

# Screening for Solidarity

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## INTRODUCTION

A central part of the unauthorized migration story has been about work. Eight million workers in the United States are unauthorized,<sup>1</sup> which is nearly three-fourths of the unauthorized migrant population and about 5 percent of the total workforce.<sup>2</sup> But at the heart of this story is a tension: While immigration

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<sup>1</sup> The immigration code prevents employers from hiring any "unauthorized alien[s]," which means that at the time of hiring, the noncitizen is not "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." Immigration Reform and Control Act of 1986 (IRCA) § 101(a)(1), Pub L No 99-603, 100 Stat 3359, 3360, 3368, amending INA § 274A(a)(1), (h)(3), codified at 8 USC § 1324a(a)(1), (h)(3).

<sup>2</sup> Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* 1 (Pew Hispanic Center Feb 1, 2011), online at <http://www.pewhispanic.org/files/reports/133.pdf> (visited Mar 4, 2013) (noting that in 2010, eight million of the approximately eleven million unauthorized migrants were in the workforce). Unauthorized workers comprise approximately 5.2 percent of the total workforce. Id at 17 table 6 (showing unauthorized immigrants' share of the US labor force for every year since 2000). Unauthorized migrants comprise a higher percentage of total workers in certain industries. See Andorra Bruno, *Immigration-Related Worksite Enforcement: Performance Measures* 2 table 1 (Congressional Research Service May 10, 2012), online at <http://www.fas.org/sgp/crs/homesec/R40002.pdf> (visited Mar 4, 2013) (noting that in 2008 unauthorized workers comprised about 14 percent, 13 percent, and 10 percent of the "Construction," "Agriculture," and "Leisure & Hospitality" industries respectively). Unauthorized migrants will likely continue to comprise a significant percentage of the total unauthorized population. The unauthorized population has remained steady for several years at around eleven million—just under 30 percent of the total foreign-born population—despite the fact that immigration law has become harsher and less forgiving. See Passel and Cohn, *National and State Trends, 2010* at 1 (cited in note 2) (graphing the unauthorized immigrant population from 2000 to 2010); id at 9 ("Unauthorized immigrants represented 28% of the nation's foreign-born population of 40.2 million in March 2010, according to the Pew Hispanic Center estimates. The share is the same as it was in 2009 but a decline from 2007's 31%.").

law expressly prohibits employers from hiring unauthorized migrants,<sup>3</sup> many of our nation's workplace laws cover workers irrespective of immigration status,<sup>4</sup> which means that an unauthorized migrant might obtain remedies for harms incurred in the course of work she was not entitled to undertake in the first place.<sup>5</sup> In recent years, the executive has ramped up its efforts to facilitate this process. Through a series of guidance documents, memoranda, and public announcements, the executive (especially under President Barack Obama) has redesigned immigration enforcement to allow the assertion of labor rights to slow, and in some cases, to halt altogether the removal process. In other words, the executive grants varying degrees of membership benefits to otherwise removable migrants who possess nonfrivolous workplace-related claims.

Why do this? The standard response—the one adopted by many federal courts and several members of the Supreme Court<sup>6</sup>—is that doing so deters unauthorized migration over the long term. In the simplest of terms, robust labor enforcement raises the costs associated with hiring unauthorized migrants, discourages employers from hiring such workers, and causes unemployed unauthorized migrants to self-deport.<sup>7</sup> But this answer is out of touch. Despite the increased allocation of resources to worksite enforcement, there have not been significant changes to the unauthorized population during the Obama administration.<sup>8</sup> Indeed, it is hard to imagine any administration harnessing worksite enforcement policy to effectively deter unauthorized migration, given the complex enforcement realities within which the executive must operate and the steep economic and human costs associated with crossing the border.

Nevertheless, this Article defends the executive's use of workplace claims to sort migrants in the removal pipeline, but

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<sup>3</sup> See IRCA § 101(a)(1), 100 Stat at 3360, amending INA § 274A(a)(1), codified as amended at 8 USC § 1324a(a)(1).

<sup>4</sup> See, for example, 29 USC § 152(3). See also *Sure-Tan, Inc v NLRB*, 467 US 883, 891–92 (1984).

<sup>5</sup> See, for example, *Agri Processor Co v NLRB*, 514 F3d 1, 3–9 (DC Cir 2008); *Singh v Jutla*, 214 F Supp 2d 1056, 1061–62 (ND Cal 2002).

<sup>6</sup> See, for example, *Hoffman Plastic Compounds, Inc v NLRB*, 535 US 137, 155–56 (2001) (Breyer dissenting); *Patel v Quality Inn South*, 846 F2d 700, 704–05 (11th Cir 1988); *Singh*, 214 F Supp 2d at 1062.

<sup>7</sup> See, for example, *Hoffman*, 535 US at 155–56 (Breyer dissenting).

<sup>8</sup> See Michael Hoefer, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* 1 (Department of Homeland Security (DHS) Mar 2012), online at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf) (visited Mar 4, 2013).

does so on an alternative basis. I argue that focusing on those migrants with workplace claims allows immigration officials to identify those unauthorized workers who have developed economic and social bonds with US and otherwise authorized workers. Because many of the laws regulating the workplace are situated within a vision of collective rights, the assertion of a workplace claim often follows from a worker's commitment to the principle of solidarity—a willingness to forego short-term individual gain in the interests of realizing long-term collective gain. The acts of solidarity signal a commitment to the values of mutuality, reciprocity, and community, which increases the likelihood that a migrant will successfully integrate into society while posing minimal costs to the public. In other words, using workplace claims to draw distinctions among otherwise removable immigrants advances a *de facto* member-selection process where potential members are identified based on their social and economic bonds with citizen coworkers.

Part I summarizes the recent changes in workplace enforcement, with a particular focus on the different regulatory innovations reconciling conflicts between labor enforcement goals and immigration enforcement goals in labor's favor. This sets up Part II, where I develop my core claim that allocating immigration benefits to migrants who are willing to stand in solidarity with citizen workers serves a member-selection purpose. Part III considers some design questions that policymakers might consider in refining immigration enforcement policy for the purposes of screening for solidarity. I then conclude.

## I. PROTECTING WORKERS THROUGH WORKPLACE ENFORCEMENT

At the heart of workplace enforcement is a tension. Immigration law excludes unauthorized migrants from the formal workforce.<sup>9</sup> At the same time, great swaths of labor and employment law protect unauthorized workers against a variety of harms including wage theft, unsafe working conditions, employment discrimination, and retaliation for asserting these legal rights.<sup>10</sup> These different statutory schemes thus create the

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<sup>9</sup> See IRCA § 101(a)(1), 100 Stat at 3361–62, amending INA § 274A(b), codified at 8 USC § 1324a(b).

<sup>10</sup> See Fair Labor Standards Act of 1938 (FLSA) §§ 6–7, Pub L No 75-718, ch 676, 52 Stat 1060, 1062–64, codified at 29 USC §§ 206–07 (prohibiting wage theft); Occupational Safety and Health Act of 1970 § 5, Pub L No 91-596, 84 Stat 1590, 1593, codified at 29 USC § 654 (requiring safe working conditions); Civil Rights Act of 1964 § 703, Pub L No 88-352, 78 Stat 241, 255–57, codified at 42 USC § 2000e-2 (forbidding employment dis-

possibility of a counterintuitive result: unauthorized migrants may hold bad-actor employers liable for harms incurred during the course of work they were not authorized to undertake in the first place. The primary justification has been that allowing labor law to displace immigration law protects the interests of citizens and otherwise authorized workers by deterring unauthorized migration over the long term.

The Obama administration has unfurled a number of workplace enforcement policies designed to harmonize labor and immigration enforcement goals to help facilitate this process. More than past administrations, the Obama administration has prioritized targeting employers who knowingly recruit and hire unauthorized workers. For example, in 2012, Immigration and Customs Enforcement (ICE) reported serving more than three thousand notices of inspections, which resulted in nearly \$12.5 million in fines.<sup>11</sup> By contrast, ICE issued only eighteen final orders in 2008, resulting in \$675,000 in fines,<sup>12</sup> and only three notices of intent to fine in 2004.<sup>13</sup> Beyond the use of fines and other civil penalties, the Obama administration has demonstrated a willingness to prosecute bad-actor employers for criminal violations. Although the bulk of criminal convictions in federal court continues to be secured against noncitizens for border crossing–related violations,<sup>14</sup> the number of convictions against employers

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crimination); FLSA § 15(a)(3), 52 Stat at 1068, codified at 29 USC § 215(a)(3). State labor agencies can be even more rights protective. See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L & Soc Inq 561, 562 (2010).

<sup>11</sup> *Fact Sheet: Worksite Enforcement* (ICE May 23, 2012), online at <http://www.ice.gov/news/library/factsheets/worksite.htm> (visited Mar 4, 2013).

<sup>12</sup> *US Immigration and Customs Enforcement: Priorities and the Rule of Law, Hearing before the Subcommittee on Immigration Policy and Enforcement*, 112th Cong. 1st Sess 10, 17 (2011) (statement of John Morton, Director, ICE) (“Priorities and the Rule of Law Hearing”).

<sup>13</sup> Government Accountability Office (GAO), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813, 35 (Aug 2005), online at <http://www.gao.gov/new.items/d05813.pdf> (visited Mar 4, 2013) (showing the number of notices of intent to fine from 1999 to 2004 where a notice of intent precedes a final order).

<sup>14</sup> For example, in August 2012, the top lead charge recorded in immigration-related convictions in federal court is for “[r]eentry of deported alien.” See *Immigration Convictions for August 2012* table 2 (Transactional Records Access Clearinghouse (TRAC) Nov 19, 2012), online at <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyaug12/gui> (visited Mar 4, 2013). By comparison, convictions reflecting a lead charge of “[u]nlawful employment of aliens” come in as the ninth most frequent lead charge. *Id.*

for immigration-related hiring decisions has been rising,<sup>15</sup> and the executive has consistently made examples of employers who engage in egregious immigration-related violations.<sup>16</sup> This policy draws a distinction between those employers who hire unauthorized workers by mistake (for whom some kind of regulatory fix may be appropriate)<sup>17</sup> and those who do so as a matter of design (for whom the castigating hand of criminal law might be necessary to deter repetition).<sup>18</sup>

The executive has also employed a variety of other administrative mechanisms harnessing labor law to punish employers who ignore immigration law's prohibition against hiring unauthorized workers. Using an array of regulatory tools, immi-

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<sup>15</sup> See *Immigration Convictions for August 2012: Lead Charge: 08 USC 1324a—Unlawful Employment of Aliens* (TRAC Dec 14, 2012), online at <http://tracfed.syr.edu/results/9x2050cb6cf565.html> (visited Mar 4, 2013) (reporting that convictions reflecting a lead charge for “unlawful employment of aliens” have increased by 60 percent from levels reported in 2007, which pre-dates the Obama administration).

