two main ways, it would be primarily for a political purpose and therefore less likely to be protected by the NLRA. First, the NLRA would not protect advocacy that is primarily on behalf of others—advocacy in the public interest—with no direct link to employees' workplace concerns. Often, this situation arises when a group of employees is responsible for the care of a class of non-employee students, patients, or customers. For example, in *Five Star Transportation Inc.*,<sup>178</sup> the NLRB found that school bus drivers who wrote letters to the school district complaining about their own working conditions were engaged in NLRA-protected labor advocacy. However, the NLRB determined that other drivers, whose letters were found to raise general safety concerns primarily on behalf of students, rather than employees, were not engaged in protected activity.<sup>179</sup>

While labor's framings of immigration reform have been largely dominated by concern for employees' workplace rights, wages and working conditions, and job opportunities and job security, labor's framings have sometimes included a concern for the public interest. For instance, labor has called for immigration reform that would turn immigrant workers into

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176. 29 U.S.C. §§ 157 (2006).

177. See e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 851-852 (1984) (“[I]t is evident that in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together [to engage in protected activity]. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.”).

178. 349 N.L.R.B. 42 (2007).

179. *Five Star Transportation, Inc.*, 349 N.L.R.B. 42, 44-45 (2007). Similarly, the NLRB found that nurses in *Misericordia Hospital Medical Center* who complained to state government agencies about insufficient staffing were engaged in protected labor advocacy. *Misericordia Hosp. Med. Ctr.*, 246 N.L.R.B. 351, 357 (1979), enforced, 623 F.2d 808 (2d Cir. 1980). However, the NLRB did not protect nurses at *Orchard Park Health Care Center, Inc.* who complained about the effects of excessive heat on patients, rather than employees. *Orchard Park Health Care Center, Inc.*, 341 N.L.R.B. 642, 643 (2004). *But see* *Manor Care of Easton, PA, LLC*, 356 N.L.R.B. No. 39 n. 13, at \*14 (finding that solicitation of support for union opposition to merger that would allegedly impact patient care was NLRA-protected).

taxpayers.<sup>180</sup> The Service Employees International Union (SEIU) has stated that “[e]very day that Washington fails to act [on passing comprehensive immigration reform], we forgo the enormous economic benefits that immigration reform would bring . . . We lose the taxes that immigrants would pay.”<sup>181</sup> Depending on the context, other broad public interest arguments that labor may make in support of immigration reform may not be protected if these arguments are not accompanied by protected frames. This may include arguments that are primarily based on family reunification<sup>182</sup> or a more rational use of the nation’s resources.<sup>183</sup> These kinds of arguments lack a connection to employees’ interests as employees.

Second, the NLRA would not protect advocacy that is primarily for or against political candidates and parties, without a sufficient link to employees’ interests as employees. The NLRB has held, for example, that “purely political tract[s]”—advocacy in support of political issues or candidates that does not have any relation to particular employment-related issues—are “so attenuated” from employees’ interests as employees that they cannot be thought of as conduct for mutual aid or protection.<sup>184</sup> The NLRB’s *Ford Motor Company*<sup>185</sup> case is a prime example of this type of unprotected labor advocacy. In *Ford*, the union distributed a newsletter that included political issues such as the national economy, the role of union leaders in politics, and the need for a national labor party.<sup>186</sup> The NLRB

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180. *Republican Framing of Immigration Policy As Pro-Worker Lacks Merit, Report Says*, DAILY LAB. REP., Jan. 24, 2011.

181. Amber McKinney, *White House Hosts Two Immigration Meetings To Assess Outlook for Possible Overhaul Bill*, DAILY LAB. REP., March 22, 2010.

182. *The Labor Movement’s Framework*, *supra* note 7, at 1 (“Family reunification is an important goal of immigration policy and it is in the national interest for it to remain that way.”). In some contexts, this frame may be protected as well. *See, e.g., id.* (stating that “the failure to allow family reunification creates strong pressures for unauthorized immigration” and that “families are the most basic learning institutions, teaching children values as well as skills to succeed in school, society and at work.”). *See also id.* (“Finally, families are important economic units that provide valuable sources of entrepreneurship, job training, support for members who are unemployed and information and networking for better labor market information.”).

