NOTE

Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After *Hoffman Plastic Compounds, Inc. v. NLRB*[1]

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I. INTRODUCTION

In May 1988, Hoffman Plastic Compounds, Inc. (Hoffman) hired José Castro to operate various blending machines at its chemical manufacturing plant.[2] After Castro had worked at the company for several months, a union organizing campaign began there.[3] One month after Castro showed support for the union, Hoffman fired him and three other employees who were also union supporters.[4] Upon investigating the matter, the National Labor Relations Board (NLRB) found that Hoffman had unlawfully selected Castro and the other employees "in order to rid itself of known union supporters," and had therefore engaged in "wrongful termination" in violation of Section 8(a)(3) of the National Labor Relations Act (NLRA).[5]

At the compliance hearing, however, Castro revealed that his immigration documents were fraudulent.[6] Consequently, the Administrative Law Judge (ALJ) held that Castro was not eligible for

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1. 535 U.S. 137 (2002).
2. *Id.* at 140.
3. *Id.*
4. *Id.*
5. *Id.* (citing 306 N.L.R.B. 100 (1992)). NLRA § 8(a)(3) prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* at 140 n.1 (citing 29 U.S.C. § 158(a)(3)).
6. 314 N.L.R.B. 683, 685 (1994).

the usual remedies associated with wrongful termination, e.g., backpay and reinstatement.[7] Subsequently, the NLRB overturned the ALJ's holding with respect to backpay.[8] After the District of Columbia Circuit Court of Appeals denied review and enforced the NLRB's order,[9] the United States Supreme Court granted certiorari, and by its decision, resolved the circuit split over whether undocumented immigrants should be entitled to backpay under the NLRA.[10]

In its 5-4 decision, the Court reasoned that awarding "undocumented aliens"[11] backpay under the NLRA violates and undermines the immigration policy set out by Congress in the Immigration Reform and Control Act (IRCA),[12] which makes it illegal for undocumented immigrants to be employed or to obtain employment.[13] As such, the Court held that IRCA forecloses undocumented immigrants from receiving backpay under the NLRA.[14]

This Note explains why the Supreme Court's decision in *Hoffman* threatens to do the exact opposite of what the Court intended. Specifically, while the majority's opinion purports to maintain the integrity of IRCA, it will likely undermine the Act by encouraging employers to hire undocumented workers.[15] In addition, the opinion's fundamentally problematic reasoning has caused much

7. *Id.* at 686.

8. 326 N.L.R.B. 1060 (1998).

9. Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000), *aff'd on reh'g en banc* 237 F.3d 639 (D.C. Cir. 2001).

10. *Hoffman*, 535 U.S. at 142 n.2.

11. In immigration case law, the term "undocumented alien" is commonly used to describe a person without legal immigration status. *See, e.g.*, *Hoffman*, 535 U.S. at 140. However, the author finds the term "alien" degrading; therefore, whenever possible, she chooses not to use it. Nevertheless, the terms "immigrant" and "non-immigrant" connote certain types of immigration status under the law. *See, e.g.*, The Immigration and Nationality Act, 8 U.S.C. §§ 1101, 1101(a)(15), 1153 (2001). For purposes of this Note, "undocumented immigrant" will be synonymous with "illegal alien" and "undocumented worker" will be synonymous with "illegal alien worker." The use of the term "alien" is preserved when it appears in quoted materials and when it is necessary to describe a person that is not a citizen or a national of the United States. *See* 8 U.S.C. § 1101(a)(3).

12. *Hoffman*, 535 U.S. at 140.

13. 8 U.S.C. § 1324a (1997).

14. *Hoffman*, 535 U.S. at 140.

15. *See* Irene Zopath Hudson & Susan Schenk, Note, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 362 (2002) (citing H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986)); *see also* Rebecca Smith & Maria Blanco, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since* Hoffman Plastic Compounds v. NLRB, Mexican American Legal Defense and Educational Fund & National Employment Law Project, 8 BENDER'S IMMIGR. BULL. 890 (Jan. 2003), *available at* http://www.nelp.org/docUploads/maldef%20nelp%2Epdf (last visited July 20, 2003).

confusion and generated substantial litigation in federal and state courts over a very short period of time: Employer defendants have either been misled to believe or have opportunistically argued that *Hoffman* immunizes them from liability in a variety of labor and employment cases involving undocumented immigrants.[16] Nevertheless, the post-*Hoffman* cases suggest that most courts are attempting to perform damage control by limiting *Hoffman* to its facts and staking out areas of labor and employment law that are not affected by the holding. However, a small number of courts have been less careful, allowing *Hoffman* to have influence beyond its reasonable scope.

In addition to creating confusion, the *Hoffman* decision offends traditional notions of statutory construction by departing from both the text of the statute and the legislative intent. Furthermore, the holding has the de facto effect of forging a new way to investigate IRCA violations and grants employers a new defense to liability. Moreover, in effect, the holding condones employer violations of IRCA. In light of the foregoing and *Hoffman*'s threat to immigration, labor, and employment law and policy, Congress must clarify its intent or the Court must overturn its decision.[17]

Following this Introduction, Part II of this Note provides some background by introducing basic issues faced by undocumented immigrants in the U.S. workforce and by outlining the legal landscape pertinent to the *Hoffman* decision and subsequent case law. It also summarizes the facts, the majority opinion, and the dissent in *Hoffman*. By examining memoranda and announcements from federal agencies that enforce the labor and employment laws at issue in *Hoffman*, Part III analyzes how lower courts and agencies have interpreted *Hoffman*. Part III also outlines subsequent cases, identifying principles and themes they have generated.[18] Part IV explains why courts should continue to limit *Hoffman* to its facts and why the Court should overturn the case or Congress should clarify its intent. A summary and concluding remarks are presented in Part V.

16. *See* Smith & Blanco, *supra* note 15, at 890.

17. *See, e.g.*, *id.* at 894.

18. For a more exhaustive survey of cases subsequent to *Hoffman*, as well as a discussion of immigrant experiences after *Hoffman*, see generally Smith & Blanco, *supra* note 15.

II. U.S. IMMIGRATION AND EMPLOYMENT POLICY AND THE *HOFFMAN* DECISION

A. Immigrants in the U.S. Workforce

Immigrant workers, "regardless of their legal status or nationality,"[19] are entitled to some legal protection under the Fair Labor Standards Act (FLSA),[20] the anti-discrimination laws,[21] and the NLRA,[22] among other laws concerning labor and employment.[23] These protections are particularly significant because employers often exploit unauthorized alien workers[24] (or "undocumented workers") for their lack of political power, and their willingness to tolerate poor working conditions and low wages.[25]

Despite the protections afforded by the labor, employment, and anti-discrimination laws, undocumented workers often do not know that they have rights.[26] Furthermore, those who do know they have rights may be afraid to assert them for fear of employer retaliation, including being reported to immigration authorities.[27] For many undocumented immigrants, such reporting could end in removal,

19. Karen A. Herrling, *Federal Employment Laws and Immigrant Workers*, IMMIGR. BRIEFINGS, Nov. 2000, *available at* WL 00-11 Immigr. Briefings 1; *see* Eric Schnapper, *Righting Wrongs Against Immigrant Workers: A Supreme Court Decision Raised Difficult Questions About What Remedies Are Available to Immigrants Who Lack Work Authorization when Their Federal or State Rights Are Violated*, TRIAL, Mar. 2003, at 46.

20. 29 U.S.C. § 203(e) (2001).

21. 42 U.S.C. § 2000e(f) (2000).

22. 29 U.S.C. § 151(3) (2001).

23. Herrling, *supra* note 19, at 1.

24. For an overview of statistics about undocumented immigrants as workers in the United States, see Rebecca Smith et al., National Employment Law Project, *Undocumented Workers: Preserving Rights and Remedies After* Hoffman Plastic Compounds v. NLRB 1–2 (Apr. 2003), *available at* http://www.nelp.org/docUploads/wlghoff040303%2Epdf (last visited July 28, 2003). Smith et al. also point out that "[m]any of the industries that are major employers of the undocumented are also known for low wages, dangerous conditions, and frequent violations of labor laws." *Id.* at 2.

25. Brief of Amici Curiae American Civil Liberties Union (ACLU) et al., 2001 WL 1631648, at *11, *Hoffman*, 535 U.S. 137 (2002) (No. 00-1595) [hereinafter Brief of ACLU]. The U.S. Congress Select Commission on Immigrant and Refugee Policy ("SCRIP"), which studies immigration and recommends legislative responses, considered the appeal of foreign workers to U.S. employers and concluded that U.S. employers have had an economic incentive to hire undocumented immigrant workers because such workers "are vulnerable to exploitation" and employers "prey on their fear." *Id.* (citing 132 CONG. REC. H9708, 9712 (daily ed. Oct. 9, 1986)). *See, e.g.*, Smith & Blanco, *supra* note 15, at 893; *cf.* Brief of Amicus Curiae: Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *reprinted in* 1 SEATTLE J. SOC. JUST. 795, 803-806 (2003) (explaining that a large portion of low wage, high risk employment in the United States is performed by undocumented immigrants); Hudson & Schenk, *supra* note 15, at 362 (citing H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986)).

26. Herrling, *supra* note 19, at 29.

27. Hudson & Schenk, *supra* note 15, at 369.

among other immigration consequences.[28] Thus, undocumented workers have a great incentive to keep quiet and to avoid conflicts with employers.[29]

Notably, regardless of their lack of political power and the risk of exploitation and deportation, undocumented immigrants continue to flood into the United States.[30] For many, even some of the worst working conditions in the United States are more tolerable or profitable than what they find in their home countries.[31] For others, basic political freedom draws them, despite their limited ability to influence or participate in the political system.[32] They come regardless of changes in legislation or policy, seeking the "American Dream" or simply a better life.[33] Recognizing that undocumented immigrants are not easily deterred from obtaining illegal employment, laws drafted to discourage illegal immigration and employment practices typically focus on the behavior of employers.[34]

B. The Legal Landscape

To understand the significance of the Court's rationale in *Hoffman*, one must first be familiar with the purpose and scope of the U.S. immigration and employment laws pertinent to the discussion of undocumented immigrant workers and backpay. The following discussion provides a brief overview of the relevant legal landscape.

1. An Overview of the Immigration Laws

In the aftermath of September 11, 2001, the creation of the U.S. Department of Homeland Security, and the enactment of the U.S.A. Patriot Act,[35] the Bush Administration's immigration policy has become focused on controlling the U.S. borders for the prevention of

28. *Id.*

29. *Id.*

30. *See, e.g.*, Brief of ACLU, *supra* note 25, at *12.