<sup>16</sup> See *Arkansas Businessman Sentenced for Multi-state Illegal Alien Hiring Scheme* (ICE Sept 26, 2012), online at <http://www.ice.gov/news/releases/1209/120926fayetteville.htm> (visited Mar 4, 2013) (reporting that a business owner was sentenced to thirty months for providing fraudulent documents to and hiring unauthorized migrants); *Owners of Bay Area Restaurant Chain Sentenced for Tax Violations, Hiring Illegal Aliens; Defendants Ordered to Pay More Than \$2 Million in Restitution to IRS* (ICE Apr 24, 2012), online at <http://www.ice.gov/news/releases/1204/120424oakland.htm> (visited Mar 4, 2013) (reporting that husband and wife business owners were sentenced for various immigration, social security, and tax violations, with the husband receiving forty-one months in prison). See also Julia Preston, *A Crackdown on Employing Illegal Workers*, NY Times A1 (May 30, 2011).

<sup>17</sup> For example, although DHS cannot compel private employers to verify the immigration status of their workers through its database, it strongly encourages employers to voluntarily do so through programs such as ICE Mutual Agreement between Government and Employers (IMAGE). *E-Verify* (ICE Nov 29, 2012), online at <http://www.dhs.gov/e-verify> (visited Mar 4, 2013) (reporting that verifying an employee's immigration status with the DHS E-Verify database is voluntary for most employers); *IMAGE* (ICE), online at <http://www.ice.gov/image> (visited Mar 4, 2013). In exchange for voluntarily submitting to this database-driven form of regulation, immigration officials offer cost-saving measures for employers, like refraining from I-9 inspection for at least two years. See *IMAGE Certification Benefits* (ICE), online at <http://www.ice.gov/image/benefits.htm> (visited Mar 4, 2013).

<sup>18</sup> In testimony before Congress's subcommittee on immigration policy and enforcement, ICE's Deputy Director Kumar Kibble explained that ICE's worksite enforcement is effectively designed to target those employers who “knowingly” hire unauthorized workers through the use of criminal and civil immigration laws and to regulate all other employers by encouraging them to join voluntary compliance programs. See *ICE Worksite Enforcement—Up to the Job? Hearing before the Subcommittee on Immigration Policy and Enforcement of the House Committee on the Judiciary*, 112th Cong, 1st Sess 79, 79 (2011) (statement of Kumar Kibble, Deputy Director, ICE). One study suggests that while the total number of arrests for criminal charges in worksite enforcement matters has remained fairly constant between 2009 and 2010, the percentage of arrests of “managerial employees” has risen from 28 percent to 51 percent. See Bruno, *Immigration-Related Worksite Enforcement* at 8 (cited in note 2).

gration policy now permits otherwise removable migrants to disrupt the removal process. The clearest example is a 2011 Memorandum of Understanding (MOU) that binds both the Departments of Labor (DOL) and Homeland Security (DHS).<sup>19</sup> The MOU attempts to cure the asymmetric allocation of regulatory power, which typically favored DHS in the past.<sup>20</sup> The key feature of the MOU is the power it grants DOL to displace DHS in the course of investigating a workplace. An active DOL investigation has the effect of shielding that workplace against DHS intervention.<sup>21</sup> Unauthorized workers typically will not blow the whistle on employers without assurances that sensitive, immigration-related information of a complainant will not be shared with other agencies.<sup>22</sup> Although similar MOUs had informed the enforcement decisions of labor and immigration agencies in the past,<sup>23</sup> the 2011 version provides the clearest guidance to date as to the specific circumstances in which a regulatory firewall will prevent information regarding a worker's status from being shared with other agencies.

Changes regarding the administration of U visas have achieved a similar effect. U visas are available to otherwise removable immigrants who have been the victims of a wide range of criminal activity.<sup>24</sup> As immigration scholars have argued, U visas have the potential for expanding the scope of labor protections in the workplace.<sup>25</sup> Although the executive lacks the authority to change the formal certification requirements for U visa eligibility, it can change the entry points for victims of qualifying crimes to begin the application process. In 2011, DOL re-

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<sup>19</sup> *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites* \*2 (Dec 7, 2011), online at <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> (visited Mar 4, 2013).

<sup>20</sup> I have written about this dynamic in previous work. See generally Stephen Lee, *Monitoring Immigration Enforcement*, 53 *Ariz L Rev* 1089 (2011).

<sup>21</sup> See *Revised Memorandum of Understanding* at \*2 (cited in note 19) ("ICE agrees to refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute.").

<sup>22</sup> See Gleeson, 35 *L & Soc Inq* at 562–63 (cited in note 10).

<sup>23</sup> See *Memorandum of Understanding between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor* \*1–3 (June 6, 1992), reprinted in 69 *Interpreter Releases* 829, 829–30 (1992); *Memorandum of Understanding between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor* \*1–6 (Nov 23, 1998), reprinted in 75 *Interpreter Releases* 1711, 1711–16 (1998).

<sup>24</sup> See *Victims of Trafficking and Violence Protection Act of 2000* § 1513(b)(3)(U)(iii), Pub L No 106-386, 114 Stat 1464, 1535, amending INA § 101(a)(15)(U)(iii), codified at 8 USC § 1101(a)(15)(U)(iii).

<sup>25</sup> See, for example, Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 *U Richmond L Rev* 891, 944–51 (2008).

leased its U visa certification protocol.<sup>26</sup> Although local police agencies, DHS, and other law enforcement agencies possess the same ability to certify such visas, agencies like DOL, the Equal Employment Opportunity Commission, and their state counterparts have greater expertise in identifying when a dispute in a particular workplace implicates the kind of criminal activity that may allow victims to receive U visas.<sup>27</sup> Similarly, their mission orientations make it more likely both that in hard cases agency officials will resolve ambiguities in favor of the unauthorized worker and that unauthorized workers will divulge their immigration status in the first place.<sup>28</sup> Labor agency officials at the state level, who are also empowered in certain cases to certify U visa applications, have evinced a particular willingness to shed the misconception that they will share information with immigration enforcement agencies.<sup>29</sup>

Finally, DHS has offered up the use of prosecutorial discretion as a means of facilitating the enforcement of labor rights. Although presidents regularly shift enforcement priorities as administrations change (especially across party lines), what has made the Obama administration unique is the degree to which it has made such shifts transparent. A key feature of the Obama administration has been the open manner in which it has offered its enforcement agenda.<sup>30</sup> The public has a window into the ordinarily shadowy world of discretionary decision making. A number of guidance memos clarify the factors line officers are

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<sup>26</sup> See DOL, Press Release, *US Labor Department Announces Protocols for Certifying U Visas Applications* (Apr 28, 2011), online at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20110428.xml> (visited Mar 4, 2013). For more detailed information on these U visa certification procedures and decisions, see Nancy Leppink, *Field Assistance Bulletin No. 2011-1* (DOL Apr 28, 2011), online at [http://www.dol.gov/whd/FieldBulletins/fab2011\\_1.htm](http://www.dol.gov/whd/FieldBulletins/fab2011_1.htm) (visited Mar 4, 2013).

<sup>27</sup> See National Employment Law Project, *The U Visa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse* 3 (Nov 2011), online at <http://www.nelp.org/page/-/Justice/2011/UVisa.pdf?nocdn=1> (visited Mar 4, 2013).

<sup>28</sup> See Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 *Berkeley J Emp & Labor L* 227, 277–83 (2012).

<sup>29</sup> See Shannon Gleeson, *Conflicting Commitments: The Politics of Enforcing Immigrant Worker Rights in San Jose and Houston* 76–77 (Cornell 2012). Consider Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 *Am Soc Rev* 756 (2009) (discussing other examples of protection of immigrant identity in service-oriented organizations).

<sup>30</sup> John Morton, Director, ICE, Memorandum for all Field Office Directors, Special Agents in Charge, Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* 1–3 (ICE June 17, 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> (visited Mar 4, 2013).

instructed to consider when making declination decisions.<sup>31</sup> Importantly, DHS has instructed low-level officers and attorneys to screen for “plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations” and “individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.”<sup>32</sup> Certainly, the articulation of such factors provides no guarantees against removal. One does not have a right to obtain the exercise of prosecutorial discretion.<sup>33</sup> But at the very least, these memos establish specific facts around which immigration officials and counsel (if a migrant has one) can negotiate. More than anything, these regulatory strategies all suggest that the executive is trying to harmonize immigration and labor enforcement goals by resolving statutory and regulatory conflicts in favor of worker rights.

## II. SCREENING FOR SOLIDARITY

Why permit otherwise-removable immigrants to pursue labor claims? The standard response is that such claims are thought to protect the rights and interests of citizen workers by deterring unauthorized migration over the long term. Yet, this justification is hard to take seriously. The unauthorized migrant population has remained high over the last several years despite the ramp-up in workplace enforcement efforts.<sup>34</sup> Furthermore, resource constraints and countervailing immigration enforcement policies suggest that this population is unlikely to abate in the foreseeable future.<sup>35</sup> As ICE explains, “Worksite enforcement investigations often involve egregious violations of criminal statutes by employers and widespread abuses. . . . By uncovering such violations, ICE can send a strong deterrent message to other

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<sup>31</sup> See generally John Morton, Director, ICE, Memorandum for all Field Office Directors, Special Agents in Charge, Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (visited Mar 4, 2013); Morton, Memorandum, *Prosecutorial Discretion: Certain Victims* (cited in note 30).

<sup>32</sup> See Morton, Memorandum, *Prosecutorial Discretion: Certain Victims* at 2 (cited in note 30).

<sup>33</sup> Consider *id.* at 3 (noting that the prosecutorial discretion memo creates no enforceable private right of action).

<sup>34</sup> See notes 53–54 and accompanying text.

<sup>35</sup> See notes 48–58 and accompanying text.

employers who knowingly employ illegal aliens.”<sup>36</sup> Enabling unauthorized workers to pursue labor claims is thought to bolster the deterrence effect. If employers recruit unauthorized workers as part of a cost-savings measure, then the enforcement of labor claims diminishes the appeal of hiring unauthorized workers in the first place.

At heart, such a policy is pragmatic in nature and is ultimately concerned with the interests of domestic and native workers. The executive permits unauthorized migrants to benefit from our nation’s labor laws because doing so fortifies the labor rights of citizen and other authorized workers.<sup>37</sup> Many federal courts have adopted this view,<sup>38</sup> including the Supreme Court. In *Sure-Tan, Inc v NLRB*,<sup>39</sup> the Court explained that the enforcement of labor laws against employers suppressed businesses’ appetite for migrant labor, thus creating “fewer incentives for aliens themselves to enter in violation of the federal immigration laws.”<sup>40</sup> Although a majority of the Court declined to extend that principle in *Hoffman Plastic Compounds, Inc v NLRB*,<sup>41</sup> which concerned the availability of backpay to unauthorized workers, the deterrence rationale still found some continuity through Justice Stephen Breyer’s dissent, in which he argued that “the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.”<sup>42</sup>

In this Part, I defend the recent turn in workplace enforcement policy, but I do so on the basis of an alternative justification. Here, I explain that focusing on migrants with labor claims advances not immigration’s enforcement goals, but rather its member-selection goals. Specifically, conferring immigration benefits to migrants who are willing to stand in solidarity with other workers fulfills a screening purpose: it helps identify those migrants with whom current members—especially US workers—feel the strongest economic and social bonds.