183. BNA, *Labor Relations Week, New SEIU Secretary-Treasurer Medina Says Immigration Overhaul a Major Goal*, DAILY LAB. REP., Oct. 4, 2010 (reporting that SEIU contends that comprehensive immigration reform would allow the nation to employ “its resources more rationally”).

184. *Firestone Steel Products Co.*, 244 N.L.R.B. 826, 826-27, *enforced* 645 F.2d 1151 (D.C. Cir. 1981) (1979) (finding the leaflets were “purely political [tracts],” and thus not protected under the “mutual aid or protection” clause because they supported political candidates and did not “relate to employee problems and concerns as employees”); *Caterpillar, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 1997 N.L.R.B. LEXIS 192, at \*30 (1997) (finding a Clinton/Gore sticker on a toolbox to be “purely political”); *Kelly v. USPS*, 492 F.Supp. 121, 126 (S.D. Ohio 1980) (finding, in a case involving buttons and T-shirts commenting on U.S. policy in Iran, that the commentary was “purely political”).

185. *Ford Motor Co.*, 221 N.L.R.B. 663 (1975), *enforced*, 546 F.2d 418 (3rd Cir. 1976).

186. *Id.* at 666.

determined that the newsletter's focus on asking employees to seek an independent workers' party deemed it unprotected as "purely a political tract."<sup>187</sup> As part of its comprehensive immigration reform efforts, labor generally has not tied its advocacy to particular political candidates or political parties.<sup>188</sup> If this type of advocacy were to dominate labor's immigration advocacy frames in the future, however, it would be unlikely to receive NLRA protection from employer interference.

Although the NLRA's protective scope certainly has limits, it nonetheless has the potential to protect many forms of employees' immigration advocacy in both union and non-union settings. The NLRB has a significant amount of latitude when interpreting the NLRA.<sup>189</sup> As the U.S. Supreme Court stated in a case involving the NLRA and employee advocacy, the NLRB "is entitled to" consider "the widely recognized impact" that certain political issues may have on labor.<sup>190</sup> Because immigration is a political issue that has an undeniable impact on many aspects of the workplace, a good deal of employees' immigration advocacy is indisputably protected labor advocacy.<sup>191</sup> Now that we have exposed the historical and doctrinal roots of our framework, we will next discuss its implications for social movements and worker solidarity efforts.

### III.

#### THE IMMIGRATION ADVOCACY AS LABOR ADVOCACY FRAMEWORK IN PRACTICE

Through Part I's review of immigration law history and secondary literature on the intersection between immigration law and workplace law, and Part II's doctrinal analysis of the NLRA, we developed our proposed immigration advocacy as labor advocacy framework. This framework, which contends that we should view immigration law as a labor issue, has

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187. *Id.* See also *Caterpillar*, 1997 N.L.R.B. LEXIS at \*29-30 (distinguishing general political support and support for legislation that directly relates to a specific matter of concern to employees).

188. See, e.g., Joaquin Guerra, *SEIU EVP Eliseo Medina on Moving Immigration Reform Forward in 2010*, Jan. 20, 2010, available at <http://www.seiu.org/2010/01/seiu-evp-eliseo-medina-on-moving-immigration-reform-forward-in-2010.php> ("We never thought of immigration reform as a partisan issue—we always knew we would need the support of both parties in order to pass comprehensive legislation.").

189. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (stating that, "on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference").

190. *Eastex v. NLRB*, 437 U.S. 556, 569-70 (1978).

191. For an advocacy group that has explored this issue to some extent, see NATIONAL IMMIGRANT LAW CENTER, *Immigrant Protests: What Every Worker Should Know* (2006), available at [http://v2011.nilc.org/ce/nilc/protests\\_what\\_every\\_worker\\_should\\_know.pdf](http://v2011.nilc.org/ce/nilc/protests_what_every_worker_should_know.pdf) (stating that employees "have the right to engage in political protests during non-work hours" and that employers cannot retaliation against employees "for engaging in political activity during [their] free time").

implications for the immigration advocacy efforts of social movements and worker solidarity among immigrants and non-immigrants.<sup>192</sup> In this Part we will discuss some of the opportunities created if social movements were to adopt such a framework more explicitly than they have previously. This Part also acknowledges the existing barriers to fully realizing these possibilities in practice.