31. *See, e.g.*, A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 412 (1995). Notably, a final report issued by SCRIP stated that "however low the salaries of undocumented/illegal aliens in the United States, the studies indicate that their U.S. wages are many times that of previous wages in the home country." Brief of ACLU, *supra* note 25, at *10–11.

32. *See* R. Paul Faxon, Comment, *Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT'L L. & BUS. 203, 242 (1984).

33. *Id.*

34. *See* Brief of ACLU, *supra* note 25, at *2; *see also* Hudson & Schenk, *supra* note 15, at 363; Faxon, *supra* note 32, at 204.

35. Pub. L. No. 107-56, 115 Stat. 272-402 (Oct. 26, 2001). The statute's purposes are "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." *Id.*

terrorism.[36] However, the majority of American immigration laws were not originally designed with that focus; in general, they were created to protect American jobs for legal workers.[37]

The Immigration and Nationality Act of 1952 (INA),[38] although amended many times over the years,[39] "continues to be the basic immigration law of the country."[40] Through the INA, Congress granted the Immigration and Naturalization Service (INS) the power to regulate the entry and deportation of aliens into and from the United States.[41] In particular, by passing the INA, Congress hoped to preserve jobs for American workers by regulating immigration.[42] However, Congress soon found the INA ineffective for keeping undocumented workers from entering the U.S. workforce because it was still legal for employers to hire them.[43]

To address this shortcoming, in 1986 Congress passed the IRCA[44] for the general purpose of deterring employers from hiring undocumented immigrants, deterring illegal immigration, and preserving employment for U.S. citizens and legal immigrant workers.[45] Notably, much of the legislative history for IRCA suggests that Congress primarily intended to control the misconduct of employers, not employees.[46] In fact, "unlike efforts to make U.S. jobs

36. U.S. Dept. of Homeland Security, *at* http://www.dhs.gov/dhspublic/ (last visited July 20, 2003).

37. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892–93 (1983) (citing De Canas v. Bica, 424 U.S. 351 (1976)).

38. 8 U.S.C. § 1101–1537 (2000).

39. For example, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (codified as amended in scattered sections of 8 U.S.C.) substantially changed the INA of 1952 "by *inter alia*, establishing a new summary removal process to adjudicate claims of aliens who arrive in the United States without proper documentation." Barapind v. Reno, 72 F. Supp. 2d 1132, 1152 (E.D. Cal. 1999). Specifically, under the IIRIRA, courts are significantly limited in their jurisdiction to review denial of removal orders. *Id.*

40. LII: Legal Information Institute, *Immigration Law: An Overview*, *at* http://www.law.cornell.edu/topics/immigration.html (last visited July 20, 2003).

41. 8 U.S.C. §§ 1225–1227 (1994). Notably, as of March 2003, the INS was replaced by other agencies within the Department of Justice and the Department of Homeland Security, including the Bureau of Immigration and Customs Enforcement and the Bureau of Citizenship and Immigration Services. *See* U.S. Dept. of Homeland Security, *DHS Organization, Building a Secure Homeland*, *at* http://www.dhs.gov/dhspublic/theme_home1.jsp (last visited Aug. 10, 2003).

42. *See, e.g.*, *Sure-Tan, Inc.*, 467 U.S. at 892–93 (citing *De Canas*, 424 U.S. 351 (1976)).

43. Hudson & Schenk, *supra* note 15, at 362; *see also* Brief of ACLU, *supra* note 25, at *12.

44. 8 U.S.C. § 1324a (1997).

45. Hudson & Schenk, *supra* note 15, at 363 (citing H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986)).

46. Brief of ACLU, *supra* note 25, at *12. For example, Congressman Lungren reportedly stated that IRCA was directed at employers "who have hired illegal aliens specifically so that they can exploit them." *Id.* at *11–12 (citing 132 CONG. REC. H10583, 10596 (daily ed. Oct. 15, 1986)).

less attractive to immigrant workers, which Congress considered futile, Congress decided that legislation aimed at reducing employers' economic incentives to hire undocumented immigrants was more likely to achieve the desired end" of IRCA.[47]

In broad terms, IRCA makes it illegal for employers to knowingly employ undocumented workers and for those workers to obtain employment without authorization from the INS or by using false documents.[48] Furthermore, if an employer unknowingly hires an undocumented immigrant, or if that immigrant becomes unauthorized to work while employed, the employer is required to discharge the worker upon discovery of the worker's undocumented status.[49] To comply with this duty under IRCA, employers must check documentation of citizenship or immigration status for all their employees or face sanctions upon investigation by immigration authorities.[50]

In particular, IRCA includes two statutory mechanisms designed to increase the cost of hiring undocumented workers.[51] First, an employer who is caught hiring unauthorized immigrants is subject to civil fines ranging from $250[52] to $10,000.[53] Criminal penalties and additional fines may be imposed on employers who engage in a "pattern of practice" of hiring undocumented immigrants.[54] Second, IRCA authorizes funds for the U.S. Department of Labor's (DOL) Wage and Hour Division to enforce employment standards laws on behalf of undocumented workers.[55] Through this provision, Congress recognized that such enforcement furthers IRCA's purpose by diminishing employers' incentive to hire undocumented workers in order to take advantage of an easily exploited workforce.[56]

47. Brief of ACLU, *supra* note 25, at *12.

48. 8 U.S.C. § 1324(a).

49. *Id.* § 1324(a)(2). *But see* Smith et al., *supra* note 24, at 4–5. Smith et al. posit that INS has given employers little reason to fear that they will actually be sanctioned for hiring undocumented immigrants. *Id.* at 4. In particular, they point out that under IRCA, employers are free to accept documents "that appear on their face to genuine and to relate to the individual named." *Id.* Thus, an employer can "ignore documents it suspects are invalid." *Id.* Ultimately, Smith et al. argue that "[r]ather than an effective deterrent to unlawful immigration, employer sanctions operate as a club against workers." *Id.* at 5.

50. 8 U.S.C. § 1324(a)(2).

51. Brief of ACLU, *supra* note 25, at *8.

52. 8 U.S.C. § 1324a(e)(4)(i), *cited in* Schnapper, *supra* note 19, at 47.

53. 8 U.S.C. § 1324a(a)(e)(4)(iii), *cited in* Brief of ACLU, *supra* note 25, at *8.

54. 8 U.S.C. §1324a(f), *cited in* Brief of ACLU, *supra* note 25, at *8.

55. Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, *cited in* Brief of ACLU, *supra* note 25, at *8.

56. *Id.*

In addition to IRCA, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which, among other things, limited immigration documents considered acceptable for the hiring process and revised the document fraud provisions.[57] These changes included adding more criminal sanctions against certain employers of undocumented immigrants and against undocumented employees who use false documents to obtain employment.[58]

Underlying all of these immigration laws is concern for the success of legal workers and the lawfulness of employer conduct. In addition, members of Congress have shown concern for the treatment of immigrants themselves, who have been known to endure exploitative and dangerous working conditions in exchange for meager compensation.[59]

2. An Overview of the Labor and Employment Laws

This subsection introduces the labor and employment laws invoked in *Hoffman* and subsequent cases. In general, these laws include all workers in their definitions of "employee," without regard to immigration status, in order to best promote safe, healthy, and just working environments for all workers.[60]

The NLRA,[61] enforced by the NLRB, regulates relations between unions and employers in the private sector.[62] The general purpose of the Act is to guarantee the right of employees to organize, to collectively bargain, and to report unfair labor practices.[63] In addition, the Act posits that these protections "[safeguard] commerce from injury, impairment, or interruption and [promote] the flow of

57. Pub. L. No. 104-208, § 412, 110 Stat. 3009, 3666, *cited in* Hudson & Schenk, *supra* note 15, at 364.

58. Hudson & Schenk, *supra* note 15, at 364.

59. Brief of ACLU, *supra* note 25, at *21–23.

60. *See, e.g.*, Herrling, *supra* note 19; Brief of ACLU, *supra* note 25, at *12–21; Schnapper, *supra* note 19, at 46.

61. 29 U.S.C. §§ 151–169.

62. *Id.*

63. *Id.* § 151.

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . . It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred.

Id.

commerce by removing certain recognized sources of industrial strife and unrest."[64] The Act makes a distinct connection between an employee's freedom to organize and the national interests of commerce.[65] Overall, the Act aims to protect workers as well as the national economy.

With similar goals in mind, Congress enacted the Fair Labor Standards Act (FLSA),[66] which strives "to eliminate substandard working conditions" for all employees.[67] The FLSA, enforced by the DOL's Wage and Hour Division, established minimum wage, overtime pay, record keeping, and child labor standards in the United States.[68] In particular, the FLSA requires covered employers to pay their employees the federal minimum wage and to pay non-exempt employees one and one-half times their regular rate of pay for overtime hours worked.[69] It also prohibits firing or discriminating against employees in retaliation for filing complaints or for participating in a legal proceedings under the FLSA.[70] In general, the Act posits that through its provisions it seeks to protect the "health, efficiency, and general well-being of workers" to promote the "orderly and fair marketing of goods in commerce."[71]

In addition, to bar employers from discriminating against individuals in the workplace on the basis of race, color, religion, sex, or national origin, Congress has passed comprehensive federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (Title VII),[72] the Equal Pay Act of 1963,[73] the Age

64. *Id.*
65. *Id.*
66. 29 U.S.C. §§ 201–219 (2001).
67. Hudson & Schenk, *supra* note 15, at 366 (citing 29 U.S.C. § 202(a)).
68. 29 U.S.C. §§ 204–207 (2001).
69. *Id.* §§ 202, 206, 207(a)(1).
70. *Id.* § 215(a)(3).
71. *Id.* § 202(a).
72. 42 U.S.C. § 2000e to §2000e-17 (1999). The purpose of this statute is as follows:
> An Act [t]o enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Preamble, Pub. L. 88-352, *available at* http://www.eeoc.gov/laws/vii.html (last modified Jan. 15, 1997).

73. 29 U.S.C. § 206 (2000). "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ." *Id.* § 206(a).

Discrimination in Employment Act of 1967,[74] Title I of the Americans with Disabilities Act of 1990 (ADA),[75] and the Civil Rights Act of 1991.[76] The basic purposes stated in these laws demonstrate Congress's commitment to deter employment discrimination and, when discrimination does occur, to create mechanisms to return injured employees to the positions they would have enjoyed had there been no discrimination.[77]

Finally, state legislatures have enacted workers compensation laws for the purpose of providing adequate, predictable, and efficient remedies to employees adversely affected by work-related conditions that led to work-related injuries.[78] In particular, these statutes have been designed to respond to industrial injuries that cause workers to incur medical expenses and losses of earnings.[79] Although each state has its own workers compensation statutes, essentially they are all based on the same model.[80] Most of these laws cover all private and most public employers,[81] and they generally protect only those employees injured during the course of employment.[82]

It is against the backdrop of these laws that the Supreme Court decided *Hoffman*. If limited to its facts, *Hoffman* only concerns cases in which undocumented workers seek backpay for wrongful termination under the NLRA. However, *Hoffman* has already been applied in cases that fall outside a narrow reading of the case. Indeed, because the Court in *Hoffman* spoke so generally about employment

74. 29 U.S.C. §§ 621–634. "It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b).