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<sup>36</sup> *Worksite Enforcement* (ICE), online at <http://www.ice.gov/worksite> (visited Mar 4, 2013).

<sup>37</sup> As DHS explains, “Worksite enforcement . . . reduces the demand for illegal employment and protects employment opportunities for the nation’s lawful workforce.” See *Fact Sheet* (cited in note 11) (emphasis added).

<sup>38</sup> See, for example, *Agri Processor Co v NLRB*, 514 F3d 1, 5 (DC Cir 2008).

<sup>39</sup> 467 US 883 (1984).

<sup>40</sup> *Id.* at 893–94.

<sup>41</sup> 535 US 137 (2002).

<sup>42</sup> *Id.* at 154 (Breyer dissenting).

These bonds are important. They increase the likelihood that a migrant will be integrated into society peacefully and with minimal burden on the interests of US workers, the cross section of Americans traditionally most affected by unauthorized labor migration.<sup>43</sup> To be clear, the scope of labor rights, which might lead to membership benefits under a solidarity rationale, is somewhat narrow. But focusing on the principle of solidarity reminds us that the long-term goal of member selection—whether it is achieved through formal admission rules or de facto enforcement policies—is to achieve the meaningful integration of new members.<sup>44</sup>

#### A. The Screening Framework

In recent years, immigration scholarship has tried to reconceptualize immigration enforcement decisions as screening decisions. Proponents of this view argue that removal decisions are sensibly understood as membership decisions where immigration officials initiate removal proceedings against unauthorized migrants deemed undesirable by membership criteria.<sup>45</sup> The criteria for desirability can change over time and across administrations, and membership benefits that the executive can distribute range in degrees of formality.<sup>46</sup> But the salient point is that the basis of the desirability determination is the migrant's conduct during her stay in the United States. A member-

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<sup>43</sup> See George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q J Econ 1335, 1368–69 (2003). In certain industries, immigrant workers compete not with citizens but with other recent immigrants. See Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 UC Irvine L Rev 125, 129–30 (2012); Frank D. Bean, et al, *Luxury, Necessity, and Anachronistic Workers: Does the United States Need Unskilled Immigrant Labor?*, 56 Am Beh Scientist 1008, 1010 (2012).

<sup>44</sup> Stephen Yale-Loehr and Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 Georgetown Immig L J 99, 101–02 (2001).

<sup>45</sup> See, for example, Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan L Rev 809, 835–38 (2007); Eleanor Marie Lawrence Brown, *A Visa to “Snitch”: An Addendum to Cox and Posner*, 87 Notre Dame L Rev 973, 988 (2012); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 Stan L Rev 1103, 1118–19 (2009).

<sup>46</sup> A central tenet of this position is that while Congress retains formal authority to define categories governing “deportability” and “inadmissibility,” as a functional matter, the executive controls the boundaries of membership through the exercise of discretion in deciding whether to initiate (or not initiate) removal proceedings. See Cox and Posner, 59 Stan L Rev at 845–46 (cited in note 45). See also Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn Pub Interest L J 243, 243–45 (2010) (arguing prosecutorial discretion is based in “statute, agency memoranda, and court decisions,” and that immigration officers exercise discretion based on “redeeming qualities” such as family ties, gainful employment, and the payment of taxes).

selection system designed around what a migrant has actually done (as opposed to what a migrant promises to do) after entry provides immigration officials with better and more information about that particular migrant's membership potential.<sup>47</sup>

In the context of the workplace, unauthorized migrants' tenuous status as de facto members leaves them vulnerable to exploitation at the hands of employers—and this is precisely where the screening framework can help clarify the significance of allowing unauthorized migrants to assert labor claims against their employers. In particular, a migrant's willingness to challenge an employer's anti-union activities points to that worker's willingness to stand in solidarity with US workers. The assertion of such claims, according to the screening framework, provides valuable information about that migrant's potential as a future member (and worker) in the United States. The presence of these cross-status social and economic bonds increases the likelihood that a migrant's integration will occur with minimal disruption to US-worker interests. Framed this way, the purpose of a worker-centric workplace enforcement policy is not to deter unauthorized migration but to provide a basis for determining which migrants among the eight million unauthorized migrants in the workforce are the strongest candidates for benefits in the form of temporary or formal membership.

The screening framework operates within existing enforcement realities. To begin with, the executive does not have nearly enough resources to confront the enormity of the unauthorized migration challenge. In 2011, the executive conceded that it had enough resources to remove no more than 400 thousand noncitizens in any given year—less than 4 percent of the total unauthorized population.<sup>48</sup> Therefore, immigration enforcement

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<sup>47</sup> Professors Adam Cox and Eric Posner argue that contact with the criminal justice system acts as a proxy for undesirability, which plausibly explains why the executive continues to focus on removing "criminal aliens." Cox and Posner, 59 *Stan L Rev* at 845–46 (cited in note 45). Professor Eleanor Marie Lawrence Brown makes a related argument in the context of foreign elites in the United States. Professor Brown argues that because many foreign elite visa holders have access to terrorist networks, such visa holders should be required to "snitch" before and after visas are issued. A visa holder's willingness or reticence to share valuable information after a terrorist act reflects on that noncitizen's desirability. Brown, 87 *Notre Dame L Rev* at 1004–06 (cited in note 45).

<sup>48</sup> See John Morton, Director, ICE, Memorandum for all Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens* (Mar 2, 2011), online at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (visited Mar 4, 2013) ("ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States.").

decisions have been reframed as decisions about selecting members who will comprise the 96 percent of the unauthorized population that will likely never formally face removal proceedings. These enforcement decisions directly engage the social engineering aspects of immigration policy.

Resource constraints also hamper the ability of immigration officials to inspect a larger number of workplaces. The number of notices of intent to fine has increased, but the number of businesses has also increased even while the size of the average business establishment has decreased.<sup>49</sup> As Professors Janice Fine and Jennifer Gordon point out, most of the industries identified as posing the greatest risk of Fair Labor Standards Act of 1938<sup>50</sup> (FLSA) violations are comprised of firms and establishments employing fewer than twenty people.<sup>51</sup> Of course, larger businesses that commit egregious immigration and labor-related violations may continue to invite scrutiny under the Obama administration, but to the extent DHS wants to use enforcement decisions to achieve a larger deterrence effect, the fragmented nature of the market frustrates the administration's ability to actually inspect even a significant minority of businesses. Indeed, the unauthorized migrant population has grown and stabilized over the last ten years. Today, approximately eleven million unauthorized migrants reside in the United States, which amounts to nearly 30 percent of the total foreign-born population.<sup>52</sup> The estimated unauthorized migrant population has *increased* since President Obama assumed office. DHS estimated that 10.8 million unauthorized migrants resided within the United States in 2009.<sup>53</sup> DHS estimated that the unauthorized population grew to

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<sup>49</sup> Compare *Fact Sheet* (cited in note 11) (showing 495 final orders resulting in nearly \$12.5 million in fines for 2012), with *Priorities and the Rule of Law Hearing*, 112th Cong, 1st Sess at 17 (cited in note 12) (reporting 18 final orders resulting in \$675,000 in fines for 2008); *Immigration Enforcement* at 35 (cited in note 13) (reporting only 3 notices of intent to fine issued in 2004). See also Janice Fine and Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 *Polit & Socy* 552, 554 (2010) (showing that the average size of businesses declined between 1990 and 2005 and that the past thirty years has seen a 112 percent increase in the number of businesses covered under the FLSA).

<sup>50</sup> Pub L No 75-718, ch 676, 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

<sup>51</sup> Fine and Gordon, 38 *Polit & Socy* at 554–55 (cited in note 49).

<sup>52</sup> See Passel and Cohn, *National and State Trends, 2010* at 10 (cited in note 2). Another twelve million lawful permanent residents (LPRs) could be rendered removable on the basis of post-entry conduct (typically criminal conduct). See *id.*; INA § 237(a)(2), 8 USC § 1227(a)(2).

<sup>53</sup> See Michael Hoefler, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009* 2 (DHS Jan

11.6 million in 2010 and receded slightly to 11.5 million in 2011.<sup>54</sup> Thus, the increased allocation of resources to worksite enforcement has not generated measurable gains in terms of deterrence. By contrast, under a screening framework, the presence of a stable and significant unauthorized population does not represent the failure of an enforcement policy so much as it represents a pool of potential (and potentially exploitable) members.<sup>55</sup>

This leads to a second and related point: worksite-enforcement strategy appears to be working at cross-purposes with DHS's border enforcement strategy. Embedded within the deterrence theory of workplace enforcement is that allowing workers to press their labor claims will discourage employers from hiring unauthorized workers in the future, which in turn will cause workers to "self-deport." But the increasing costs associated with crossing back over the border render this scenario unlikely.<sup>56</sup> As Professor Mariano-Florentino Cuéllar observes, "[T]he mix of labor market incentives and limited legal immigration opportunities all but ensures a vast, long-term undocumented population in the United States which has been increasingly discouraged from leaving because of a build-up in border security."<sup>57</sup> Indeed, in a twist on the traditional narrative, migrants appear to receive "reverse remittances" from sending countries while they wait out the economic downturn.<sup>58</sup>

## B. Harnessing Social Bonds to Facilitate Integration

The screening literature has focused primarily on how immigration screens for "undesirability." It has explored how engaging in criminal behavior or facilitating terrorist activity<sup>59</sup> can lead to removal, thus building the national community through

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2010), online at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf) (visited Mar 4, 2013).

<sup>54</sup> See Hoefer, Rytina, and Baker, *Estimates: January 2011* at 3 (cited in note 8).

<sup>55</sup> See David A. Martin, *Eight Myths about Immigration Enforcement*, 10 NYU J Leg & Pub Pol 525, 545 (2007).

<sup>56</sup> See Pratheepan Gulasekaram, *Why a Wall?*, 2 UC Irvine L Rev 147, 157 (2012) (showing the extortion rate of human smuggling across the border increased from \$500 in 1986 to \$3,000 in 2008).

<sup>57</sup> Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 UC Irvine L Rev 1, 7 (2012).

<sup>58</sup> Consider Marc Lacey, *Money Starts to Trickle North as Mexicans Help Out Relatives*, NY Times A1 (Nov 16, 2009) (describing the rise of "reverse remittances," where families in Mexico have increasingly been sending money to family members in the United States who were negatively affected by the economic downturn).