The framework probably has the most relevance when it comes to workplace-based immigration advocacy activities. By workplace-based activities we are referring broadly to various forms of education, organizing, or other joint immigration advocacy efforts among co-workers both inside and outside of their physical work site. The framework could be applied most fruitfully to workplace-based activities, in part, because of Part II's illustration that the NLRA has the potential to protect a wide range of workplace-based immigration advocacy efforts in both union and non-union settings. Moreover, the workplace can encourage "a sense of interdependence and common fate" among workers and can constitute "a significant deliberative forum for issues related to the particular workplace and to broader political issues."<sup>193</sup> While sometimes there are limits to the extent to which immigrants and non-immigrants can effectively communicate,<sup>194</sup> the workplace is undoubtedly one of the few places that fosters interaction between immigrants and non-immigrants,<sup>195</sup> thereby helping immigrants integrate "into their surrounding communities and larger society."<sup>196</sup>

While the framework has implications for advocacy efforts in all workplaces, it is likely to be particularly salient in workplaces that have both immigrant and non-immigrant workers. In these mixed workforces, language and cultural differences can sometimes divide workers. A vision of immigration as a labor issue could help immigrant workers to further "develop the capacity and incentive to engage fellow workers and citizens

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192. See Jennifer Gordon and R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1167 (2008) ("As legal scholars, we are particularly interested in exploring laws, policies, and employer practices that could increase the potential for solidarity.").

193. *Id.* at 1191 (internal quotation marks omitted) (citing Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000)).

194. See *id.* at 1230 (contending that, although low-wage African American and Latino workers "come from different worlds . . . there are ways in which their interests are closely aligned" and there is "evidence of solidarity" efforts in the past).

195. See *id.* at 1191 ("In the perennially segregated United States, the workplace is a—perhaps the—place where people of different races and ethnicities regularly mix.").

196. Lee, *supra* note 13, at 1109. See also Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 237 (stating that adult immigrants have no access to "an assimilating institution" like a public school and that the workplace is one of the few places that "cultural adaptation" takes place); Gordon & Lenhardt, *supra* note 192, at 1168 ("Work serves a number of citizenship-and community-building functions.").

to articulate and defend mutual interests—a process likely to promote social connectedness as well as broader forms of concerted or political action.<sup>197</sup> Indeed, a shared vision that immigration issues are labor issues could provide a means for immigrant and non-immigrant employees to build ties with each other around issues of mutual concern, even though the law has often operated to separate these groups.<sup>198</sup>

It is not only the shared vision that immigrant and non-immigrant workers have shared concerns about immigration law that may foster solidarity and promote immigration advocacy efforts. The NLRA's protection of some forms of immigration advocacy, described in Part II, could also play a crucial role. The inclusion of workers' collective immigration advocacy efforts within the NLRA's protective scope could help to foster solidarity and inspire both immigrants and non-immigrants to participate in immigration advocacy efforts. While there certainly are limits to the use of the law to bolster advocacy efforts,<sup>199</sup> scholars have shown that legal claims and “rights talk” have sometimes supported the efforts of advocacy groups.<sup>200</sup>

The framework, for instance, could lead to actual legal remedies or protections for individuals involved in certain advocacy efforts who experience an adverse employment action as a result of these activities. Through “legal discourses or social practices” both inside and outside of legal institutions, the framework could also play a more symbolic role.<sup>201</sup> It could serve as “a powerful source of legitimacy” that helps advocates, even when law is not effectively enforced in practice.<sup>202</sup> Through her study of humanitarian immigration advocacy groups along the Arizona-Mexico border, Professor Maria Lorena Cook convincingly illustrates that

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197. Rodriguez, *supra* note 196, at 239.