75. 42 U.S.C. § 12101 (2002).

76. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). The purpose of the Act is "to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes." *Id.* The Act goes on to state, in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

77. *Id.*

78. MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, EMPLOYMENT LAW § 6.1, at 536 (2d ed. 1999).

79. *Id.*

80. *Id.*

81. *Id.* § 6.4, at 541–42.

82. *Id.* § 6.6, at 552.

relationships and immigration policy, *Hoffman* threatens to undermine many of the policies and purposes that drove Congress to adopt the immigration and labor and employment laws discussed above.

C. *The* Hoffman *Decision*

This Section introduces the *Hoffman* opinion. While the majority spoke boldly about how immigration policy precluded José Castro from recovering backpay under the NLRA, the dissent maintained that immigration policy and an award of backpay to Castro were compatible.

1. The Facts

José Castro worked as a blending machine operator in Hoffman's chemical manufacturing plant.[83] After several months of employment there, Castro joined a union organizing campaign.[84] One month later, Hoffman fired him and three other union supporters.[85] Three years after Hoffman fired these workers, the NLRB investigated and found that the layoff violated Section 8(a)(3) of the NLRA[86] because Hoffman fired the workers to rid itself of union supporters.[87] Consequently, the NLRB ordered Hoffman to: (1) cease and desist from further violations of the NLRA; (2) post a detailed notice to its employees about the remedial order; and (3) offer reinstatement and backpay to Castro and other wrongfully terminated employees.[88]

When the parties proceeded to the compliance hearing before an ALJ,[89] Castro testified that he had used a friend's birth certificate to obtain employment at Hoffman.[90] Furthermore, there was no evidence to show that he had ever sought authorization or had been authorized to work in the United States.[91] Castro also testified that he fraudulently obtained a Social Security card and a California driver's license in order to obtain employment following his termination at Hoffman.[92]

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83. *Hoffman*, 535 U.S. at 140.

84. *Id.*

85. *Id.*

86. NLRA § 8(a)(3) prohibits discrimination "in regard to the tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3), *cited in Hoffman*, 535 U.S. at 140 n.1.

87. *Hoffman*, 535 U.S. at 140.

88. *Id.* at 140–41.

89. *Id.* at 141. The compliance hearing was meant to determine the amount of backpay owed to each discriminatee. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

Based on Castro's testimony and the Supreme Court's holding in *Sure-Tan, Inc. v. National Labor Relations Board*,[93] the ALJ held that Castro was precluded from collecting backpay and from reinstatement because, under *Sure-Tan*, backpay is tolled "during any period in which [a person] is not lawfully authorized to work in this country."[94] Therefore, because Castro was not working legally under IRCA,[95] the ALJ ordered that he receive no backpay.[96]

Four years after the ALJ's decision in *Hoffman*, the NLRB reversed with respect to withholding backpay.[97] The Board explained that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[98]

After the D.C. Circuit Court of Appeals denied Hoffman's petition for review,[99] the Supreme Court granted certiorari in order to resolve the split between those circuits holding that undocumented workers can collect backpay under the NLRA and one circuit holding that they cannot.[100]

2. The Majority Opinion

Writing for the 5-4 majority in *Hoffman*, Chief Justice Rehnquist (joined by Justices O'Connor, Scalia, Kennedy, and Thomas) held that federal immigration policy, as expressed by Congress in IRCA, foreclosed the NLRB from awarding Castro backpay under the NLRA because he had never been legally authorized to work in the United States.[101] Furthermore, Justice Rehnquist stated that the NLRB had overstepped its authority to award remedies because awarding Castro backpay would "trench" upon federal statutes and policies unrelated to its administrative

93. 467 U.S. 883, 892–93 (1984).

94. Hoffman Plastic Compounds, Inc., 314 N.L.R.B. 683, 685 (1994).

95. 8 U.S.C. § 1324a.

96. *Hoffman*, 314 N.L.R.B. at 685–86.

97. Hoffman Plastic Compounds, Inc. and Casimiro Arauz, 326 N.L.R.B. 1060, 1060 (1998).

98. *Id.* (citing A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 414 (1995)).

99. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 208 F.3d 229, 231 (D.C. Cir. 2000).

100. *Hoffman*, 535 U.S. at 142 n.2 (citing NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997) (holding that undocumented immigrant workers can collect backpay under the NLRA); Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 719–20 (9th Cir. 1986) (also holding that undocumented immigrant workers can collect backpay under the NLRA); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121–22 (7th Cir. 1992) (holding that undocumented immigrant workers cannot collect backpay under the NLRA)).

101. *Id.* at 140.

charge.[102] Justice Rehnquist also maintained that the purpose of IRCA would be undermined if backpay were awarded to individuals without work authorization.[103]

Justice Rehnquist explained that since the NLRB's inception, the Court has consistently set aside awards of reinstatement or backpay to employees who, like Castro, were found guilty of "serious illegal conduct" related to their employment.[104] For example, in *NLRB v. Fansteel Metallurgical Corp.*, the Court overturned the Board's award of reinstatement and backpay to employees who engaged in an unlawful confrontation with law enforcement officials subsequent to a sit-down strike.[105] In that case, the Court found that although the employer had committed serious violations of the NLRA, the NLRB had no discretion to remedy those violations with reinstatement because the Court was unable to conclude that Congress could have wanted employers to retain employees despite their employees' illegal conduct.[106]

In addition, Justice Rehnquist emphasized that the NLRB does not have the discretion to award remedies when doing so trenches upon federal statutes and policies unrelated to its administrative charge.[107] He noted that in *Southern S.S. Co. v. NLRB*,[108] the Court precluded sailors from receiving backpay and reinstatement, despite their employer's violations of the NLRA, because the sailors conducted a strike that ended in mutiny, which violated federal maritime law.[109] In that case, the Court stated that the NLRB was not commissioned to operate so "single-mindedly" that it may "ignore other and equally important [c]ongressional objectives."[110]

Similar to the ALJ, Justice Rehnquist also likened *Hoffman* to *Sure-Tan* because he perceived a conflict of laws between IRCA and the NLRB's preferred remedy for Castro.[111] In *Sure-Tan*, two companies had reported illegal alien employees to the INS in retaliation for their union activities.[112] Subsequently, the NLRB

102. *Id.* at 148–49.
103. *Id.* at 140.
104. *Id.* at 143.
105. *Id.*
106. *Id.* (citing NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939)).
107. *Id.* at 148–49.
108. 316 U.S. 31 (1942).
109. *Hoffman*, 535 U.S. at 143–44.
110. *Id.* On this point, Justice Rehnquist also discussed *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), *Connell Constr. Co. v. Plumbers*, 421 U.S. 616 (1975), and *Carpenters v. NLRB*, 357 U.S. 93 (1958).
111. *Hoffman*, 535 U.S. at 145 (citing *Sure-Tan*, 467 U.S. 883, 903 (1983).
112. *Sure-Tan*, 467 U.S. at 887.

investigated and found that the employers had violated Section 8(a), paragraphs (1) and (3) of the NLRA, and consequently, that the employees should be entitled to reinstatement.[113] Nevertheless, when the Supreme Court reviewed *Sure-Tan*, it held that the plaintiffs could not be reinstated because they had voluntarily departed to their home country of Mexico in order to avoid INS sanctions associated with deportation; as a result, they could not legally re-enter the United States to receive their remedy.[114]

While in *Hoffman* the NLRB argued that *Sure-Tan* only affects recoveries by undocumented immigrants who leave the United States, Justice Rehnquist clarified that the Court in *Sure-Tan* actually held that the NLRB's authority is limited by "federal immigration policy."[115] He asserted that at the time of *Sure-Tan*, Congress had not yet made it a separate criminal offense for an employer to employ an illegal alien.[116] Since *Sure-Tan*, Congress changed the legal landscape by passing IRCA, making it a crime for an unauthorized alien to subvert the employer verification system by utilizing fraudulent documents.[117]

Justice Rehnquist reasoned that the combined effect of *Sure-Tan*, *Fansteel*, cases like *Southern S.S. Co.*, and IRCA meant that the NLRB did not have the discretion to award Castro backpay.[118] Because Castro obtained work with fraudulent documents, Rehnquist framed Castro's conduct as seriously illegal and in violation of federal law.[119] Thus, like the employees in *Sure-Tan*, Castro could not recover backpay without trenching on the immigration laws, this time the IRCA instead of the entry provisions of the INA.[120]

Justice Rehnquist also criticized the underlying employment relationships between undocumented workers and employers, stating that "under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party contravening explicit congressional policies."[121] Furthermore, he emphasized that if the Court were to allow the NLRB to award Castro backpay, it would essentially condone payment "for years of work not performed, for wages that could not lawfully have been earned, and for

113. Operating Eng'rs Local Union No. 3 of Int'l AFL-CIO, 324 N.L.R.B. 1187 (1987).
114. *Hoffman*, 535 U.S. at 145.
115. *Id.*
116. *Id.* at 144–45.
117. *Id.* at 147–48.
118. *Id.* at 148.
119. *See id.*
120. *Id.*
121. *Id.*

a job obtained in the first instance by criminal fraud."[122] Moreover, the Chief Justice stated that "there is no reason to think that Congress . . . intended to permit backpay where but for an employer's unfair labor practices, an alien would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by the authorities."[123] He also explained that when the NLRB's interpretation of a statute is so far removed from its expertise, like the interpretation of an immigration statute, its interpretation of that statute is not entitled to deference from the Court.[124]

Additionally, Justice Rehnquist asserted that awarding backpay to Castro would not only trivialize the immigration laws but also condone and encourage future violations.[125] For example, if Castro had returned to Mexico, he would have been precluded from collecting backpay because he would have had to violate the entry provisions of the INA to return and collect it.[126] However, if the Court were to allow the NLRB to award Castro backpay in this case, Castro would essentially receive backpay for staying in the United States illegally.[127] Justice Rehnquist reasoned that this result would create an incentive to break the law.[128] In addition, Castro would not be able to mitigate damages by obtaining or attempting to obtain new employment, as the statute requires, "without triggering new IRCA violations."[129]

Ultimately, Justice Rehnquist stated that the NLRB's lack of authority to award Castro backpay did not preclude it from imposing other significant sanctions against the employer for terminating Castro in violation of the NLRA.[130] For example, the NLRB had already imposed orders that Hoffman cease and desist from its NLRA violations and post a notice detailing employees' rights and its previously unfair practices.[131] Finally, he stated that the NLRB has no authority to impose punitive sanctions on an employer.[132]