<sup>59</sup> See, for example, Cox and Posner, 59 Stan L Rev at 845–46 (cited in note 45); Brown, 87 Notre Dame L Rev at 1004–06 (cited in note 45).

a process of attrition. But because the executive allows certain workers to temporarily or permanently avoid removal—either in the form of a U visa or the favorable exercise of prosecutorial discretion—the screening challenge is slightly different. The vast majority of the eight million unauthorized workers will never be removed either because such an outcome is politically unpalatable, administratively infeasible, or both. Most of these workers will effectively be allowed to remain and access US labor markets, even if they lack any formal membership rights. Therefore, the screening challenge involves identifying “desirable” workers to whom membership benefits should be affirmatively granted.

On this point, when immigration law screens for “desirable” members, it often prefers those migrants who easily integrate into the mainstream.<sup>60</sup> And one way immigration law sets out to identify those who are most likely to integrate is to rely on the presence of social bonds between current and new members. The use of social bonds to identify potential members is most readily appreciable in the context of family-based migration. The immigration code very clearly allocates membership benefits to “immediate relatives”<sup>61</sup> and other family members.<sup>62</sup> Parents can sponsor their children; wives can sponsor their husbands; sisters can sponsor their brothers.<sup>63</sup> Importantly, one of the assumptions built into this system is that migrants who gain entrance into the national community through the family will nestle into a more stable community than those who are admitted without a comparable social network, which in turn increases the likelihood of integration into the mainstream. Thus, a system of family-based migration represents more than our federal branches recognizing

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<sup>60</sup> Immigration and citizenship laws focus on a variety of characteristics to assess a migrant’s potential to integrate into the mainstream. In the naturalization context, two obvious examples are requiring applicants to possess a basic understanding of English and US history and civics. See INA § 312(a), 8 USC § 1423(a). As is well known by now, in the past, the integration rationale has been used to justify the exclusion of certain classes of migrants on the basis of race. See *Chae Chan Ping v United States*, 130 US 581, 595–96 (1889) (noting that Chinese migrants proved “impossible . . . to assimilate” with white Americans and that they were unwilling “to make any change in their habits or modes of living”).

<sup>61</sup> See INA § 201(b)(2)(A)(i), 8 USC § 1151(b)(2)(A)(i).

<sup>62</sup> See INA § 203(a)(1)–(4), 8 USC § 1153(a)(1)–(4).

<sup>63</sup> See INA § 201(b)(2)(A)(i), 8 USC § 1151(b)(2)(A)(i) (listing “immediate relatives” of citizens as eligible for permanent residence); INA § 203(a)(1)–(4), 8 USC § 1153(a)(1)–(4) (determining family-sponsored immigrants).

the right of its members to have a family; it also reflects a pragmatic attempt to integrate and stabilize migrant communities.<sup>64</sup>

Importantly, the presence of social bonds *alone* will not lead to membership. Almost all sponsors of family-based immigrants must promise to assume financial responsibility over the incoming member, thus ensuring a baseline level of economic productivity and, at the very least, guarding against the possibility that the new member will become an economic burden to the public.<sup>65</sup> In this sense, immigration law privatizes the responsibility of integrating new members into society. This is a part of *why* US immigration law values social bonds: by vouching for the new member, the citizen sponsor promises to individually provide support so the public will not have to. This feature separates US migration rules from those of other industrialized countries, like Canada, where the state assumes a greater responsibility over the integration of migrants.<sup>66</sup> The US model of migration grants current members the right to sponsor new members, but it also foists on them the responsibility to oversee the integration process and to internalize some of the associated costs.

Using bonds with current members to sort potential members also comports with principles of fairness and notions of justice. As Professor Hiroshi Motomura explains, immigration law tends to offer a greater array of protections to residents as time passes and their affiliation with the United States deepens. An “affiliation-based approach” to immigration law rests on two intuitions, according to Professor Motomura.<sup>67</sup> One is that an individual’s decision to migrate represents “a gradual decline in a newcomer’s attachment to her former country as part of an incremental process in which her life’s center of gravity shifts to the United States.”<sup>68</sup> The other is that

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<sup>64</sup> See Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 Hofstra L Rev 273, 285–86 (2003). See also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn L Rev 1625, 1637–38 (2007).

<sup>65</sup> See INA § 212(a)(4)(C)(ii), 8 USC § 1182(a)(4)(C)(ii) (requiring sponsors of family-based immigrants to file an affidavit of support over the immigrant); INA § 213A, 8 USC § 1183a (listing the requirements of the sponsor’s affidavit of support). The immigration code does exempt certain immigrants from the affidavit of support requirement, but these are limited to special classes of immigrants who are vulnerable to family-based violence. See, for example, INA § 212(a)(4)(C)(i)(I)–(III), 8 USC § 1182(a)(4)(C)(i)(I)–(III).

<sup>66</sup> See Irene Bloemraad, *Becoming a Citizen in the United States and Canada: Structured Mobilization and Immigrant Political Incorporation*, 85 Soc Forces 667, 679 (2006).

<sup>67</sup> Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 89 (Oxford 2006).

<sup>68</sup> *Id.*

belonging is principally a matter of social connections. Even if this belonging is something less than citizenship itself, it seems unjust to disregard a lawful immigrant's life in America. To do so would leave her recognized as belonging only in another country, typically where she is a citizen but lacks real connections.<sup>69</sup>

The policy choice to focus on connections to current members recognizes that migration, and the process of growing the national community more generally, can be a disruptive process for both the migrant and the host society. Unauthorized labor migration can be especially disruptive to US workers, the segment of the population whose wages are often the most directly affected by the presence of unauthorized workers.<sup>70</sup> Because this tension animates the labor market, selecting new members out of the unauthorized migrant pool requires a delicate hand.

On this point, Professor Cristina Rodríguez's critique of guest-worker programs proves helpful. She argues against the adoption of a large-scale guest-worker program because it undermines immigration law's long-term goal of integration.<sup>71</sup> Importantly, a key part of Professor Rodríguez's vision of integration involves fostering and preserving social peace: "Successful assimilation . . . should be defined by immigrants becoming full participants in the country's economic, social, and cultural life—by their becoming not only contributors, but also equals. Success further depends on whether immigration is absorbed with minimal social cleavages and inter-group competition."<sup>72</sup> Although she does not directly address unauthorized labor migration, Professor Rodríguez's observation holds across contexts. If the unauthorized population will remain inflated within the United States, enabling US workers to influence who among this larger population might earn immigration benefits can help reduce the likelihood of conflict. This resonates with immigration law's larger integrationist aspirations, a process through which members of immigrant groups and host societies come to resemble

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<sup>69</sup> Id.

<sup>70</sup> See Borjas, 118 Q J Econ at 1370 (cited in note 43) (estimating that immigration from 1980 to 2000 resulted in US workers' "wage[s] falling by 8.9 percent for high school dropouts, 4.9 percent for college graduates, 2.6 percent for high school graduates, and barely changing for workers with some college").

<sup>71</sup> Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U Chi Legal F 219, 221.

<sup>72</sup> Id at 229–30, 234 ("[A] focus on integration is required to promote social peace. It is in our interest to acknowledge that migrants are here to stay and to facilitate their becoming functional and well-adjusted members of our society.").

one another over time and across economic and sociocultural dimensions.<sup>73</sup>

Labor claims operate as a rough proxy for mutuality and commitment among workers. Like all proxies, labor claims are imperfect. A sense of solidarity need not exist only among workers. In many industries, like home care, the solidarity model makes for an awkward fit given that home workers often work in isolation and have few people to call coworkers. Indeed, they may very well feel a deep sense of loyalty to their employers. Adults spend an inordinate amount of time in the workplace,<sup>74</sup> and for adult migrants, it likely represents one of the only social institutions in which migrants face opportunities to interact with native workers.<sup>75</sup> Professor Kerry Abrams makes an analogous point about the use of marriage to sort committed relationships in the family-based migration context. She points out that a more accurate method of screening might be allowing reunification for unmarried couples in committed relationships and denying reunification to married couples evincing signs of dysfunctionality, but employing such a model would come at a cost.<sup>76</sup> For similar reasons, immigration officials could, in theory, develop screening methods for identifying intimacy in the workplace whether such relationships track or cut across the management-labor divide. But such an endeavor would prove challenging and costly given competing obligations.

### C. Cross-Status Solidarity

Although the executive has tried to accommodate the enforcement of labor rights by unauthorized migrants on deterrence grounds, the screening framework suggests that there may be member-selection reasons for allowing labor-enforcement goals to displace immigration enforcement goals. But what does the willingness to assert labor claims suggest about an unauthorized worker's membership potential? Here, I explain that certain types of labor claims require the presence of social and economic bonds between immigrant and citizen work-

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<sup>73</sup> See Susan K. Brown and Frank D. Bean, *Assimilation Models, Old and New: Explaining a Long-Term Process* (Migration Policy Institute Oct 2006), online at <http://www.migrationinformation.org/USfocus/display.cfm?ID=442> (visited Mar 4, 2013) (describing and defining the assimilation of immigrant groups).

<sup>74</sup> See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Georgetown L J* 1, 8–9 (2000).

<sup>75</sup> See *id.* at 3.

<sup>76</sup> Abrams, 91 *Minn L Rev* at 1668–69 (cited in note 64).

ers. These bonds, in turn, suggest the capacity and desire to integrate into society. Moreover, because these bonds are with low-skilled US workers—a class of workers that has traditionally opposed the migration of low-wage migrant workers<sup>77</sup>—selecting these immigrant workers helps minimize the possibility of social and economic tension that can arise between these classes of workers, at least where the claim that is being advanced arises from worker organizing efforts.

Under the labor code, workers exert power over management by withholding their labor. This threat becomes credible only when the workers have demonstrably organized themselves, set aside their individual short-term interests, and committed to the long-term interests of the larger workforce. Thus, in the most general terms, our nation's labor laws advance a vision of collective rights grounded in a principle of mutuality, or as the National Labor Relations Act<sup>78</sup> (NLRA) puts it: "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>79</sup> For a worker to forgo individual gain is not to act irrationally but to recognize and embrace the "promise of reciprocal benefit."<sup>80</sup>

Many workplace laws are grounded in a vision of collective rights and at the heart of this vision is the principle of solidarity. A basic definition of solidarity is the willingness to work only if doing so will not violate workplace laws or existing labor agreements.<sup>81</sup> It is an ethical commitment to forgo individual gain in the interests of a larger set of community interests. Although the law accommodates some group-based rights under certain circumstances,<sup>82</sup> it would be hard to point to another area of law that has developed a vision of collective rights to the same extent as the labor code.

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<sup>77</sup> See Gordon H. Hanson, *Why Does Immigration Divide America? Public Finance and Political Opposition to Open Borders* 3–4 (Institute for International Economics 2005).

<sup>78</sup> Pub L No 74-198, ch 372, 49 Stat 449 (1935), codified at 29 USC §§ 151–69.

<sup>79</sup> NLRA § 7, 49 Stat at 452, codified at 29 USC § 157.