198. See Gordon & Lenhardt, *supra* note 192, at 1232-33 (stating that the “law has done little to foster cooperation” between low-wage African American and immigrant workers because it “renders it difficult for undocumented workers to assert their rights, offers limited tools for addressing workplace segregation, and grants minimal support to workers who act in solidarity across racial lines.”).

199. See generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984).

200. See Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 664 (2003) (stating that “‘rights talk’ can legitimize grievances by bridging frames and making connections between emerging grievances and long-established legal rules” and “can be an important source of oppositional interpretations and meanings that raise consciousness and mobilize participants into a movement”); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC'Y REV. 367, 386 (2000) (“Legal claims-making was thus one component of a political organizing strategy, not at odds with such a strategy.”).

201. Maria Lorena Cook, “Humanitarian Aid Is Never a Crime”: *Humanitarianism and Illegality in Migrant Advocacy*, 45 LAW & SOC'Y REV. 561, 562 (2011).

202. *Id.* at 565 (stating that there is “a form of ‘legal consciousness’ that is mistrustful of the law, yet cognizant of its power to legitimize and protect”).

“subordinate groups may use legality claims for protection, but also to reframe debates, go on the offensive, and reduce differences in power, if only temporarily.”<sup>203</sup>

Moreover, the framework’s focus on law could play a unique role when both documented and undocumented immigrant workers are involved in workplace-based immigration advocacy efforts. Cook’s study demonstrated that the “illegality” of undocumented immigrants can pose challenges and shape advocates’ strategies in important ways.<sup>204</sup> Undocumented immigrants are sometimes viewed as “lawbreakers” from an immigration law vantage point. According to the NLRA, however, these individuals are “employees” regardless of immigration status, and thus have the same NLRA rights as documented employees to engage in concerted activity around immigration reform. Awareness of these NLRA rights may serve as a type of legitimacy-builder that unifies documented and undocumented workers around their mutual interests as workers.

Moving forward, labor unions and organizations that work with low-wage immigrants are best positioned to spearhead workplace-based immigration advocacy efforts. As this Article has shown, labor unions have been active in immigration reform efforts. They are well suited to bring immigrants and non-immigrants together around immigration advocacy because they are institutions that “connect immigrants not only with their own co-ethnics, but also with members of other immigrant groups and native-born Americans.”<sup>205</sup> Similarly, worker centers, the nascent grassroots groups that organize “the most underserved and vulnerable groups” of low-wage and immigrant workers, have been protagonists in immigration advocacy efforts.<sup>206</sup> Worker centers, like other emerging non-union worker organizations, are dynamic institutions that are working to build a collective identity that crosses the immigration-labor divide.<sup>207</sup> In

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203. *Id.* at 587.

204. *See id.* at 563 (noting how the “illegality” of undocumented individuals can “shape and constrain the work of advocates”); *see also id.* at 564 (“[M]igrant ‘illegality’ presents a dilemma for advocates and an analytical challenge for scholars of grassroots activism and law.”).

205. Rodriguez, *supra* note 196, at 239.

206. Miriam A. Chery, *Working (with) Workers: Implementing Theory*, 41 SUFFOLK U. L. REV. 731, 733 (2008). *See also* JANICE FINE, WORKER CENTERS: ORGANIZING NEW COMMUNITIES AT THE EDGE OF THE DREAM 11 (2006) (describing the history and distinguishing features of worker centers); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1896 (2007) (“Lawyers filed Unfair Labor Practice charges pursuant to the NLRA against employers engaged in retaliatory actions against workers participating in worker center campaigns.”).

207. *See e.g.*, Ruth Milkman, *Immigrant Workers, Precarious Work, and the US Labor Movement*, Globalizations 361, 363 (June 2011), available at [http://www.ruthmilkman.info/rm/Articles\\_files/globalizations%202011.pdf](http://www.ruthmilkman.info/rm/Articles_files/globalizations%202011.pdf) (describing workers’ centers as one of three “distinctive strands” of immigrant labor activism, and describing their work as “regularly organiz[ing] around not only workplace issues but also the social needs of low-wage immigrants”).

this way, they are also well positioned to bring immigrant and non-immigrant workers together around their shared interests.