122. *Id.* at 148–49.
123. *Id.*
124. *Id.* at 143–44.
125. *Id.* at 150.
126. *Id.*
127. *Id.*
128. *Id.* at 150–51.
129. *Id.* at 151. For an interesting discussion of the importance of "mitigating damages" to the *Hoffman* decision, see Schnapper, *supra* note 19, at 46.
130. *Id.* at 152.
131. *Id.*
132. *Id.*

3. The Dissent

For the dissent, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) responded that backpay awards like the one in *Hoffman* are not inconsistent with the policies underlying IRCA; on the contrary, they are necessary to sufficiently deter employers from violating the labor laws.[133] Instead of finding a conflict between the laws, he framed the NLRA and IRCA as having a symbiotic relationship—that providing backpay to undocumented immigrants "reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent."[134] Furthermore, Justice Breyer asserted that immigration laws do not explicitly state how immigration violations are to affect the enforcement of other laws, such as the labor laws.[135] In fact, he reported that those in Congress who wrote the immigration laws stated explicitly and unequivocally that IRCA does not take from the NLRB any of its authority to remedy unfair practices committed against undocumented employees.[136] Moreover, he asserted that the availability of backpay awards to undocumented workers would not likely influence an individual's decision to migrate illegally to the United States.[137]

Notably, Justice Breyer posited that the purpose of the NLRA involves more than just victim compensation; in fact, remedies such as the backpay award serve as essential deterrents to employers.[138] Specifically, he asserted that "[w]ithout the possibility of the deterrence that backpay provides, the NLRB can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal."[139] As such, "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity."[140] Furthermore, he stated that the backpay award provides an important incentive to the employee to report illegal employer conduct.[141]

Justice Breyer also disagreed with Chief Justice Rehnquist's interpretation and use of precedent. In particular, he distinguished the facts in *Fansteel* and *Southern S.S. Co.* from the facts in *Hoffman*,

133. *Hoffman*, 535 U.S. at 153. However, there is also a view that the immigration laws and the labor laws are incompatible as written. *See, e.g.*, Hudson & Schenk, *supra* note 15, at 362 (offering an interesting proposal for legislative solutions to this incompatibility).

134. *Hoffman*, 535 U.S. at 153 (emphasis in original)

135. *Id.* at 154–55.

136. *Id.* at 157 (citing H.R. REP. NO. 99-682, at 58 (1986)).

137. *Hoffman*, 535 U.S. at 157.

138. *Id.* at 154.

139. *Id.*

140. *Id.*

141. *Id.*

stating that in the former two cases, the employees had "responded" to their employer's labor law violations with unlawful acts of their own.[142] Thus, in both cases, the Court held that the employees' own unlawful conduct provided the employer with good cause for discharge, severing any connection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay.[143] In contrast, the discharge in *Hoffman* was itself the unfair labor practice, and the backpay remedy was not precluded by some subsequent act of Castro's.[144]

Finally, Justice Breyer stated that Justice Rehnquist's decision undermined the public policies that underlie U.S. labor laws.[145] In particular, he criticized the Chief Justice's summary of the "negative features" involved in awarding backpay and reinstatement to undocumented immigrants: (1) for years of work not performed; (2) for wages that could not lawfully have been earned; and (3) for a job obtained in the first instance by a criminal fraud.[146] Justice Breyer explained that the backpay award simply requires an employer to pay an employee whom the employer *believed* could lawfully have worked in the United States: (1) for years of work that he would have performed; (2) for a portion of the wages that he would have earned; and (3) for a job that the employee would have held had that employer not unlawfully dismissed the employee for union organizing.[147] In other words, awarding backpay should never have brought up the issue of a conflict in the laws because the immigration laws were never implicated.

4. The Majority Opinion and Dissent Distinguished

Overall, Chief Justice Rehnquist and Justice Breyer agreed that achieving the stated purpose of IRCA is desirable. However, their opinions depart most sharply over whether IRCA and remedies under the NLRA are compatible or in conflict. In particular, they disagreed over whether an act which would be criminal under another federal law, in this case IRCA, should bar one from eligibility for backpay under the NLRA. According to Justice Breyer, precedent only bars backpay to employees who commit criminal acts in response to an

142. *Id.* at 158–59.
143. *Id.*
144. *Id.* at 159.
145. *Id.*
146. *Id.* at 160.
147. *Id.*

employer's labor law violations.[148] Other employees, particularly those who may be working illegally, have not been barred from such recovery.[149] In fact, the Court has even condoned the NLRB's award of remedies to employees who have committed serious illegal acts such as perjury.[150]

In contrast, Chief Justice Rehnquist framed the granting of backpay to an undocumented immigrant under the NLRA as a violation of IRCA itself.[151] And ultimately, he predicted that allowing the grant of backpay to undocumented immigrants would increase illegal immigration and employment of illegal immigrants, which would undermine the purpose of IRCA.[152]

The next Part shows how agencies and courts appear to be combating the confusion and opportunism *Hoffman* generated by adopting Justice Breyer's arguments, limiting *Hoffman* to its facts, identifying laws the holding did not touch, and articulating that federal immigration policy is served by enforcement of the labor and employment laws.

III. MITIGATING THE CONFUSION AND OPPORTUNISM THAT PRECIPITATED FROM *HOFFMAN*[153]

Hoffman is confusing and misleading, which has encouraged opportunistic employer defendants to exploit the opinion to limit their liability for remedies under any labor or employment laws in general, not just the NLRA. Specifically, Justice Rehnquist's statement that "awarding backpay to illegal aliens runs counter to policies underlying IRCA" has already been construed broadly by lawyers and their employer defendant clients.[154] Some employer defendants have already begun to argue that undocumented workers have "no labor rights" at all.[155] As a result, undocumented workers are being

148. *Id.* at 158–59

149. *Id.* at 157.

150. *Id.*

151. *Id.* at 151.

152. *Id.*

153. *See generally* Smith et al., *supra* note 24, at 16–20 (discussing practice methods to protect undocumented immigrant clients from "intrusive discovery," such as interview questions, informal discussions with opposing counsel, formal discovery protections, and motions in limine).

154. *Hoffman*, 535 U.S. at 149; *see infra* Section III.B (discussing how courts are limiting *Hoffman*).

155. *See* National Employment Law Project, Inc., *Employers' and Their Lawyers' Attempts to Expand U.S. Supreme Court Ruling in* Hoffman Plastic Compounds v. NLRB, (Sept. 18, 2002), *available at* http://www.nelp.org; Kilpatrick Stockton LLP, *Supreme Court Strikes Down NLRB's Back Pay Award to Illegal Aliens*, *available at* http://www.kilstock.com/site/print/detail?Article_Id=1053 (last visited July 23, 2003); *see also*

dissuaded from bringing labor law claims for fear of exposure of their immigration status, and ultimately, exposure to immigration authorities.[156] This reluctance to litigate claims will make undocumented workers more attractive to employers (as explained *infra* in Part IV).

Importantly, the *Hoffman* opinion is confusing because Justice Rehnquist never expressly limited or attempted to clarify its reach. For instance, he never explicitly distinguished NLRA backpay cases from other types of employment law cases in which undocumented workers may be eligible for labor and employment law remedies.[157] In addition, the general nature of the discussion suggests that the case is merely a harbinger for future cases in which any foreigner who has "never been legally authorized to work in the United States" is precluded by federal immigration policy from receiving any labor and employment law remedies.[158] By focusing much of the analysis on the illegality of the underlying employment relationships between undocumented workers and employers, Justice Rehnquist implicitly described relationships that give rise to all kinds of labor and employment law claims, not just NLRA claims.[159]

To date, the NLRB,[160] the DOL,[161] the Equal Employment Opportunity Commission (EEOC),[162] and state and federal courts[163]

Smith & Blanco, *supra* note 15, at 894. To illustrate, as Smith and Blanco point out in their article, a website for one of the United State's fifty largest law firms advises its employer clients to familiarize themselves with the holding in *Hoffman* for the purpose of saving money when defending claims for lost wages and benefits against undocumented immigrants. The website advises as follows:

> [T]he principles of the *Hoffman* decision are likely to be applied to remedies for violations of other laws as well. Thus, the potential financial exposure of employers for such claims as employment discrimination and wrongful discharge may be substantially reduced when the claimant is found to be an illegal alien who falsified identification documents to obtain employment. Employers should remain alert to this possibility when defending claims for lost wages and benefits.

Id.

156. *See* Smith & Blanco, *supra* note 15, at 893.

157. *Hoffman*, 535 U.S. at 145.

158. *Id.* at 140.

159. *See id.* at 149.

160. *NLRB Discusses Impact of* Hoffman Plastic *on Procedures and Remedies for Undocumented Workers*, IMMIGR. BUS. NEWS & COMMENT, 2002 WL 31398685 (Nov. 1, 2002).

161. Wage and Hour Division, U.S. Dept. of Labor, Fact Sheet No. 48: *Application of U.S. Labor Laws to Immigrant Workers: Effect of* Hoffman Plastics *Decision on Laws Enforced by the Wage and Hour Division, available at* [http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last visited July 24, 2003) hereinafter DOL, Fact Sheet No. 48].

have largely chosen to limit *Hoffman* to its facts, clarifying its scope in several ways, including the extent to which it should apply in cases involving backpay.[164] Nevertheless, many employer defendants have attempted to use *Hoffman* to their benefit in cases concerning various employment laws and fact patterns analogous to *Hoffman*.[165] In addition, a few members of state courts have adopted the general language of *Hoffman* and have even stretched its rationale in order to exclude undocumented immigrants from recovery in workers compensation cases.[166]

A. Agencies Are Clarifying Hoffman's *Scope*

Soon after the July 2002 *Hoffman* decision, the NLRB's Office of General Counsel issued a memorandum intended to guide its administrators on the appropriate procedures and remedies concerning immigrant employees.[167] The memo explains that despite the *Hoffman* decision, undocumented immigrants are still considered "employees" under the NLRA.[168] An individual's work authorization status is irrelevant to an employer's liability under the NLRA, and questions concerning immigration status should be left for the compliance stage of a case.[169] In addition, conditional reinstatement remains an appropriate remedy as long as an undocumented alien achieves legal status before reinstatement.[170] The memo states that because of *Hoffman*, backpay is no longer a suitable remedy for the discharge of individuals for the period of time they were legally unavailable to work in the United States.[171] Consequently, the NLRB states that it will not seek a backpay remedy once evidence establishes

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162. Office of Legal Counsel, U.S. Equal Employment Opportunities Commission, Directives Transmittal No. 915.002, June 27, 2002, *available at* http://www.eeoc.gov/docs/undoc-rescind.html [hereinafter EEOC, D.T. No. 915.002].