<sup>80</sup> See Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities under the National Labor Relations Act*, 89 Colum L Rev 789, 801 (1989) (explaining how employees' concern about their coworkers' plights may benefit those employees in future disputes of their own). See also Benjamin I. Sachs, *Employment Law as Labor Law*, 29 Cardozo L Rev 2685, 2739–43 (2008) (citing laboratory experiments confirming the reciprocity principle).

<sup>81</sup> See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S Cal L Rev 503, 509 (2007) ("[S]olidarity with other workers . . . [is] expressed as a commitment to refuse to work under conditions that violate the law or labor agreements.").

<sup>82</sup> See, for example, FRCP 23 (defining the requirements for class action suits).

This principle of solidarity finds its greatest support in workplace laws in those instances where a worker accepts the “promise of reciprocal benefit” as a part of a larger set of self-interested choices made by rational actors.<sup>83</sup> This vision of self-interested action is most apparent where workers engage in acts of solidarity with workers within the same workplace. In certain instances, courts have recognized as legally cognizable acts of solidarity that cut across workplaces. Thus, where two drivers working for a chemical waste hauling company refused to pick up waste from a customer whose workers were on strike, Judge Richard Posner recognized that the drivers “may have felt that strengthening the union movement by honoring a union’s picket line would promote their own economic interests as workers.”<sup>84</sup>

Some labor scholars have argued that this vision of solidarity remains unduly narrow. More than twenty years ago, Professor Richard Michael Fischl argued that this “self-interested” view of solidarity “devalues the individual whose personal plight is at stake by treating her as a mere means to her colleagues’ self-interested ends.”<sup>85</sup> More recently, Professor James Gray Pope argued that the NLRA’s mutuality principle has been misconstrued as generating a “network of tit-for-tat expectations.”<sup>86</sup> According to Professor Pope, this cramped understanding of solidarity fails to capture the “movement culture of labor” where workers are “‘sisters’ and ‘brothers’ bound together by workplace community, trade, industry, and class.”<sup>87</sup>

Labor sociologists have begun documenting instances where unauthorized migrants have stood in solidarity with citizen workers to enforce their workplace rights.<sup>88</sup> Professor Ruth

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<sup>83</sup> James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 Buff L Rev 653, 663–67 (2009) (recognizing the circumstances under which workers self-organize). See also Fischl, 89 Colum L Rev at 796 (cited in note 80) (highlighting a circumstance where workers pressed for an employee’s case, motivated by their own future well-being).

<sup>84</sup> *NLRB v Browning-Ferris Industries, Chemical Services, Inc.*, 700 F2d 385, 387 (7th Cir 1983).

<sup>85</sup> Fischl, 89 Colum L Rev at 792, 797–98 (cited in note 80).

<sup>86</sup> Pope, 57 Buff L Rev at 672–73 (cited in note 83).

<sup>87</sup> *Id.* at 662.

<sup>88</sup> See, for example, Caitlin C. Patler, *Alliance-Building and Organizing for Immigrant Rights: The Case of the Coalition for Humane Immigrant Rights of Los Angeles*, in Ruth Milkman, Joshua Bloom, and Victor Narro, eds, *Working for Justice: The LA Model of Organizing and Advocacy* 71, 78–81 (ILR 2010) (documenting a Los Angeles coalition’s focus on mobilizing undocumented immigrants, and the coalition’s role in the development of the Garment Worker Center to fight against labor law violations in the garment industry); Marco Hauptmeier and Lowell Turner, *Political Insiders and Social Activists: Coalition Building in New York and Los Angeles*, in Lowell Turner and Daniel B. Corn-

Milkman recounts one particularly vivid example of workers at a doors and windows factory who began protesting the firm's decision to close the factory and relocate to a nonunion facility.<sup>89</sup> Garnering the support of a variety of private donors and elected officials (including then-President elect Obama), the workers eventually achieved a sizeable settlement.<sup>90</sup> But as Professor Milkman observes, an important point that was lost in the mainstream coverage of the dispute was the composition of the workers: most workers were unauthorized workers from Mexico and Central America and they earned the support of many of their fellow African American native workers.<sup>91</sup> The workplace action represented a joint effort cutting across immigration and citizenship lines. Of course, different labor markets experience the effects of unauthorized migration differently; US workers in some regions might be more inclined to support the interests of unauthorized workers than in others. But this growing literature suggests that a worker's identity can transcend immigration status and other differences.

Examining labor claims through a screening lens supplements existing accounts, which have tended to embrace a claims-making stance. For example, in *Agri Processor Co v NLRB*,<sup>92</sup> the DC Circuit held that unauthorized workers in a meat processing plant could belong to the same collective bargaining unit as authorized workers despite their immigration status.<sup>93</sup> Professor Motomura suggests that *Agri Processor* exemplifies how noncitizen interests can often be repackaged as citizens' rights. He observes that unauthorized migrants can move through society outside of the law but can find some measure of relief within the law through their citizen coworkers operating as "interest surrogates" or "citizen proxies."<sup>94</sup> Thus, a theory of citizen proxies explains how citizens can help make noncitizens whole even if noncitizens lack formal rights.

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field, eds, *Labor in the New Urban Battlegrounds: Local Solidarity in a Global Economy* 129, 137–38 (ILR 2007); Roger Waldinger, et al, *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in Kate Bronfenbrenner, et al, eds, *Organizing to Win: New Research on Union Strategies* 102, 116–18 (ILR 1998).

<sup>89</sup> Ruth Milkman, *Immigrant Workers, Precarious Work, and the US Labor Movement*, 8 *Globalizations* 361, 361–62 (2011).

<sup>90</sup> *Id.* at 362.

<sup>91</sup> *Id.*

<sup>92</sup> 514 F3d 1 (DC Cir 2008).

<sup>93</sup> *Id.* at 2.

<sup>94</sup> Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration outside the Law*, 59 *Duke L J* 1723, 1754 (2010).

The solidarity framework extracts a slightly different lesson from *Agri Processor*. It takes notice of the fact that the citizen workers in *Agri Processor* evinced a willingness to undertake such an endeavor in the first place; that unauthorized workers overcame their individual fears of removal in the interests of advancing their claims to economic justice; and that citizen and noncitizen workers engage in the messy and sometimes perilous process of forming a community.<sup>95</sup> And all of *this* information facilitates the member-selection process by identifying migrants who are willing to forgo individual benefits in the pursuit of raising working conditions more broadly.<sup>96</sup> In other words, the solidarity framework suggests that the whole of citizen-noncitizen interactions in the workplace is greater than the sum of its individual parts.

#### D. From Sojourn to Solidarity

Academics, policy advocates, and the media have paid increasing attention to remittances and the money transfer market, which immigrant workers' wages support.<sup>97</sup> While the subject of remittances typically casts a flattering light on unauthorized workers (as committed and compliant workers), it tends to perpetuate the notion that immigrants are interested in migrating to the United States only for the purposes of accessing its labor markets, which offers higher wages relative to their sending countries.<sup>98</sup> For this reason, unauthorized workers are often seen as unorganizable as "sojourners" who plan to return to the sending country after a short stay.<sup>99</sup> Yet, examples of unauthorized

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<sup>95</sup> *Agri Processor*, 514 F3d at 2, 9.

<sup>96</sup> *Id* at 9.

<sup>97</sup> See, for example, Ezra Rosser, *Immigrant Remittances*, 41 Conn L Rev 1, 14–20 (2008); Roberto Suro, et al., *Billions in Motion: Latino Immigrants, Remittances and Banking* 5–16 (Pew Hispanic Center Nov 22, 2002), online at <http://www.pewhispanic.org/files/reports/13.pdf> (visited Mar 4, 2013); Miriam Jordan, *Migrants' Cash Keeps Flowing Home*, Wall St J A16 (Sept 24, 2012).

<sup>98</sup> For example, a Pew Hispanic Center study interviewed over three hundred migrant workers in the United States and, according to the study, almost all of the participants cited "the ability to contribute to a family budget back home [as] a major motivation in their decision to come to the United States." Suro, *Billions in Motion* at 6 (cited in note 97). See also Jordan, *Migrants' Cash Keeps Flowing Home*, Wall St J at A16 (cited in note 97) (reporting that although unauthorized workers have been affected by the economic downturn, they are willing to make sacrifices "to keep money flowing back home").

<sup>99</sup> Ruth Milkman, *L.A.'s Past, America's Future? The 2006 Immigrant Rights Protests and Their Antecedents*, in Kim Voss and Irene Bloemraad, eds., *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America* 201, 204 (California 2011).

workers standing in solidarity with their coworkers suggest that the story can be more complicated than that.

A migrant worker's commitments may change over time. Migrants may initially plan on staying in the United States only a short while, just long enough to meet their income needs for the year, but they may soon realize that savings are harder to accumulate than they initially thought. Economic downturns dry up jobs, and the costs of illicit entry into the United States may suddenly (and coercively) increase at the hands of their smugglers,<sup>100</sup> both of which can have the effect of prolonging a migrant's stay in the United States.<sup>101</sup> Over time, a migrant worker might begin to value her social and economic bonds with her citizen coworkers differently. Injustices that a migrant worker experiences during her time in the United States, especially at the hands of her employer, can affect her willingness to sacrifice her individual opportunities for work in the interests of standing in solidarity with other workers.<sup>102</sup>

As a general matter, immigration scholarship is still developing a picture of citizen workers, immigrant workers, and the factors and conditions influencing whether they achieve some sense of solidarity. Outside of immigration law, family scholars have begun examining the related concept of friendship between adults in the workplace and the regulatory questions it poses.<sup>103</sup> As Professor Laura Rosenbury observes,

Although such relationships are at times primarily transactional, at other times they take on intimate qualities similar to those of family relationships or friendships. Workplaces

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<sup>100</sup> See Jennifer Gordon and R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L Rev 1161, 1213 (2008). Oftentimes, these costs can be foisted upon the workers in the form of debt, which must be paid off. Such conditions can give rise to coercion triggering potential liability against employers for trafficking violations. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 222(b)(3), Pub L No 110-457, 122 Stat 5044, 5068, codified at 18 USC § 1589; Kathleen Kim, *The Coercion of Trafficked Workers*, 96 Iowa L Rev 409, 450–53 (2011); Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U Pa L Rev 1609, 1640–41 (2010).

<sup>101</sup> See Jennifer Gordon and R.A. Lenhardt, *Conflict and Solidarity between African American and Latino Immigrant Workers* 44–45 (Nov 30, 2007), online at <https://www.law.berkeley.edu/files/GordonLenhardtpaperNov30.pdf> (visited Mar 4, 2013); Motomura, *Americans in Waiting* at 48 (cited in note 67) (discussing reasons for the lack of union solidarity among recent immigrant arrivals).

<sup>102</sup> See Leticia M. Saucedo, *African American-Immigrant Tensions: Myths, Realities and Policy Implications* 7 (Warren Institute July 2008), online at [http://www.law.berkeley.edu/files/Saucedo\\_African\\_Am\\_Immigrant\\_Tensions\\_Final\\_brief.pdf](http://www.law.berkeley.edu/files/Saucedo_African_Am_Immigrant_Tensions_Final_brief.pdf) (visited Mar 4, 2013).

