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Workers' Compensation and Hoffman Plastic: Pandora's Undocumented Box

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WORKERS' COMPENSATION AND *HOFFMAN PLASTIC*: PANDORA'S UNDOCUMENTED BOX

Remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists.

—President Franklin D. Roosevelt[1]

We need the National Guard to clean up our cities and round them up. . . . They have no problem slitting your throat and taking your money or selling drugs to your kids or raping your daughter and they are evil people.

—Chris Simcox[2]

INTRODUCTION

The twenty-first century immigrant in America exists amidst dreams and nightmares. The twentieth century immigrant provided both the foundation and versatility that made America one of the most diverse, democratic, and dynamic nations on the planet by fulfilling the "American Dream."[3] In the aftermath of the terrorist attacks on September 11, 2001, xenophobia ran wild across the nation. The immigrant became a dangerous stranger, full of criminal and terroristic intent,[4] as well as an economic pillager assaulting our economy by stealing jobs.[5] There was an urgent call to resolve America's immigration problems via militarized borders and more stringent standards for legal entry into the country, thus making the twenty-first century a nightmare

1. Franklin Delano Roosevelt, President of the U.S., Remarks to the Daughters of the American Revolution (Apr. 21, 1938), *reprinted in* THE AMERICAN READER 474 (Diane Ravitch ed., rev. 2d ed. 2000).

2. David Holthouse, *Arizona Showdown: High-powered Firearms, Militia Maneuvers and Racism at the Minuteman Project*, S. POVERTY L. CTR. INTELL. REP., Summer 2005, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/summer/arizona-showdown (quoting Chris Simcox, co-founder of the Minuteman Project and president of the Minuteman Civil Defense Corps, 2005).

3. *See* Everett Carll Ladd, Op-Ed., *Don't Discount the Successes of the American Melting Pot*, CHRISTIAN SCI. MONITOR, Aug. 4, 1995, at 19.

4. *See* Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1154 (2002) ("[U]ndocumented aliens are now seen as a national security threat, as would-be terrorists . . . .").

5. *See* Adam L. Lounsbury, Comment, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 416 (2008).

for American immigrants.[6] Inside the border, the new battlefront is in the U.S. economy, where there is a staggering number of undocumented workers in the workforce.[7]All of these things converge into the present-day situation: There exist migrants responding to black-market job opportunities,[8] employers attempting to cut costs by hiring undocumented workers at low wages and with few rights,[9] and media-savvy politicians assuring the public that with each new statute there will be progress toward curbing illegal immigration.[10]

Immigration provides a policy paradox. The unspoken tension is that while the United States desperately needs secured borders, undocumented immigrants have been powering the U.S. economy with tacit approval for over fifty years.[11] In fact, many present undocumented immigrants contribute actively to our economy, and yet, they receive only marginal returns on their labor contributions to our nation.[12] There has been a search amongst Congress and the courts for a way to enforce immigration laws at workplaces, rather than at borders, by shifting the burden of enforcing documentation for lawful employment onto employers.[13] Voices of concern from both the Court and Capitol Hill have warned that until both labor and immigration laws are in accordance with each other, there will remain a "perverse" incentive to encourage further illegal immigration.[14]

6. Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 852, 857–58 (2003). Professor Johnson acknowledges that the militarization of the border predated the events of September 11. *Id.* at 852–53.

7. *See* STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGRATION STUDIES, BACKGROUNDER: A SHIFTING TIDE: RECENT TRENDS IN THE ILLEGAL IMMIGRANT POPULATION 1–2 (2009), *available at* http://www.cis.org/articles/2009/shiftingtide.pdf (finding an estimated 10.8 million illegal immigrants in the United States in 2009 and noting that the illegal immigrant population reflects the unemployment rate among that population).

8. *See* Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 914–15 (2001).

9. *Cf. id.* at 916 (noting the low wages paid and advocating for legal status for migrants so that the U.S. government might protect their rights).

10. *Cf.* Cecelia M. Espenoza, *Relief for Undocumented Students: The Dream Act*, 56 FED. LAW., July 2009, at 44, 44 (detailing the political grandstanding surrounding the Development, Relief, and Education for Alien Minors (DREAM) Act of 2009, S. 729, 111th Cong. (2009)).

11. *See* Bickerton, *supra* note 8, at 907.

12. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 2–6 (2006) (finding that empirical studies prove that undocumented workers contribute more into the economy than what they cost to support via social services).

13. *See, e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359–94 (1986) (codified as amended at 8 U.S.C. § 1324a (2006)); H.R. REP. NO. 99-682(I), at 45–46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50.