163. *See infra* Section III.B.

164. *See* Smith & Blanco, *supra* note 15, at 890. Smith and Blanco note that some courts have "substantially limited labor rights post-*Hoffman*." *Id.* While this may be true, I have found that most lower courts are attempting to control the effect of *Hoffman*. If anything, lower courts have shown a commitment to the labor and employment laws and have sought to keep as separate endeavors the enforcement of those laws and the enforcement of the immigration laws.

165. *See* Hudson & Schenk, *supra* note 15, at 891.

166. *See, e.g.*, Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003); Reinforced Earth Co. v. Workers Comp. Appeal Board., 810 A.2d 99, 102 (Pa. 2002).

167. Office of the General Counsel, NLRB, Memorandum GC 02-06, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.* (July 19, 2002), *available at* http://www.nlrb.gov/gcmemo/gc02-06.html.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

that a worker was not, in fact, authorized to work during the period for which backpay is sought.[172]

In addition, the NLRB memo clarifies that *Hoffman* did not prohibit compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions.[173] The memo also states that backpay for an employee who has been unlawfully demoted into a lower paying position presents an open question, and requests that those cases be referred to the central office for advice.[174] The memo also states that *Hoffman* had no effect on other sanctions that may be imposed under current law.[175] Finally, with respect to investigative procedures, the memo adds that *Hoffman* does not shift the burden to the NLRB to conduct an immigration investigation in the first instance.[176]

Similarly, other federal agencies have sought to clearly define *Hoffman's* scope and limit the holding to its facts. For example, the EEOC issued a directive informing the public of its decision to rescind its previous enforcement guidance on remedies available to undocumented workers under federal employment discrimination laws.[177] In the directive, the EEOC stated that because of *Hoffman*, undocumented workers are not entitled to backpay or reinstatement.[178] However, it reaffirmed that *Hoffman* does not call into question the principle that federal employment discrimination statutes cover undocumented workers.[179] Furthermore, it stated that the EEOC will not, on its own initiative, inquire into a worker's immigration status when enforcing discrimination laws.[180] It also affirmed that the EEOC will not consider an individual's immigration status when examining the underlying merits of a charge,[181] and it promised that the EEOC would continue to vigorously pursue charges filed by any worker covered by the federal employment discrimination laws, including charges brought by undocumented workers.[182] Nevertheless, the EEOC stated that it would seek appropriate remedies in light of *Hoffman,* and that it would "continue vigorously to pursue charges

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. EEOC, D.T. No. 915.002, *supra* note 162.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

filed by any worker covered by the federal employment discrimination laws."[183]

Likewise, the DOL issued a fact sheet explaining the effect the *Hoffman* decision had on laws enforced by its Wage and Hour Division.[184] The fact sheet explicitly states that the DOL's Wage and Hour Division "will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented."[185] It also distinguishes the NLRA from the FLSA by explaining that in *Hoffman*, the Court refused to award backpay "for years of work not performed, for wages that could not lawfully have been earned."[186] In contrast, under the FLSA, the Department generally "seeks back pay for hours an employee has actually worked, under laws that require payment for such work."[187]

And the agencies are not alone in their fight to limit *Hoffman*. Most opinions from state and federal courts have shown a concerted effort among judges and justices to identify circumstances and laws unaffected by *Hoffman* and to clarify *Hoffman's* scope in general. The next Section summarizes these efforts and, in addition, discusses a case in which *Hoffman* was misapplied.

B. Courts Are Limiting Hoffman

The sheer volume of cases that *Hoffman* spawned is an indication that the opinion has confused and misled many litigants.[188] However, similar to the agencies discussed above, courts appear to be performing damage control, limiting *Hoffman* to its facts and identifying laws and remedies that should remain unaffected by the decision. In general, although they do not cite Justice Breyer, these courts are constructing a body of case law reminiscent of his dissent.[189]

In particular, like Justice Breyer, courts have emphasized that awarding employment remedies to undocumented workers helps to achieve the purpose of IRCA. The courts emphasize that the employment laws, if applied to undocumented as well as legal workers, help to deter employers from exploiting the illegal workforce. From these cases, the following premises have begun to emerge and

183. *Id.*

184. *See* DOL, Fact Sheet No. 48, *supra* note 161.

185. *Id.*

186. *Id.*

187. *Id.*

188. Whether those litigants are opportunist or simply misled employers, or whether they are misinformed employees, the number of cases where persons are battling over backpay suggests that something is awry.

189. *See Hoffman*, 535 U.S. at 153–60.

develop:[190] (1) *Hoffman* did not affect unpaid wages claims for work already performed;[191] (2) the release of immigration documents in minimum wage and overtime cases will have an in terrorem effect;[192] (3) requiring employers to pay proper wages to undocumented immigrants for work performed furthers the goals and policies behind IRCA;[193] (4) *Hoffman* does not bar injunctive and declaratory relief or compensatory and punitive damages in retaliation cases under the FLSA;[194] (5) immigration status is not relevant to stating a claim for a violation of the ADA;[195] (6) immigration status outside the discreet backpay period is not relevant;[196] and (7) IRCA does not foreclose the grant of workers compensation benefits to undocumented immigrants if they have satisfied all of the eligibility requirements for workers compensation as detailed in state workers compensation statutes.[197]

This Section discusses the decisions that generated these premises as well as two opinions in which a court, or one member of a court, improperly extended *Hoffman*.[198] Some of these opinions are unpublished, and many jurisdictions have yet to voice their interpretations of *Hoffman*; however, they indicate some consensus and trends on important distinctions between the facts of *Hoffman* and cases in which *Hoffman* should not apply.

1. Immigration Status Is Irrelevant to Unpaid Wages Claims

Several jurisdictions have held that immigration status is not relevant to an unpaid wage claim for work already performed.[199] For example, in *Flores v. Albertsons, Inc.*, eight janitors sued their employers for unpaid overtime premiums and other wages to which they were entitled under the FLSA.[200] In turn, the employer

190. For a comprehensive practitioner's summary of the labor and employment law remedies that survived *Hoffman*, see Smith et al., *supra* note 24, at 8–16, which discusses pre- and post-*Hoffman* remedies as well as some employment laws not discussed in this Note, such as the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651–678 (1970), and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801–1872 (1994).

191. Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

192. Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

193. Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

194. Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056 (S.D.N.Y. 2002).

195. Lopez v. Superflex, Ltd., No. 01 CIV.10010 (NRB), 2002 WL 1941484 (S.D.N.Y. Aug. 21, 2002).

196. De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002).

197. *Reinforced Earth*, 810 A.2d at 102.

198. *See Sanchez*, 658 N.W.2d at 510.

199. *See, e.g.*, *Albertsons*, 2002 WL 1163623; Cortez v. Medina's Landscaping, Inc., No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); *Singh*, 214 F. Supp. 2d 1056 (S.D.N.Y. 2002); *Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

200. *Albertsons*, 2002 WL 1163623, at *1.

defendants submitted a discovery request for documents related to the plaintiffs' immigration status.[201] The defendants claimed that the plaintiffs' immigration documents were relevant because, under *Hoffman*, employer liability for backpay is limited as to undocumented immigrants.[202] However, the district court found that *Hoffman* did not concern unpaid wages for work already performed.[203] The court also took the opportunity to clarify *Hoffman's* reach by stating boldly that "[f]ederal courts are clear that the protections of the FLSA are available to citizens and undocumented workers alike."[204] Consequently, the court denied the defendant's motion.[205]

Similarly, in *Cortez v. Medina*,[206] employer defendants invoked *Hoffman* in an attempt to compel the immigration documents of an employee plaintiff who sued under the FLSA for overtime wages.[207] In *Cortez*, the district court clearly distinguished *Hoffman* from cases in which a plaintiff seeks unpaid wages under the FLSA,[208] stating that "[c]ritical to the Court's holding [in *Hoffman*] was the fact that the work had not been performed and that it would have been illegal for the plaintiffs to mitigate damages, which is required for a backpay award."[209] In contrast, the court found no conflict of laws in awarding backpay to Cortez, who would not be expected to mitigate damages for unpaid wages. Ultimately, the court denied the defendant's motion to compel finding that *Hoffman* does not bar undocumented immigrants from receiving backpay, [210] which suggests that the court found immigration status irrelevant to unpaid wages cases.

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201. *Id.* at *2.

202. *Id.* at *5.

203. *Id.*

204. *Id.* (citing Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988)).

205. *Id.*

206. *Cortez*, 2002 WL 31175471, at *1.

207. *Id.*

208. *Id.*

209. *Id.* In *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002), the court made the same distinction, noting that in *Hoffman*, Castro was terminated from employment, could not be legally reinstated, and could not legally obtain other work through mitigation because he was not lawfully permitted to be in the United States. The court in *Amigon* articulated that there was no such impediment to awarding repayment for work the plaintiff already performed. *Id.*

210. *See Cortez*, 2002 WL 31175471, at *1. Notably, during oral argument in *Hoffman*, the Supreme Court indicated that it already perceived a distinction between backpay for work already performed and backpay for work not performed (such as backpay after wrongful termination under the NLRA). Transcript of Oral Argument , *Hoffman*, 535 U.S. 137 (2002) (No. 00-1595), 2002 WL 77224, at *14 (Jan. 15, 2002). If this point had been made clear in the *Hoffman* decision itself, immigration status would not have been at issue in *Cortez* or *Albertsons*. It is likely that *Cortez* and *Albertsons*, and other unpaid wage cases (such as *Singh*, 214 F. Supp. 2d 1056 (2002), and *Amigon*, 233 F. Supp. 2d 462 (2002)) would survive review at the Supreme Court on the issue of backpay. Note the following excerpt from the oral argument in *Hoffman*:

2. Discovery of Immigration Status in FLSA Wage Cases Has an In Terrorem Effect

In other cases, courts have not only stressed that *Hoffman* cannot justify discovery of immigration documents in minimum wage and overtime cases under the FLSA, but that allowing for such discovery would have an in terrorem effect that would be more harmful than relevant.[211] In general, these courts have included detailed policy discussions in their rationales, weaving well-articulated arguments in favor of preserving unpaid wage claims for undocumented immigrants and adopting language reminiscent of Justice Breyer's dissent.[212]

For example, in one such case, *Zeng Liu v. Donna Karan International, Inc.*, the court suggested that evidence of immigration status was more harmful than relevant.[213] Notably, the court reasoned that even if the parties were to enter into a confidentiality agreement restricting discovery of the plaintiffs' immigration documents, there would still remain "the danger of intimidation, [and] the danger of destroying the cause of action" which would inhibit the plaintiffs in pursuing their rights under the FLSA.[214] In a similar case, *Flores v. Amigon*,[215] when employer defendants sought to use *Hoffman* to compel immigration documents,[216] the court stressed that *Hoffman* did

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> QUESTION [the Court]: May I ask if your position would apply if this were a violation of the Fair Labor Standards Act instead of the labor act? If the employer had underpaid the employee, would he have a right to back pay?
> MR. McCORTNEY [counsel for the Government]: Your Honor, I—in the amicus brief of the States they seem to equate back pay under the NLRA with back pay under the FLSA when they're two different things. Back pay—
> QUESTION: I understand they're two different—I just want to know what your position is on that.
> MR. McCORTNEY: No, we would not advocate at all, and we have not, taking wages away from undocumented aliens that have been earned for work already performed.