<sup>103</sup> For the importance of intimacy in non-family environments, see Laura A. Rosenbury, *Working Relationships*, 35 Wash U J L & Pol 117, 117–20 (2011).

are thus often sites of both intimacy and production, much like the home is a site of both intimacy and production, even though the law assigns production to the workplace and intimacy to the home.<sup>104</sup>

One final note: the meaning of solidarity within the realm of immigration enforcement has changed and evolved over time. In decades past, immigration officials viewed workplace-related conflicts with suspicion given the strong conceptual ties between labor organizing as a tactic for improving working conditions and communism as a political ideology embraced by many nations whose interests conflicted with those of the United States. During those decades in the early and mid-twentieth century when the spread of communism posed a foreign threat to American interests, federal officials often used immigration law to quash those domestic labor protests involving noncitizen participants.<sup>105</sup> The convergence of these goals generated administrative difficulties. The Immigration and Naturalization Service (INS)—the predecessor to our various immigration agencies today—operated under the oversight of DOL for the early part of the twentieth century.<sup>106</sup> Thus, the challenge of using immigration law to regulate workplace disputes foisted a set of conflicting goals onto the shoulders of DOL, causing Secretaries of Labor across admin-

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<sup>104</sup> Id at 119. For example, Professor Viviana Zelizer explains that intimacy in the workplace can have a solidarity-enhancing effect. See Viviana A. Zelizer, *Intimacy in Economic Organizations*, 18 *Rsrch Soc of Work* 23, 24 (2009). Importantly, she defines intimacy as “privileged access to another person’s attention, information, and trust, all of which would damage the person if widely available to other people.” Id at 25. This culture of sensitive information sharing finds direct analogues throughout immigrant communities where the fear of being “outed” as unauthorized pervasively regulates their lives.

<sup>105</sup> For example, the Act of Oct 16, 1918 rendered excludable and deportable any noncitizens “who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law.” Pub L No 65-221, ch 186, 40 Stat 1012, repealed by the Immigration and Nationality Act of 1952 (INA), Pub L No 82-414, ch 477, 66 Stat 163, codified as amended at 8 USC § 1101 et seq. As American officials watched the rise of the Bolshevik party during the Russian revolution, they feared the possibility of these worker-centric ideas spreading among the US working class. Immigration officials were particularly wary of labor organizations, like the Industrial Workers of the World, which waged aggressive organizing campaigns. See Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 *St Mary’s L J* 833, 846–47 (1997). Similarly, the Internal Security Act of 1950 listed membership in the community as grounds for exclusion. See Internal Security Act of 1950 § 22, Pub L No 81-831, ch 1024, 64 Stat 987, 1006–07, amending the Act of Oct 16, 1918, 40 Stat at 1012 and repealed by INA § 403(a)(16), 66 Stat at 279.

<sup>106</sup> For a brief overview of the historical development of INS, see Lee, 53 *Ariz L Rev* at 1091 n 6, 1110–13 (cited in note 20).

istrations to openly resist such a mandate, and in some cases, inviting charges of impeachment.<sup>107</sup> Today, the national security goals have been largely disaggregated from workplace enforcement goals. As 9/11 demonstrates, modern national security concerns appear in the form of discrete (but deadly) surprise attacks.<sup>108</sup> To the extent national security goals take immigration officials into the workplace at all, they do so only in those workplaces involving access to critical infrastructure. In other words, the challenge is not suppressing the spread of ideology, but rather categorically limiting access to work in airports, railways, and other workplaces central to the basic operation of national life.<sup>109</sup>

#### E. Some Qualifications

My central claim has been that allocating membership benefits to immigrants who stand in solidarity with their citizen coworkers facilitates the member-selection process. Allocating benefits on this basis prioritizes those migrant workers who have developed social and economic bonds with US and other authorized workers. And because migrants who have developed bonds with current members are more likely to successfully integrate into society than migrants without such bonds, screening for solidarity helps distinguish long-term residents from temporary sojourners. To be clear, this claim is subject to some important limitations.

First, although labor and employment laws broadly apply to unauthorized workers, thus creating opportunities for cross-status solidarity in the workplace, courts have narrowed their

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<sup>107</sup> See John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925* 228–29 (Rutgers 2d ed 1988) (describing the reluctance of Secretary of Labor William Wilson to enforce deportation orders during World War I). Frances Perkins, the Secretary of Labor during the Roosevelt administration, proved to be a particular annoyance to members of Congress. In 1939, impeachment proceedings were brought against her. See *Resolution for an Investigation of the Official Conduct of Frances Perkins, Secretary of Labor; James L. Houghteling, Commissioner of Immigration and Naturalization Service, Department of Labor; and Gerard D. Reilly, Solicitor, Department of Labor, to Determine Whether or Not They Have Been Guilty of Any High Crimes or Misdemeanors Which, in the Contemplation of the Constitution, Requires the Interposition of the Constitutional Powers of the House*, HR Rep No 76-311, 76th Cong, 1st Sess (1939).

<sup>108</sup> See Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* 73–97 (Rowman & Littlefield 2005).

<sup>109</sup> Congress has simply excluded noncitizens from workplaces, such as airports. See Aviation and Transportation Security Act § 111(a), Pub L No 107-71, 115 Stat 597, 616–17 (2001), codified at 49 USC § 44935. For a critical view of the executive's post-9/11 invocation of national security reasons to suppress labor rights, see Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U Pa J Labor & Empl L 283, 304–07 (2006).

breadth in some significant ways. Specifically, judicial interpretations have constrained the ability of unauthorized workers to engage in organizing activity under the NLRA. The Court's decision to interpret the Immigration Reform and Control Act's (IRCA) employer sanctions provision as displacing the NLRA's reinstatement and backpay provisions is the most obvious example of this dynamic.<sup>110</sup> But courts have also limited the ability of unions to coordinate their activities with nonlabor groups or otherwise engage community organizations, which has frustrated the ability of communities of color to harness labor law to meet their needs.<sup>111</sup> Similar stories could be told about other workplace laws, such as Title VII.<sup>112</sup> Thus, while it may prove too much to suggest that unauthorized workers engage their citizen coworkers *despite* the current state of labor laws, neither is it entirely true that such organizing occurs *because* of labor and employment protections.

A second qualification to my claim is that the employer can disrupt the opportunities for cross-status solidarity by segregating work responsibilities. In many industries, employers will relegate migrant workers to jobs involving little contact with customers because of their limited English-speaking skills while leaving native workers to comprise the "face" of the company.<sup>113</sup> In the restaurant industry, for example, new migrant workers will often work as cooks or busboys, but not as hosts or waiters. Such a dynamic not only creates segregated work conditions but also dampens the conditions under which organizing drives might otherwise flourish.<sup>114</sup> Indeed, employers enjoy a signifi-

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<sup>110</sup> IRCA, 100 Stat 3359; *Hoffman Plastic*, 535 US at 151 (holding that allowing the NLRB to award backpay to unauthorized immigrants conflicted with the IRCA).

<sup>111</sup> See Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of "Community" to the Transformation of Legal Structures That Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U Pa J Labor & Empl L 773, 799–804 (2000) (providing an overview of various judicial interpretations narrowing the LMRDA's reach). As is well documented, immigrant communities are heavily dependent on community-based organizations in accessing services and navigating society generally. See, for example, S. Karthick Ramakrishnan and Celia Viramontes, *Civic Spaces: Mexican Hometown Associations and Immigrant Participation*, 66 J Soc Issues 155 (2010); Will Somerville, Jamie Durana, and Aaron Matteo Terrazas, *Hometown Associations: An Untapped Resource for Immigration Integration?* (Migration Policy Institute July 2008), online at <http://www.migrationpolicy.org/pubs/insight-htas-july08.pdf> (visited Mar 4, 2013).

<sup>112</sup> See Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 Ind L J 63, 79–82 (2002), citing *Childress v City of Richmond*, 907 F Supp 934, 938–939 (ED Va 1995), affd 134 F3d 1205 (4th Cir 1998) (en banc).

<sup>113</sup> See Gordon, 2 UC Irvine L Rev at 129–30 (cited in note 43).

<sup>114</sup> In some workplaces, this is because employers have difficulty attracting US and other authorized workers. For example, the agricultural industry has had difficulty at-

cant bargaining advantage over unauthorized migrants. Injustices may lead to a sense of solidarity among the workforce, but such a legal consciousness must persist under the weight of a work culture that rewards subservience.<sup>115</sup>

Professors Jennifer Gordon and Robin Lenhardt's work develops this point nicely. The vast majority of unauthorized migrants are from Latin America (mostly Mexico) and Asia,<sup>116</sup> and because they are, in certain labor markets, moving into low-wage jobs once occupied by native black workers, Professors Gordon and Lenhardt point out that the workplace has become an arena structured for conflict.<sup>117</sup> These workers, burdened by different origin stories, often bring different expectations to work that can obstruct their ability to organize around common points of interest, such as shared experiences of economic exploitation, racial subordination, and poor working conditions. At the same time, these sorts of conflicts highlight why cross-status solidarity carries so much promise as a means of identifying potential members. In those workplaces where unauthorized Latino workers and black native workers can organize themselves, signs of solidarity might demonstrate signs of "racial literacy,"<sup>118</sup>

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tracting US workers under current wages and conditions. See Kirk Johnson, *Hiring Locally for Farm Work Is No Cure-All*, NY Times A1 (Oct 5, 2011). See Gordon, 2 UC Irvine L Rev at 136–37 (cited in note 43) (explaining that employers often prefer temporary migrant workers to citizen workers for reasons of subservience even if they are required to pay a higher hourly wage).

<sup>115</sup> See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 Ohio St L J 961, 976–79 (2006). The notion of subservience is also expressed in racial terms. See Edward J.W. Park, *Racial Ideology and Hiring Decisions in Silicon Valley*, 22 Qualitative Soc 223, 230 (1999) (noting that some employers avoid hiring white and black workers because of the perception that "they like to stand up for their rights" whereas "Asians and Mexicans are generally not like that"). To be fair, the issue of friendship between employers and unauthorized workers can be complicated. In some industries, especially homecare, deep bonds of affection can develop between employers and workers. See Peggine R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 NC L Rev 45, 69–70 (2000).

<sup>116</sup> One study estimates this figure to be over 90 percent. Jeffrey S. Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow* iii (Pew Hispanic Center Oct 2, 2008), online at <http://pewhispanic.org/files/reports/94.pdf> (visited Mar 4, 2013).

<sup>117</sup> Gordon and Lenhardt, 55 UCLA L Rev at 1170–73 (cited in note 100). See also Joshua Bloom, *Ally to Win: Black Community Leaders and SEIU's L.A. Security Unionization Campaign*, in Milkman, Bloom, and Narro, eds, *Working for Justice* 167, 169–70 (cited in note 88).