There are, however, formidable challenges to implementing the framework in practice. The NLRA, for instance, may not turn out to be an effective legal recourse for many employees who experience an adverse employment action due to their participation in workplace-based immigration advocacy. Employees may not bring NLRA claims because they may not be aware of the NLRA's protections, they may not believe that the NLRA/NLRB can protect them, or they may be hesitant to come forward because of their immigration status or the immigration status of their friends and family.

Suspicious that the NLRA may provide inadequate protection from employer interference in practice are not entirely unfounded. The NLRA, as interpreted by the NLRB and courts, undoubtedly has significant limitations.<sup>208</sup> The NLRA's protection of immigration advocacy, while broad, requires employees to connect their advocacy to the somewhat circumscribed set of interests described in Part II—workplace rights, wages and working conditions, or job opportunities or job security issues. These frames may make it difficult for the labor movement to connect its advocacy message with other social movements in circumstances that do not involve employees' interests as employees. Moreover, the NLRA may not have efficient, or even sufficient, remedies for employees who face illegal employer retaliation due to their protected immigration advocacy efforts.<sup>209</sup>

Perhaps the biggest challenge to implementing the immigration advocacy as labor advocacy framework is that undocumented immigrant

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208. The NLRA and the NLRB are frequently and roundly critiqued as unable to effectively fulfill their central purposes to protect collective activity among employees from employer interference. For critiques of the NLRA and NLRB see, Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMPL. L. J. 311 (2010); Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?* 59 AM. U. L. REV. 1, 2 nn.3-7 (2009); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1 (2009); *Embracing Paradox*, supra note 71; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Karl Klare, THE HORIZONS OF TRANSFORMATIVE LABOUR AND EMPLOYMENT LAW, IN LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 3, 4 (Joanne Conaghan et al. eds., 2002).

209. See, e.g., Morris M. Keiner & David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies* Analysis and Comparison with Other Workplace Penalty Policies, NBER Working Paper Series (2010) ("We have shown that the benefits for individuals of winning a claim under the [NLRA] are comparatively small, meaning that the Act often fails to achieve even remediation of those whose rights have been violated."). In a recent case, *Mezonos Maven Bakery*, 2011 N.L.R.B. LEXIS 422, at \*17 (2011), the NLRB interpreted *Hoffman Plastics* and concluded that undocumented workers are categorically precluded from a traditional NLRA back-pay remedy "regardless of whether the employee or employer violated IRCA."

employees may be hesitant to engage in workplace-based immigration advocacy. This is the case at least in part because, due to *Hoffman Plastics* and its progeny, undocumented workers have access to fewer legal remedies than their documented counterparts if they suffer an NLRA violation.<sup>210</sup> Moreover, due to their status, undocumented employees may have a heightened fear of the possibility of a workplace-based immigration raid if they get involved or that an employer will engage in immigration-based retaliation if they engage in concerted activity with their co-workers.<sup>211</sup>

Undoubtedly, it is difficult to build a united voice between immigrant and non-immigrant employees when there is a subclass of workers who may be fearful of engaging in collective action.<sup>212</sup> The success of collective efforts related to immigration reform in mixed workforces may therefore ultimately depend on legal changes that adequately assure undocumented workers that they will not face negative immigration consequences related to collective activity or the assertion of their rights as employees. Among other strategies, this could include affirmative educational programs and coordinated efforts between federal immigration authorities and federal labor authorities to avoid immigration enforcement during, or as a consequence of, employees' collective activity.<sup>213</sup>

## CONCLUSION

The immigration advocacy as labor advocacy framework provides a comprehensive analytical lens for viewing immigration law as a labor issue. A historical review of immigration law and relevant scholarship on the relationship between immigration law and employees' workplace

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210. *Mezonos Maven Bakery*, 2011 N.L.R.B. LEXIS at \*19 n.5 (members Liebman and Pearce, concurring) (acknowledging that *Hoffman Plastics* “entails certain undesirable consequences as a matter of federal labor and immigration policy”); *id.* at \*21 (stating that because the NLRB could not provide a “rudimentary remedy” to undocumented workers for the NLRA violations that they suffer, “employees are chilled in the exercise of their Section 7 rights, the work force is fragmented, and a vital check on workplace abuses is removed”).