Transcript of Oral Argument at *14. Robert H. Gibbs drew my attention to the fact that the Court made this distinction at the oral arguments and yet omitted it from the opinion. I posit that this omission is what generated much of the resulting confusion in the wake of *Hoffman*. E-mail from Robert H. Gibbs, Partner, Gibbs Houston Pauw, to Elizabeth R. Baldwin, law student, Seattle University School of Law (May 2, 2003, 16:31:25 PST) (on file with the Seattle University Law Review).

211. *See, e.g.*, Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Amigon*, 233 F. Supp. 2d 462.

212. *See, e.g.*, *Donna Karan*, 207 F. Supp. at 193; *Amigon*, 233 F. Supp. 2d at 464.

213. *Donna Karan*, 207 F. Supp. 2d at 193 (stating that "if it appears at some later juncture that such discovery would be relevant, and more relevant than harmful, Donna Karan may seek leave to renew this request").

214. *Id.* (quoting Ansoumana v. Gristide's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001)).

215. *Amigon*, 233 F. Supp. 2d at 464.

216. *See id.*

not limit employer liability in FLSA cases and that the potential prejudice and in terrorem effect from production of immigration documents far outweighed whatever minimal value discovery of immigration documents might have.[217]

3. Requiring Employers to Comply with Wage Standards Under the FLSA Furthers the Goal of IRCA

The *Amigon* court also articulated that "requiring employers to pay proper wages to undocumented immigrants when the work has been performed actually furthers the goal of the IRCA."[218] The court reasoned that if employers were threatened by civil penalties[219] and criminal prosecution[220] when they hire undocumented workers, and they were also required to pay those workers at the same rate as legal workers, incentive for hiring undocumented immigrants will be eliminated.[221] Thus, the court asserted, the "FLSA's coverage of undocumented immigrants goes hand in hand with the policies behind the IRCA."[222] In addition, the court stated that the legislative history of IRCA suggests that Congress believed undocumented immigrants should be protected by the FLSA for this very reason and that allowing employers to circumvent the labor laws as to undocumented immigrants condones the exploitation and underpay of those workers.[223]

4. *Hoffman* Does Not Bar Injunctive and Declaratory Relief or Compensatory and Punitive Damages in Retaliation Cases Under the FLSA

In *Singh v. C.D. & R's Oil, Inc.*, the district court held that *Hoffman* does not bar injunctive and declaratory relief, or compensatory and punitive damages, in retaliation cases under the FLSA.[224] In that case, an undocumented worker sued his employer, alleging that the employer violated the FLSA when he reported the worker to the INS with retaliatory intent a day after the worker and employer settled the worker's wage claim.[225] Subsequently, the

217. *Id.*
218. *Id.*
219. 8 U.S.C. § 1324a(e)(4)(A).
220. *Id.* § 1324a(f)(1).
221. *Amigon*, 233 F. Supp. 2d at 464.
222. *Id.* (quoting *Patel*, 846 F.2d at 704).
223. *Id.* (quoting Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998)).
224. *Singh*, 214 F. Supp. 2d at 1060.
225. *See id.* at 1057.

employer made a motion to dismiss asserting that the plaintiff's action was barred under *Hoffman*.[226] According to the defendant's motion, *Hoffman* limits employer liability to undocumented immigrants under any federal labor law.[227] The court denied the defendant's motion, asserting that "[a]llowing an undocumented worker to bring an anti-retaliation claim under the FLSA is consistent with the immigration policies underlying IRCA."[228] Like the *Amigon* court, the *Singh* court stated that if FLSA's minimum wage provisions did not apply to undocumented workers, employers would have an economic incentive to hire undocumented workers because many employers would choose the risk of liability under IRCA in exchange for saving money on wages.[229]

5. Immigration Status Is Not Relevant to Stating a Claim Under the ADA

Case law also suggests that immigration status is not relevant to stating a claim for a violation of the ADA.[230] For example, in *Lopez v. Superflex*, an employee who worked for a year in Superflex's hose factory was diagnosed with kidney failure.[231] Consequently, he required ten days leave from work for surgery and recovery.[232] After he was released from the hospital and was ready to return to work, Superflex fired him without a determination as to whether or not he could perform the duties of his old job or any other job at the company.[233] Subsequently, Lopez filed a complaint against the employer alleging that his termination violated the ADA.[234] In turn, the employer defendant brought a motion to dismiss for failure to state a claim because Lopez would not produce documents to show he was legally employed.[235]

In its motion, Superflex argued that, in light of *Hoffman*, a plaintiff must prove that he or she is legally employed in order to be entitled to "federal relief." However, the court held that even if an illegal alien were precluded from seeking compensatory and punitive damages for alleged violations of the ADA, a former employee would not be required to plead that he or she was legally working in the

226. *Id.*
227. *Id.* at 1060.
228. *Id.* at 1062.
229. *Id.*
230. *See, e.g.*, Lopez v. Superflex, 2002 WL 1941484, at *2.
231. *Id.* at *1.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at *2.

United States in order to state a claim that an employer's termination of that employee violated the ADA.[236] Furthermore, the court held that an award of backpay or reinstatement, which could potentially invoke the holding in *Hoffman*, is not a prerequisite for a punitive damages award under the ADA.[237]

6. Immigration Documents Are Only Relevant to the Discreet Backpay Period

Immigration documents have been found to be only relevant to the discreet period for which backpay is sought. For example, in *De La Rosa v. Northern Harvest Furniture*, the district court held that immigration status outside the backpay period is not relevant to a claim for backpay.[238] Former employees filed suit against their employers alleging violations of Title VII, the FLSA, and the Illinois Minimum Wage Law,[239] seeking post-termination backpay from the date that the employees were terminated to the date that the defendants offered to reinstate the plaintiffs in their jobs.[240] The employer defendants filed a motion to compel immigration documents from the employees to prove their immigration status during their previous employment with the defendant and to confirm their current immigration status.[241] They based their request on the premise that the holding in *Hoffman* made immigration documents relevant to claims for backpay.[242] However, the court held that the only period for which the plaintiffs sought backpay would be relevant.[243] Ultimately, the court in *Lopez* denied the defendant's motion because the documents they tried to compel fell outside the actual period of backpay sought by the plaintiffs.[244]

7. IRCA Does Not Affect Workers Compensation Benefits when

236. *Id.* at *1 (citing FED. R. CIV. P. 8(a)).

237. *Id.* at *2. Notably, the court chose not to address the issue of standing, stating only that "[i]f *Hoffman Plastics* does deny undocumented [immigrant] workers the relief sought by plaintiff, then [the plaintiff] would lack standing." *Lopez*, 2002 WL 1941484, at *2. However, because the issue of standing was not ripe for decision, the court refrained from making this determination and did not answer whether an undocumented worker has standing to sue under the ADA. *Id.*

238. *De La Rosa*, 210 F.R.D. at 239.

239. 820 ILL. COMP. STAT. 105/1-15 (1999).

240. *See De La Rosa*, 210 F.R.D. at 237.

241. *Id.* at 237–38.

242. *Id.* at 238.

243. *Id.* at 239.

244. *Id.*

Undocumented Workers Meet the Requisite Standards[245]

State courts have already grappled with issue of whether IRCA affects undocumented immigrants' eligibility for workers compensation benefits. While some courts have held that *Hoffman* will not affect the eligibility of a person who otherwise meets the requisite standards, other courts have not been unanimous on this point. For example, in *Reinforced Earth Co. v. Workers Compensation Appeal Board*,[246] a majority of the Pennsylvania Supreme Court affirmed the Workers Compensation Appeals Board's order to grant an undocumented worker total disability and all reasonable and necessary medical expenses associated with his on-the-job injury.[247] Despite the employer defendant's representations to the contrary, the court reasoned that IRCA does not foreclose the grant of workers compensation benefits to unauthorized workers if workers have satisfied all of the eligibility requirements for workers compensation as detailed in the workers compensation statute.[248]

In addition, the court distinguished *Reinforced Earth* from *Graves v. Workers Compensation Appeal Board*,[249] in which the court held that an escaped prisoner could not receive backpay.[250] Importantly, the court in *Graves* expressly limited its holding to the "proposition that an escape from official detention renders a claimant ineligible for benefits" under the workers compensation law.[251] The court in *Reinforced Earth* explicitly emphasized that "we specifically limited the *Graves* holding to escaped convicted criminals only, not illegal aliens who upon detection would normally be deported from the United States."[252]

However, the dissent in *Reinforced Earth* maintained that the policy of affording workers compensation benefits to employees injured in work-related accidents should yield to the injunction of Congressional policy against the employment of undocumented immigrants as expressed in IRCA and as illustrated by the Court in *Hoffman*.[253] Specifically, the dissent claimed that *Hoffman* teaches, "where two legislative schemes apply to the same situation, one may

245. For a discussion contrasting state law before and after *Hoffman*, see Smith et al., *supra* note 24, at 14–16.

246. Reinforced Earth Co. v. W.C.A.B. (Astudillo), 570 Pa. 464, 810 A.2d 99 (2002).

247. *Id.* at 107.

248. *Id.*

249. 668 A.2d 606 (Pa. Cmwlth. Ct. 1995)

250. *Reinforced Earth*, 810 A.2d at 102.

251. *Id.*

252. *Id.* at 103.