<sup>118</sup> Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J Am Hist 91, 100 (2004) (defining "racial literacy" as "the capacity to decipher the durable racial grammar that structures racialized hierarchies and frames the narrative of our republic").

which can in turn help ease the racial conflict that might arise in communities beyond the workplace. Organizing campaigns, collective bargaining, secondary boycotts—these are all signs that migrants have achieved some shared understanding of unjust treatment even as, and perhaps because, they confront injustices in the workplace.<sup>119</sup>

The final qualification relates to the general downturn in the labor movement. As a number of immigration and labor scholars have noted, shifting economic and demographic realities have significantly reduced the number of unionized workplaces in the United States.<sup>120</sup> The percentage of unionized workplaces is at a low last seen in 1916.<sup>121</sup> Thus, even though migrant workers have collaborated with unions in a number of instances, the labor movement as a whole has been diminished, thus limiting the ability of unions to help organize and support migrant workers.<sup>122</sup>

The decline of the labor movement (along with the realities of segregated workplaces) curtails the scope of my claim. If the strongest proxy for cross-status solidarity is NLRA claims arising out of unionized workplaces, then organized labor's decline suggests that a regime of screening for solidarity may be more aspirational than operational. Yet, such a regime has room to grow. Although organized labor formally opposed or ignored the rights of unauthorized migrants and some classes of authorized ones for much of the twentieth century, the changing landscape has prompted labor to reconsider these long-held positions.<sup>123</sup> And even while labor organizations continue to discuss whether and to what extent they wish to organize across immigration

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<sup>119</sup> See Gordon and Lenhardt, 55 UCLA L Rev at 1230–36 (cited in note 100); Rodríguez, 2007 U Chi Legal F at 229 (cited in note 71) (arguing that given the realities of unauthorized migration and work, “a focus on integration is required to promote social peace”).

<sup>120</sup> See, for example, Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 Hofstra Labor & Empl L J 133, 133 n 1 (1998).

<sup>121</sup> See Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, NY Times B1 (Jan 23, 2013). An interesting point is that despite the national trend in declining union membership, California and other states in the southwest appear to be moving in the opposite direction. While the national percentage average of unionized workplaces hovers around 12.5 percent, the percentage in California sits at around 18.4 percent. See Alana Samuels, *Latinos Lead the State's Union Gains; Membership Growth Bucks US Trend*, LA Times A1 (Jan 24, 2013).

<sup>122</sup> See Immanuel Ness, *Immigrants, Unions, and the New U.S. Labor Market* 44–45 (Temple 2005).

<sup>123</sup> Most notably, labor organizations tended to oppose temporary guest workers. See Gordon, 80 S Cal L Rev at 509, 553 (cited in note 81); Rodríguez, 2007 U Chi Legal F at 279–81 (cited in note 71).

status lines,<sup>124</sup> unauthorized workers appear to be forging ahead in some industries, drawing attention to and improving working conditions in a few notable instances.<sup>125</sup>

### III. DESIGN QUESTIONS

The executive has tracked rather than ignored unauthorized migrants asserting workplace rights, and such a choice has advanced rather than stalled the goal of identifying immigrants who are willing and able to form meaningful bonds with current members. So far, so good—but what will it take to translate this good idea into sustainable policy over the long term? In this Part, I explore three basic design questions that policymakers will have to address. One is a proper law question. Workplace-related claims operate as proxies for solidarity, and like all proxies, they are not without limitations. The limitations are not fatal, but some types of workplace claims are more likely than others to reflect workplace bonds. Therefore, creating a taxonomy of workplace claims can improve the screening process over the long-term. A second question involves delegation. To whom should screening authority be delegated? Although the executive has delegated labor enforcement power with some reluctance, the truth is that an array of delegation options exist within the universe of workplace regulation. A third and final question involves timing: At what point in the migration process should workers be screened? Each model involves tradeoffs, which I address.

#### A. Which Types of Workplace Claims?

Although I have been fixated on NLRRA-type labor claims—those claims involving collective rights stemming from union membership—the reality is that the workplace is regulated by a variety of laws grounded in both labor and employment law. Thus, if the screening goal is identifying those migrant workers with whom US workers feel the strongest bonds, one set of design questions should focus on determining which laws, within

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<sup>124</sup> See Chinyere Osuji, *Building Power for “Noncitizen Citizenship”: A Case Study of the Multi-ethnic Immigrant Workers Organizing Network*, in Milkman, Bloom, and Narro, eds, *Working for Justice* 89, 101–04 (cited in note 88).

<sup>125</sup> See Edward J.W. Park, *Labor Organizing beyond Race and Nation: The Los Angeles Hilton Case*, 24 *Intl J Soc & Soc Pol* 137, 138–39 (2004) (noting that while immigrants are less likely to hold unionized jobs they have “spearheaded some of the most successful and innovative labor campaigns”).

the larger suite of labor and employment laws, best capture this dynamic.

Traditionally, labor law and employment law have been understood to function within two different and largely incompatible paradigms. Labor law outlines a series of rights that are expressed collectively, whereas employment law articulates a set of rights that are asserted individually, largely through private rights of action.<sup>126</sup> This conceptual distinction suggests that within the universe of workplace laws, labor law provides a finer sieve through which removal cases might be filtered. After all, the pursuit of labor remedies attendant to protected union organizing strongly suggests a firm embrace of and commitment to workplace bonds.

At the same time, other labor laws contain no formal organizing component, which diminishes their utility as a screening device. In *Singh v Jutla*,<sup>127</sup> for example, the district court permitted an unauthorized migrant to pursue an FLSA claim against his “business partner” for unpaid wages and overtime pay.<sup>128</sup> It is less obvious how providing relief from removal in that instance furthers the goal of selecting members who evince workplace bonds with current members.<sup>129</sup>

There are further complications. Larger shifts in the labor landscape suggest that organizing efforts in some sectors may be moving away from the traditional collective bargaining model.<sup>130</sup> Although the NLRA stands as the paradigmatic example of regulation through collective rights, over the last several years, workplace scholarship has begun exploring how parallel areas of workplace law have fostered organizing among workers. These

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<sup>126</sup> See Sachs, 29 Cardozo L Rev at 2688–89 (cited in note 80).

<sup>127</sup> 214 F Supp 2d 1056 (ND Cal 2002).

<sup>128</sup> Id at 1057–59.

<sup>129</sup> To be clear, providing relief from removal to the plaintiff in *Singh* is completely consistent with other immigration objectives related to workplace enforcement, namely deterring unauthorized migration and deterring the exploitation of workers. For descriptions of the deterrence rationales, see *Hoffman Plastic*, 535 US at 153–54 (Breyer dissenting) (finding deterring unauthorized immigration to be a goal of immigration policy); Saucedo, 67 Ohio St L J at 980–86 (cited in note 115) (outlining the statutory goal of preventing exploitation of workers); Donald M. Kerwin and Kristen McCabe, *Labor Standards Enforcement and Low-Wage Immigrants: Creating an Effective Enforcement System* 44 (Migration Policy Institute July 2011), online at <http://www.migrationpolicy.org/pubs/laborstandards-2011.pdf> (visited Mar 4, 2013).

<sup>130</sup> For example, the restaurant industry has proven to be resilient to organizing unionization efforts, and yet Professor Sameer Ashar documents the ways in which the Restaurant Opportunities Center of New York has utilized a creative suite of organizing tools to achieve worker justice. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Cal L Rev 1879, 1889–98 (2007).

scholarly interventions have been particularly noticeable in the context of employment law. As Professor Benjamin Sachs argues, the NLRA has proven to be both “too weak” and “too rigid” to accommodate the evolving organizing needs of workers, thus forcing workers to redirect their claims through employment law channels.<sup>131</sup> Although employment rights are typically conceived as “individualistic,” in practice, workers have deployed them to achieve a sense of solidarity, a key part of which is “a shared experience of unjust treatment.”<sup>132</sup> Employment violations strategically framed as shared harms can help elevate that characteristic within the hierarchy of identity characteristics including race, national origin, and language. Thus, although the NLRA has traditionally protected the collective interests of workers, standing beyond the NLRA’s shadow need not hamper organizing efforts. In fact, doing so, according to some proponents of this view, may liberate it.

In short, solidarity entails individuals foregoing short-term gain in order to advance the community’s long-term gain. And while labor laws protect only those acts of solidarity that advance economic gains, other workplace laws, like employment laws, are not so limited. As the labor market continues to evolve, workers can respond by creatively redirecting legal claims through alternate channels to achieve a shared understanding of unjust treatment.

A related question is whether and to what extent *intragroup* solidarity advances immigration’s integrationist goals. A part of the promise of screening for migrants engaging in intergroup, or cross-status, solidarity is that immigration officials can reliably conclude that because these migrants have been willing and able to form meaningful social bonds with US workers once already, they are likely to do so with other US workers moving forward. It is harder to reach the same conclusion regarding migrants who have stood with other migrants. Such acts of defiance certainly demonstrate a willingness to punish bad-actor employers. It becomes harder to infer that these workers necessarily have or are willing to form social bonds with native workers. This is not to say such workers should not be allowed to proceed with their claims against their bad-actor employers. They should. But a screening regime that takes solidarity seriously as a marker of membership potential would have to consider the composition of

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<sup>131</sup> See Sachs, 29 *Cardozo L Rev* at 2685–87 (cited in note 80).

<sup>132</sup> *Id.* at 2727 (“[S]hared experience of unjust treatment will increase the salience of the collective identity which is the basis for such treatment.”).

the community of interest in allocating immigration benefits. If the point of screening for solidarity is to use the workplace as a laboratory for integration (rather than as a site for implementing a strategy of deterrence), this is a crucial step.

#### B. Should Screening Duties Be Delegated?

Another design question relates to delegation. The delegation and devolution of power to local entities has been justified by the desire to expand the executive's reach in screening for "serious criminal aliens."<sup>133</sup> The executive might similarly expand its screening powers in this context. The current model of screening focuses on those migrants who report or seek to remedy labor violations. But one option would be to expand the number of triggers that slow the removal process. For example, the 2011 MOU disrupts the removal of immigrants only where a particular workplace is subject to DOL investigation.<sup>134</sup> As a result, the executive's screening capacity is constrained by DOL's resources because the agency simply cannot respond to, much less investigate, every complaint that is filed. But partnering with state labor investigations can have a force-multiplier effect,<sup>135</sup> thus expanding the executive's ability to screen for migrants engaging in acts of solidarity. Indeed, some scholarship suggests that state and local labor agencies have been more successful than their federal counterparts in protecting the workplace-related rights of unauthorized migrants.<sup>136</sup>

While the delegation of authority to state labor agencies would expand the reach of a solidarity-based screening regime, such a move would encounter at least two difficulties. First, as in the "cimmigration" context, regulators will confront principal-agent problems. For example, our nation's labor laws permit states to create local versions of the federal Occupational Safety

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<sup>133</sup> Morton, Memorandum, *Civil Immigration Enforcement: Priorities* at 1-3 (cited in note 48).