211. *Id.* at \*23 (stating that undocumented workers “face a double risk in taking concerted action—not just as employees asserting their Section 7 rights . . . but as undocumented immigrants at risk of deportation”). See also Lee, *supra* note 13, at 1109; *Discovering ‘Immigration’ Law*, *supra* note 11, at 437 n.228.

212. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (“[E]xclud[ing] [undocumented aliens] ‘from protections . . .’ would create ‘a subclass of workers without a comparable stake in the collective goals of their legally resident coworkers, thereby eroding the unity of all the employees’”) (citing *Jones & Laughlin Steel*, 301 U.S. 1, 33 (1937)).

213. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011) (developing monitoring framework to ensure that immigration law is enforced without negative consequences for labor protections); see also *ICE Was Not Meant to be Cold*, *supra* note 45, at 1154 (noting the importance of education to workers in any interagency monitoring effort).

protections illustrates that immigration law has been a labor issue for over a hundred years and that the relationship between these two statutory regimes has deepened since Congress enacted IRCA in 1986. Moreover, a review of NLRA case law and its application to recent immigration advocacy efforts by labor unions further reveals the close connection between immigration law and labor issues.

Thus, despite their divergent statutory roots and policymaking processes, immigration law is intricately connected to workplace law.<sup>214</sup> As we discussed in the Introduction, those who have examined the relationship between immigration law and workplace law have predominantly focused on immigration law's negative effects on employees' workplace protections. This focus is justified given the myriad ways immigration law has eroded labor protections for employees. But viewing immigration law and workplace law in relationship to one another can also yield an unexpected broadening of employees' workplace protections,<sup>215</sup> because employees' immigration advocacy is, in many ways, protected labor advocacy.

The Article, however, not only contributes to the existing scholarship on the relationship between immigration law and workplace law. Part II's doctrinal analysis of the NLRA, for instance, also has implications for legal cases that may emerge when employees face adverse employment actions because of their engagement in workplace-based immigration advocacy efforts. Moreover, as discussed in Part III, the framework informs law and organizing debates, social movement strategy and worker solidarity efforts between immigrants and non-immigrants. In sum, as immigration law ventures further into the workplace, it becomes even more important for

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214. For an argument that the policymaking process should be considered simultaneously, see Juan F. Perea, *Destined for Servitude*, Speech at the University of San Francisco Law Review Symposium: The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law (Feb. 27, 2009), in 44 U.S.F. L. REV. 245, 252 (2009) (arguing that "immigration reform alone is not enough" because "[i]t must be coupled with the repeal of labor laws intended to oppress.").

215. The NLRA's potential to protect immigration advocacy demonstrates that the NLRA has the potential to be relevant to an important aspect of modern workplace relations—immigration law and policy. Some scholars have acknowledged ways that the NLRA and NLRB can remain relevant to modern workplace issues without legislative change. See, e.g., Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1 (2009); ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006) (creating a framework for NLRA revitalization). Legislative change is much more unlikely than changes at the NLRB level. See Catherine L. Fisk and Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2018 (2009) ("Solutions to the NLRB's problems are less likely to come from labor law reform in Congress than from closer attention to the demands of administrative law by all charged with review and oversight of the Board, and by the Board itself.").

scholars, adjudicators, enforcement agents, advocates, workers, and policymakers to view immigration law as a labor issue.<sup>216</sup>

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216. See *Ghost Workers*, *supra* note 10, at 765 (2003) (“On the books, immigration law and labor law are separate bodies of law, but in action they are interconnected statutory schemes.”); Decker, *supra* note 62, at 2195 (analyzing IRCA “through the lens of labor law” and proposing that Congress “amend IRCA to provide a strong and clear rule suspending employers’ verification duties during labor disputes”).