253. *Id.* at 110–11.

have to yield to the higher policy interests served by the other," and that in *Hoffman*, the court held that labor policy must yield to immigration policy.[254] Furthermore, the dissent stated that an unauthorized alien, by operation of IRCA, has no legal earning power.[255] Accordingly, it reasoned that the Pennsylvania General Assembly could not have intended the "absurd result" of supplying social welfare benefits in the form of a wage and employment-benefit substitute "to one whom federal law says could not lawfully obtain those wages and benefits in the first place" and for work that arose out of an illegal employment relationship.[256]

Similar to the dissent in *Reinforced Earth*, in *Sanchez v. Eagle Alloy Inc.*,[257] the Michigan Court of Appeals applied *Hoffman* to reverse a Workers Compensation Appellate Commission (WCAC) decision that granted weekly wage loss benefits under the Workers Disability Compensation Act (WDCA) to an undocumented worker beyond the date on which his illegal employment status was discovered.[258] In its rationale, the court first looked to the language of the WDCA, which absolves employers of liability for such periods of time as the employee is "unable to work because of a commission of a crime."[259] The court decided that this language precluded an undocumented immigrant worker from recovering weekly wage loss benefits beyond the date in which his employment status was discovered because, according to *Hoffman*, document fraud is a crime under IRCA.[260] Furthermore, the court reasoned that, according to *Hoffman*, an employer could not legally retain an undocumented immigrant as an employee or help him find other work.[261]

From analysis of the foregoing state and federal cases, it is clear that *Hoffman* has tempted and misled many employer defendants to fight liability in cases that fall well outside of the strict holding of *Hoffman*. Typically, these defendants argue that undocumented immigrants, from a policy standpoint, should not recover remedies or benefits under any of the labor and employment laws because of their illegal status under IRCA. Nevertheless, with a few exceptions, courts have sought to clarify the scope of *Hoffman*, limiting it to its facts and identifying areas of the law that were unaffected by the opinion.

254. *Id.* at 110.
255. *Id.* at 111.
256. *Id.*
257. 658 N.W.2d 510 (Mich. Ct. App. 2003).
258. *Id.* at 521.
259. *Id.* at 519.
260. *Id.* at 520.
261. *See id.* at 521.

Limiting the opinion in this way will be essential to preserving the integrity of IRCA. To buttress the argument that courts must continue to limit *Hoffman*, the next Part addresses the weaknesses in the *Hoffman* opinion itself.

IV. *HOFFMAN* SHOULD BE LIMITED TO ITS FACTS[262]

Hoffman must be limited to its facts because it departs from IRCA's statutory language and it undermines Congress's intent.[263] Furthermore, the opinion has the unwelcome feel of judicial activism,[264] effectively creating a new way to initiate IRCA investigations that will trigger its enforcement mechanisms in ways Congress never intended. Moreover, *Hoffman* fails to achieve its own stated purpose by condoning violations of IRCA and the labor and employment laws. In light of these criticisms, the case must be overturned by the Supreme Court or its effects ameliorated by Congressional action.[265]

A. Departing from the Text of IRCA and the Intent of Congress

Where Congress passes an act, "the particular language of the text is always the starting point on any question concerning the application of the law."[266] As a general rule of statutory construction, when a statute is clear on its face (i.e. when well-

262. *See also* Thomas J. Walsh, Note, Hoffman Plastic Compounds, Inc. v. NLRB: *How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313 (2003) (critiquing Justice Rehnquist's use of case precedent in *Hoffman*).

263. *See* 8 U.S.C. § 1324a; H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986).

264. "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." BLACK'S LAW DICTIONARY 850 (7th ed. 1999).

265. It should be noted that the Court has shown its willingness to overturn its own decisions, as demonstrated by the recent 5-4 vote in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). This decision overturned the controversial decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that all sodomy laws in the United States are unconstitutional and unenforceable when applied to consenting adults in private.

266. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:01, at 1 (6th ed. 2000) [hereinafter STATUTES AND STATUTORY CONSTRUCTION]; *cf.* Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 434 (2002) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also* Smith v. Doe, 123 S.Ct. 1140, 1147 (2003) ("Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' . . . We consider the statute's text and its structure to determine the legislative objective."); Sprietsma v. Mercury Marine, 123 S.Ct. 518, 526 (2002) (Regarding interpretation of a pre-emption clause, the court stated, "our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'").

informed persons cannot reasonably disagree about the meaning of the text) the text need not be interpreted beyond its plain meaning.[267] Nevertheless, when Congress has drafted an ambiguous statute, our system of separation of powers mandates that courts interpret what the law says.[268] However, it is commonly understood that as part of this mandate, courts have an "obligation to construe statutes so that they carry out the will, real or attributed, of the law-making branch of the government."[269] For instance, Lord Blackburn, who is often cited for his portrayal of the task of interpretation, has stated the following:

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of the word varies according to the circumstances with respect to which they were used.[270]

In essence, canons of statutory construction suggest that courts should interpret an ambiguous statute by contextualizing it,[271] reviewing the policy and legislative scheme behind it, researching the legislative history, and employing "concepts of reasonableness along with the language of the statute in order to determine the legislative intent."[272]

Justice Rehnquist purported to craft the *Hoffman* decision for the purpose of preserving Congressional intent; yet his opinion relies on assumptions that are absent from the texts of IRCA and the NLRA and that run contrary to stated immigration and employment policies and the legislative history of IRCA. Nowhere in IRCA's statutory

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267. STATUTES AND STATUTORY CONSTRUCTION, *supra* note 266, § 45:02, at 11 (citing Caminetti v. United States, 242 U.S. 470 (1917); McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980)).

268. STATUTES AND STATUTORY CONSTRUCTION, *supra* note 266, § 45:03, at 19–21; *see also* Marbury v. Madison, 1 Cranch 137, 177 (1803) (holding that it is "the province and duty of the judicial department to say what the law is").

269. STATUTES AND STATUTORY CONSTRUCTION, *supra* note 266, § 45:05, at 25.

270. *Id.* (citing River Wear Comm'rs v. Adamson, LR 2 AC 743 (1877)).

271. *But see* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 2.2, at 225 (1997) (explaining that "canons of statutory interpretation are often contradictory; there is almost always a canon to which each side in the dispute can appeal."). Nevertheless, it would be unreasonable to maintain that the interpretation of a statute should both depart from the text of the statute, as well as the intent of Congress, unless the interpreter were saving the greater society from a dangerous and destructive result.

272. STATUTES AND STATUTORY CONSTRUCTION, *supra* note 266, § 45:03, at 21 (citing No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio, 264 N.J. Super. 318, 624 A.2d 981 (App. Div. 1993).

language are undocumented immigrants expressly precluded from protections or remedies under the labor and employment laws, especially not from the NLRA.[273] In fact, despite what Justice Rehnquist implies in *Hoffman*, IRCA simply does not say that employers cannot pay employees for work not performed.[274] Rather, IRCA explicitly sanctions unauthorized employment and the presentation of false documents; but it does not explicitly penalize payment of money from a citizen or documented immigrant to an undocumented immigrant.[275] Nowhere in the NLRA does the statutory language indicate that finding a plaintiff to be an undocumented immigrant constitutes a defense to employer liability.[276] Moreover, the NLRA explicitly protects "any employee," not merely "legal employees."[277]

And the legislative history of IRCA suggests that Justice Rehnquist, and those who joined him, arrived at a result never contemplated by Congress. When IRCA was conceived, the House Judiciary Committee Report on H.R. 6514 (or the Immigration Reform and Control Act of 1982) explained that the Act was needed to help "secure our borders" and to "protect our own workers from adverse competition in the labor market."[278] However, Congress expressly designed IRCA to achieve this goal by focusing on employer behavior and making undocumented immigrants less attractive as employees.[279] As a result of various studies, Congress had a developed understanding of employment dynamics and undocumented

273. *See* Pub. L. No. 99-603 (1986).

274. Gibbs, *supra* note 210.

275. *Id.*

276. *See* 29 U.S.C. §§ 151–169 (2001).

277. *Id.* § 152(3). The NLRA defines "employee" in the following manner:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act 45 U.S.C. § 151 et seq., as amended from time to time, or by any other person who is not an employer as herein defined.

Id.

278. Brief of ACLU, *supra* note 25, at *6 (citing H.R. REP. NO. 98-115, pt. 1, at 95–96 (1983)).

279. *Id.*

immigrant worker habits that led to this approach.[280] Exhibiting this understanding as far back as 1973, the House Judiciary's immigration subcommittee stated that "the U.S. employer, unlike the illegal alien, is amenable to deterrence vis a vis economic and criminal sanctions."[281] In other words, Congress knew long before it passed IRCA that it would have to focus its attack on employer practices if it was to have any effect on the employment of undocumented immigrants.

Moreover, the legislative history for IRCA suggests that Congress intended undocumented immigrants to be eligible for remedies under the labor laws, including the NLRA, for the purpose of furthering the goals of IRCA.[282] For example, Congress explicitly funded the DOL's Wage and Hour Division so it could enforce labor laws, such as the FLSA, on behalf of undocumented workers.[283] As the language of IRCA reads, this funding was meant to enable undocumented immigrants to bring labor claims; the hope was that their ability to bring claims would deter employers from hiring them.[284] Thus, the legislative intent of Congress was clear: protect U.S. jobs for legal workers by making undocumented immigrants unattractive to employers through imposing economic sanctions on the employers who hire them.

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280. *See id.* at *12–13 (citing Subcomm. No. 1 of the House Comm. on the Judiciary, 93d Cong., *Illegal Aliens: A Review of Hearings Conducted During the 92d Congress* (Serial No. 13, pts. 1–5) at 22).

281. *Id.*

282. *Id.* at *13–14. To illustrate, the House Education and Labor Committee report "makes it clear that Congress [upon adopting IRCA] intended the full panoply of the Nation's labor and employment laws, including the [NLRA], to be enforced on behalf of undocumented workers." *Id.* Importantly, the report also stated the following:

> [T]he committee does not intend that any provision of this Act [IRCA] would limit the powers of State and Federal labor standards agencies such as . . . the Wage and Hour Division of the Department of Labor . . . [and] the National Labor Relations Board . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

Id. (citing H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986)).

283. *Id.* at *8 (citing IRCA § 111(d)). This statute states, in part:

> There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

See also Brief of National Labor Relations Board et al., 2001 WL 1597748, at *36–37, *Hoffman*, 535 U.S. 140 (2002) (No. 00-1595).

284. Brief of ACLU, *supra* note 25, at *8–10.

In contrast, in *Hoffman*, Justice Rehnquist apparently sought to protect U.S. jobs by making it impossible for the NLRB to charge employers backpay after they wrongfully discharge undocumented workers. This effectively releases employers from their usual obligation of paying wrongfully terminated employees backpay under the NLRA. Thus, *Hoffman* had the crude result of eliminating economic consequences for employers who terminate undocumented employees for labor union involvement, which makes it crudely cheaper for employers to hire undocumented workers than documented or citizen workers. Ironically, this result does nothing but make undocumented immigrants more attractive to employers, a result that constitutes the exact inverse of what Congress intended when it passed IRCA.