<sup>134</sup> *Revised Memorandum of Understanding* at \*2 (cited in note 19) ("ICE agrees to refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute.").

<sup>135</sup> See Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime Part I: A New Vision for Workplace Regulation*, 33 NYU Rev L & Soc Change 479, 547-50 (2009) (arguing in favor of greater coordination between federal and state labor enforcement agencies).

<sup>136</sup> See, for example, Gleeson, 35 L & Soc Inq at 562 (cited in note 10); Shannon Gleeson, *Organizing for Immigrant Labor Rights: Latino Immigrants in San Jose and Houston*, in S. Karthick Ramakrishnan and Irene Bloemraad, eds, *Civic Hopes and Political Realities: Immigrants, Community Organizations, and Political Engagement* 107, 119 (Russell Sage 2008).

and Health Act of 1970<sup>137</sup> plans.<sup>138</sup> Although these plans are subject to federal approval, once these plans are approved, it is difficult for federal labor agencies to continue monitoring their local counterparts, thus creating the distinct possibility that local labor enforcement will deviate from federal priorities and standards.<sup>139</sup> One of the advantages of consolidating screening power in the hands of DHS and DOL officials is that power remains centralized.<sup>140</sup>

A second hurdle will be that delegating screening power may actually neutralize the very trait that enables state labor agencies to protect the rights of unauthorized migrants in the first place. Whenever state labor agencies interact with workers, engage stakeholders, or provide information to the community more generally, they can credibly promise that an informational firewall separates them from federal entities.<sup>141</sup> But this credibility will strain under the weight of misperceptions that would inevitably arise if state and local labor enforcement agencies begin acting on the basis of delegated power. And while the vast majority of information that is shared with DOL (which is itself bound by an informational firewall) will not be shared with DHS, immigrant communities often suffer from imperfect information about what legal obligations state and local labor agencies do and do not have to carry out.<sup>142</sup>

### C. When Should Workers Be Screened?

A final design question is a more fundamental one. Sorting other removable migrants in the removal pipeline operates at the back end, often well after a noncitizen has effectuated an unauthorized entry or overstayed the terms of her visa. As others have pointed out, the benefits of ex post screening can be measured in terms of information acquisition—immigration officials can simply learn more about potential members in this

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<sup>137</sup> Pub L No 91-596, 84 Stat 1590, codified as amended at 29 USC § 651 et seq.

<sup>138</sup> 29 USC § 667(b).

<sup>139</sup> See Jayesh M. Rathod, *Protecting Immigrant Workers through Interagency Cooperation*, 53 Ariz L Rev 1157, 1161–62 (2011).

<sup>140</sup> Ensuring that low-level agency officials carry out the executive's bidding presents its own challenges. As I have explored elsewhere, an agency's mission orientation, organizational structure, and the number and nature of enforcement goals all affect whether and to what extent agency decision making reflects the will of the president and other high-ranking cabinet members. Lee, 53 Ariz L Rev at 1092–93 (cited in note 20).

<sup>141</sup> See Gleeson, *Organizing for Immigrant Labor Rights* at 119 (cited in note 136).

<sup>142</sup> See Lee, 53 Ariz L Rev at 1100–05 (cited in note 20).

manner.<sup>143</sup> But such a system operates at a considerable cost to the migrants: because these immigration benefits are distributed largely as a matter of discretion, unauthorized migrants must organize their lives amidst a set of rules mired in uncertainty. Correcting this uncertainty requires Congress to redesign the labor migration process and to grant US workers or organizations representing their interests the power to assume greater formal control over the member-selection process at the front end.

Ultimately, Congress retains a monopoly over the criteria that must be fulfilled in order to access full membership. Although the executive can expand the channels through which U visa applicants may come to the attention of immigration officials, agency officials cannot grant applications to any more noncitizens than the annual visa limit permits.<sup>144</sup>

The executive can distribute some benefits without congressional oversight, but these benefits may be more easily extinguished. For example, the exercise of prosecutorial discretion often comes in the form of conferring deferred-action status to otherwise removable migrants.<sup>145</sup> Such status can attach at various stages of the removal process and carries different meanings. It might mean that an agency official has decided not to initiate removal proceedings, or it could mean that a migrant's case has simply been deprioritized, which means that it might be taken from the bottom of the pile at any time. And as is the case with most exercises of enforcement discretion, deferred-action status is largely unreviewable by a court.<sup>146</sup> At the same time, the membership benefits in this context are thinner and less robust. Conferring deferred-action status upon a worker saves that worker from removal, but granting a migrant's request for reprieve is not the same as inviting that migrant to become a member. In a similar vein, DHS's "silent raids" do not point the way toward membership, but neither do they set out to sweep unauthorized migrants into the removal pipeline.<sup>147</sup> Although such an approach permits these workers to "live to work another day" and could be understood as a way to preserve the opportunity for membership benefits in the future, the predicta-

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<sup>143</sup> Cox and Posner, 59 *Stan L Rev* at 847–49 (cited in note 45).

<sup>144</sup> See INA § 214(p)(2)(A), 8 USC § 1184(p)(2)(A).

<sup>145</sup> See, for example, *Wan Chung Wen v Ferro*, 543 F Supp 1016, 1017 (WDNY 1982).

<sup>146</sup> See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 *U NH L Rev* 1, 8 (2012).

<sup>147</sup> Miriam Jordan, *Fresh Raids Target Illegal Hiring*, *Wall St J A2* (May 3, 2012).

ble consequence of this approach is to push migrants into a sweatshop or other workplace operating within the informal economy.

Without any real guarantees of obtaining U visa certification or a favorable exercise of prosecutorial discretion, unauthorized migrants must weigh whether the potential benefits of obtaining membership benefits (in whatever form) are worth the dangers of outing themselves to immigration enforcement officials. The Obama administration has refined the removal process to allow unauthorized workers to press their equitable claims, but at a certain point, no amount of refining can make up for what the current screening system lacks, namely clearly enforceable guidelines for beneficiaries.<sup>148</sup>

A strong case could be made for screening migrants at the front end through a formal (and congressional rather than executive) redesign of the labor migration system. The redesign would give labor organizations formal sponsorship authority, which is currently monopolized by employers. This is precisely the kind of reform for which Professor Gordon has creatively and persuasively advocated.<sup>149</sup> Under Professor Gordon's model, these organizations would operate in a transnational context, which

would entitle migrants to services, benefits, and rights that cross borders just as the workers do. In exchange for the authorization to work that they would receive as members, migrant workers would commit to the core value of labor citizenship: solidarity with other workers in the United States,

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<sup>148</sup> The Deferred Action for Childhood Arrivals (DACA) program provides one example of how the executive can distribute immigration benefits with some measure of clarity and without congressional input. In a memorandum issued by DHS, Secretary Janet Napolitano provides a clear set of criteria defining who may qualify for deferred action relief. See Janet Napolitano, Secretary of Homeland Security, Memorandum for David V. Aguilar, Acting Commissioner, US Customs and Border Protection, Alejandro Mayorkas, Director, US Citizenship and Immigration Services, John Morton, Director, ICE, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012), online at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (visited Mar 4, 2012). Given the controversial nature of this program, it is unlikely the executive could provide relief through similar channels to unauthorized workers asserting labor claims or to classes of migrants other than those inviting sympathies comparable to the high-achieving youth who benefitted under DACA. For criticisms of this program, see Robert J. Delahunty and John C. Yoo, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 *Tex L Rev* \*7–41 (forthcoming 2013), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144031](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144031) (visited Mar 4, 2013); *Arizona v United States*, 132 S Ct 2492, 2521–22 (2012) (Scalia dissenting).

<sup>149</sup> Gordon, 80 S Cal L Rev at 509, 565–70 (cited in note 81).

expressed as a commitment to refuse to work under conditions that violate the law or labor agreements.<sup>150</sup>

Transferring formal screening duties to labor organizations, Professor Gordon argues, will help resolve the tension that US workers face in seeking to build ties with unauthorized workers (which improves working conditions) while controlling the flow of future unauthorized migration (which undermines such conditions).<sup>151</sup>

The benefit of formalizing and moving up the screening process is that it makes the entire process more transparent. It allows future migrants (mostly from Latin America) to make better choices about whether they want to undertake the risky journey north. Rather than entering the United States “outside of the law”<sup>152</sup> and hoping that solidarity opportunities arise so they can prove themselves, migrant workers can commit at the front end, offer an “oath of solidarity,”<sup>153</sup> and enter the United States with a clear picture of the conditions under which admission will be revoked.

Of course, an oath of solidarity places a lot of faith in a migrant’s word. In trading information-acquisition (which benefits the state) for certainty (which by-and-large benefits the migrant), Professor Gordon’s model invites the possibility of migrants shirking on their solidarity commitments once they gain entry in part because it short-circuits the organic and informal process by which intimacy and solidarity opportunities often arise. One way to reconcile these competing concerns would be to impose some set of continuing obligations on the immigrants once they enter the United States. As a part of their oath of solidarity, workers admitted in this manner would agree that a failure to make good on a solidarity oath triggers the possibility of removal.<sup>154</sup>

Injecting the possibility of removal raises another risk: the possibility of subjecting workers to exploitation at the hands of US workers (and the organizations that represent them) rather than US employers. To control for this, the migration rules could be calibrated so that the solidarity oath (and its concomitant removal provision) would last for a relatively short period of

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<sup>150</sup> *Id.* at 509.

<sup>151</sup> *Id.* at 584–86.

<sup>152</sup> Hiroshi Motomura, *Immigration outside the Law*, 108 *Colum L Rev* 2037, 2038 n 1 (2008).

<sup>153</sup> Gordon, 80 *S Cal L Rev* at 567 (cited in note 81).

<sup>154</sup> See *id.*

time. Other migration rules employ a similar type of probationary period. Since 1986, Congress has subjected admission on the basis of a marriage to a US citizen to a two-year conditional status. This conditional status can be removed only by petition at the two-year mark<sup>155</sup> and is designed to deter the use of sham marriages to obtain membership benefits.<sup>156</sup> This is precisely the dynamic implicated by screening for solidarity at the front end. Thus, the immigration code might sensibly extend its regulation of intimacy from the home into the workplace should Congress vest labor organizations with sponsorship power.

#### CONCLUSION

Regulating the workplace has long posed a vexing challenge for immigration officials. But once we account for enforcement realities, the challenge becomes more manageable, and it even begins bearing the markers of rationality. Labor law is more than a tool to be used to guard against exploitative employment practices. It can also facilitate the member-selection process and advance immigration law's integrationist project by collecting useful and otherwise difficult to obtain information about migrants and their commitments.

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<sup>155</sup> See Immigration Marriage Fraud Amendments of 1986 § 2, Pub L No 99-639, 100 Stat 3537, 3537–38, amending INA § 216A, codified at 8 USC § 1186a.

<sup>156</sup> See Immigration Marriage Fraud Amendments § 2, 100 Stat at 3537.