B. Creating a New Way to Investigate IRCA Violations and a New Defense for Employers

The *Hoffman* decision did not just depart from the language of IRCA and the intent of Congress; de facto, the holding created a new way to investigate employee violations of IRCA and a new defense for employers. By singling out undocumented immigrants as ineligible for backpay, the Court necessitated investigation into immigration status each time an immigrant employee brings a claim for wrongful termination. Document discovery in these situations could have three effects: (1) it will limit employer obligations to provide backpay; (2) it will limit an undocumented employee's eligibility for backpay; and (3) in some cases, it will precipitate exposure of a person's undocumented status to immigration authorities, which will likely trigger an enforcement action under IRCA or other immigration laws.

As a generally accepted legal premise, in each area of law, there is always a right way to go about investigations (e.g., requirements for *Miranda* warnings[285] and search warrants[286] in the criminal context; general discovery rules in civil litigation;[287] and employee rights in investigatory interviews conducted by employers,[288] to name just a few). Discovery of immigration documents in labor and employment litigation over wrongful termination for labor activities is simply not a proper way to investigate an IRCA violation.[289] Indeed, there is no

285. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

286. Johnson v. United States, 333 U.S. 10, 15 (1948).

287. *See, e.g.*, FED. R. CIV. P. 26, 33, 34, 36, 37, 45.

288. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

289. *See, e.g.*, 8 U.S.C. § 1324a(e)(1)(A)–(C) (1997); 8 C.F.R. § 274a.9 (2003); Big Bear Supermarket No. 3 v. INS, 913 F.2d 754, 757 (9th Cir. 1990) (Employer's failure to present employment verification forms at second INS inspection, after first inspection had resulted in

evidence in the statute that Congress intended IRCA investigations and enforcement against immigrants to precipitate when employers violate the labor laws. [290] Rather, Congress designed specific investigatory and enforcement mechanisms for IRCA, and those mechanisms do not involve immigration document discovery in employment litigation.[291] In fact, the investigatory and enforcement mechanisms and regulations for IRCA focus on the conduct of employers, describing how investigations should proceed,[292] how complaints should be filed,[293] and when enforcement should take place[294] among other clearly defined procedures.[295]

Despite the plain language of IRCA and the NLRA, and despite the legislative history, Justice Rehnquist traded judicial restraint for a legislative-like role in his interpretation of the statute. The upsetting result of *Hoffman* typifies why "judicial activism" is so often criticized.[296] Justice Rehnquist clearly preferred his own vision of how to best achieve the goals of IRCA—despite the fact that the democratically elected Congress had spent years determining the most appropriate way to design and focus the Act.[297]

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warning citation, constituted a second violation of IRCA for which the government could assess administrative penalties under the Act.).

290. Notably, IRCA states the following about the importance of maintaining privacy during employment verification: "Any personal information utilized by the [employee verification] system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien," 8 U.S.C. § 1324a(d)(2)(C) (1997), and "[t]he system must protect the privacy and security of personal information and identifiers utilized in the system." *Id.* § 1324a(d)(2)(D). *See id.* § 1324a(e)(1) (Complaints and Investigations), § 1324a(e)(2) (Authority in Investigations), § 1324a(e)(3) (Hearing); 8 C.F.R. § 274a.9 (2003) (Enforcement Procedures).

291. 8 U.S.C. §§ 1324a(d)(2)(C)–(D), 1324a(e)(1)–(3)(1997); 8 C.F.R. § 274a.9 (2003).

292. *See* 8 C.F.R. § 274a.9(b) (2003).

293. *See id.* § 274a.9(a).

294. *See id.* § 274a.9(d).

295. *See* 8 U.S.C. § 1324a(e)–(f) (2003).

296. Scholars have noted that the Chief Justice has been highly critical of judicial activism in the Court. *See, e.g.*, Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 57 (1993).

> Of particular importance, according to Chief Justice Rehnquist, Justice Scalia, and other political conservatives, is the need for judges to defer to decisions made by the democratically elected officials in the legislative and executive branches of government. This concern for deference to majoritarianism is intended to combat "judicial activism" that involves "a judicial decision that substitutes judicial policy for the policy of the elected branches of government."

Id. at 57–58. For a new compilation of essays concerning the Rehnquist Court's Constitutional and statutory jurisprudence, see generally THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002) [hereinafter THE REHNQUIST COURT].

297. *Hoffman* does not constitute the first opinion in which the Rehnquist Court has used its judicial power to alter or extinguish legislative decisions of Congress. See Herman Schwartz, *The States Rights Assault on Federal Authority*, *in* THE REHNQUIST COURT, *supra* note 296, at

C. *Condoning Employer Violations of IRCA and Labor and Employment Laws*

Other inconsistencies plague the *Hoffman* opinion. In particular, the Chief Justice implied that to afford backpay remedies to undocumented immigrants would force the court to ignore blatant violations of IRCA.[298] This Note does not dispute that it is illegal for an immigrant to obtain work without authorization under IRCA. However, unlike the Chief Justice suggests, the Court would not need to ignore IRCA violations if it were to award backpay to undocumented immigrants under the NLRA because, as the foregoing discussion indicates, immigration evidence should not be at issue in those cases. In fact, the award of backpay and other remedies under the labor and employment laws should not precipitate an inquiry about immigration status at all unless immigration status is expressly at issue (i.e., a person was terminated because of his or her immigration status and wants to prove that his or her status was legal).

Ironically, *Hoffman* forces courts to ignore IRCA violations as well as labor and employment laws. By refusing to make employers accountable to undocumented immigrants for backpay, the Court condones employers' exploitation of all undocumented workers. By condoning these violations, *Hoffman* has made undocumented workers more attractive to employers. Specifically, undocumented employees are being dissuaded from bringing claims for fear of the discovery and exposure of their immigration status;[299] thus, employers will inevitably

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155–67, which discusses cases such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), among other decisions in which the Rehnquist court has struck down acts of Congress in the name of states' rights. *See also* Smith & Jones, *supra* note 296, at 55, 57. For example, before the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. §§ 2244–2266 (2000), Justice Rehnquist unsuccessfully attempted to persuade Congress to reform the habeas corpus statutes to limit the number of habeas petitions permitted by prisoners on death row. Smith & Jones, *supra* note 290, at 62–64 (1993) (citing Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 188 n.137); Linda Greenhouse, *Judges Challenge Rehnquist's Role on Death Penalty: An Extraordinary Move*, N.Y. TIMES, Oct. 6, 1989, at A1). When these efforts failed, Justice Rehnquist and the other Justices who supported the cause "embarked on an effort to limit the habeas statutes through a series of judicial reforms." *Id.* at 64 (citing Teague v. Lane, 489 U.S. 288 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989); Butler v. McKellar, 494 U.S. 407 (1990); McClersky v. Zant, 111 S.Ct. 1454 (1991); Coleman v. Thompson, 111 S.Ct. 2546 (1991)). As Smith and Jones note in their article criticizing the court for these legislative-like opinions: "The fact that the Rehnquist Court's judicial activism, with its powerful effects on outcomes for individual litigants, comes from justices who made their names as advocates of judicial restraint raises troubling questions about the hypocrisy detectable in the contradictions between judges' public statements and their actual behavior." *Id.* at 76.

298. *See Hoffman*, 535 U.S. at 148–49.

299. *See* Smith & Blanco, *supra* note 15, at 893–94.

find that hiring undocumented immigrants saves them the cost of supplying labor and employment law remedies to workers they mistreat.[300] If employers are willing to hire undocumented workers over documented workers, undocumented workers may have a greater incentive to come to the United States in search of work because there will simply be more work available to them upon arrival. In addition, influx of illegal immigrants aside, those illegal workers that are here already will find themselves more competitive among opportunist employers than their legal worker counterparts.

Overall, by providing immigrants with fewer employment protections, *Hoffman* encourages corruption in the labor-market economy, tacitly condones the exploitation of undocumented workers, and places the risk associated with this exploitation on the employee instead of the employer. These results run directly counter to the purpose of the immigration laws as well as the employment laws, which together could ensure fair and safe labor practices and conditions for all employers and employees while preserving jobs for legal workers. If employers are held equally accountable to undocumented immigrants and legal employees, employers will have virtually no incentive to hire undocumented immigrants because there will be no savings on employment disputes, whereas there will still be penalties under immigration laws. Therefore, when undocumented immigrants are equally eligible for remedies under the employment laws, regardless of how many illegal immigrants come to the United States, they will be less competitive with legal workers and IRCA's purpose will be furthered. Most importantly, the courts will not be condoning the exploitation and abuse of undocumented workers.

V. CONCLUSION

Hoffman represents a significant departure from the text and the legislative intent of IRCA, the primary federal statute regulating the employment of immigrants. *Hoffman* has created additional, unnecessary ways to investigate IRCA violations, and it will eventually undermine IRCA. Courts and agencies are limiting *Hoffman* to its facts and generating a body of case law that is reminiscent of Justice Breyer's dissent in *Hoffman*. In particular, the majority of courts emphasize that the labor and employment law remedies, if applied to undocumented as well as legal workers, help to deter employers from exploiting the illegal workforce. Therefore, these remedies help to implement the policies behind IRCA.

300. *See Hoffman*, 535 U.S. at 154.

Ultimately, the courts and agencies have asserted that undocumented workers are only ineligible to collect backpay for wrongful termination claims under the NLRA if they are undocumented during the backpay period and if the backpay period is for work not performed. Immigrants are only ineligible for reinstatement under the NLRA if they are undocumented at the time of the reinstatement. In addition, although under *Hoffman* immigration status is relevant to determining eligibility for backpay for work not performed and to determining eligibility for reinstatement, the Court has not stated that immigration status is relevant to other kinds of remedies under labor and employment laws. In fact, careful analysis of the stated goal of the Court suggests that immigration status must not be found relevant to any other employment or labor law dispute because to do so would encourage employers to violate both immigration and employment laws in pursuit of cheaper labor.

The sheer volume of cases that *Hoffman* spawned should not be overlooked. The opinion has been confusing to some courts and has tempted numerous employer defendants to fight their employees' legitimate labor and employment law claims based on the misguided interpretation that undocumented immigrants are not entitled to any employment remedies. For this reason alone, *Hoffman* should be overturned.

Hoffman should also be overturned because it fails to follow the language of the statute and the underlying legislative intent. Chief Justice Rehnquist all but ignored the existing enforcement mechanisms as they are written in IRCA and the NLRA, deciding that NLRA claims for backpay for work not performed should enable a person's immigration status to be exposed in discovery—despite the fact that neither IRCA nor the NLRA authorizes such an inquiry. Finally, the threat of this discovery will deter undocumented immigrants from bringing labor and employment law claims, which will undermine the purpose of IRCA by making undocumented immigrants more attractive to employers. It will also undermine the employment laws, which are designed to create workplaces that comply with standards for all workers. Thus, to preserve the integrity of IRCA and to minimize negative effects on all persons in American places of work, *Hoffman* must be limited until it is overturned by the Court or Congress corrects the problems caused by *Hoffman*.