14. Hoffman Plastic Compounds, Inc., v. NLRB, 535 U.S. 137, 155–56 (2002) (Breyer, J., dissenting); Janet Napolitano, Sec'y, Dep't Homeland Sec., Prepared Remarks on Immigration

Despite legislative action, there remains a growing black market for undocumented labor, which creates both an illegal and exploited labor class.[15] This labor exploitation takes the most grotesque forms, including not paying workers for their toils,[16] forcing employees to work in ultra hazardous conditions with little training,[17] and threatening injured workers with deportation should they file a workers' compensation claim.[18] In 2002, during the midst of this crisis, *Hoffman Plastic* was decided by the Supreme Court, establishing that immigration policies supersede labor policies in regards to unionization and labor rights[19] and allowing the policy pendulum to swing towards favoring black market incentives.[20]

In *Hoffman Plastic Compounds v. NLRB*, the Supreme Court held that the federal immigration laws supersede labor laws precluding the NLRB from effectuating their back pay damages to an undocumented worker fired for unionizing.[21] In the years following the seminal *Hoffman Plastic* decision, the holding has been used repeatedly as an affirmative defense in workers' compensation cases involving undocumented workers.[22] Each time, the employer cites *Hoffman Plastic* as preemption to any recovery by an injured undocumented plaintiff.[23] The focus of this Comment is whether *Hoffman Plastic*, which was decided in regard to unionization and back pay, is properly applied when its rationale is utilized in litigation across the country by employers to preclude workers' compensation payments to injured undocumented workers. This Comment examines the rationale and policy from courts across the nation in determining whether *Hoffman Plastic* belongs

Reform at the Center for American Progress (Nov. 13, 2009), *available at* http://www.dhs.gov/ynews/speeches/sp_1258123461050.shtm.

15. *See* Richard D. Vogel, *Harder Times: Undocumented Workers and the U.S. Informal Economy*, MONTHLY REV., July/Aug. 2006, at 29, *available at* http://www.monthlyreview.org/0706vogel.htm. *But see* Camarota & Jensenius, *supra* note 7, at 2 (concluding that although illegal migration is currently decreasing, when the economy recovers and if enforcement is reduced, the illegal population will begin to grow again).

16. *See* Patel v. Quality Inn S., 846 F.2d 700, 701 (11th Cir. 1988) (examining claim for back pay); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002) (examining claim by undocumented worker for unpaid labor).

17. Jason Schumann, Note, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 712 (2004).

18. *Id.* at 713 n.21 (citing Jenalia Moreno, *Undocumented and Endangered*, HOUS. CHRON., Sept. 3, 2000, at Bus. 1).

19. *Hoffman Plastic Compounds*, 535 U.S. at 151.

20. *Id.* at 154–55 (Breyer, J., dissenting).

21. *Id.* at 151.

22. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 223 (2d Cir. 2006); Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246, 1250 (N.Y. 2006); Amoah v. Mallah Mgmt., LLC, 866 N.Y.S.2d 797, 798–99 (N.Y. App. Div. 2008).

23. *Madeira*, 469 F.3d at 223; *Balbuena*, 845 N.E.2d at 1250; *Amoah*, 866 N.Y.S.2d at 798–99.

in workers' compensation cases, when such an application has serious consequences for workplace safety and state police power.

Part I of this Comment discusses the historical background of federal immigration and labor statutes examined in the *Hoffman Plastic* decision. Part II captures the case law and doctrinal precedent involving cases in which illegal immigration and labor laws were at odds with immigration policies. Part III explains the lasting effects of the *Hoffman Plastic* decision, including the rationales of the majority and dissent, attempting to resolve the policy crisis. Part IV describes how *Hoffman Plastic* has been used in workers' compensation litigation and how state and federal courts across the country have responded to its application. This Comment concludes by arguing that the application of *Hoffman Plastic* in workers' compensation cases is misplaced and perversely incentivizes employers to both further violate immigration laws by employing undocumented workers and ignore workplace safety standards, endangering both legal residents and the undocumented claimants.

I. BACKGROUND AND THE POLICY PATH TO *HOFFMAN PLASTIC*

A. Immigration Legislation from 1790 to 2002

1. From Open Borders to Ethnic Quotas: Years 1790 to 1952

America is a nation built by and for immigrants. The encouragement or prohibition on immigration and certain types of immigrants has fluctuated with history and foreign policy conflicts.[24] The first immigration-related statute in the United States was arguably the Naturalization Act of 1790, which required immigrants meet the following standards to be eligible for citizenship: be a "free white person," of "good character," residence in the United States for over two years, and residence in any given state for at least one year.[25] Then, during the late 1800s, Congress enacted a series of statutes establishing limits on entry of socially undesirable peoples, such as convicts, prostitutes, lunatics, and paupers.[26] Starting with the Chinese Exclusion Act of 1882 and continuing to the Immigration Act of 1924, Congress began systematically excluding targeted countries and ethnic groups from lawfully immigrating into the United States.[27] While the Chinese Exclusion Act of 1882 suspended the

24. *See* RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 7–12 (paperback ed. 1993).

25. Act of Mar. 20, 1790 (Naturalization Act of 1790), ch. 3, 1 Stat. 103–04 (repealed 1795).

26. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, 477; Act of Aug. 3, 1882, ch. 376, 22 Stat. 214, 214.

27. Act of May 6, 1882 (Chinese Exclusion Act of 1882), ch. 126, 22 Stat. 58, 59 (repealed 1943) (excluding immigrants from China); Act of May 26, 1924 (Immigration Act of 1924), ch. 190, 43 Stat. 153, 167 (repealed 1952) (providing exceptions from quotas to certain nationalities).

Chinese immigration of skilled and unskilled laborers and mining employees,[28] the Immigration Act of 1924 conclusively outlawed all Asian immigration.[29] The aftermath of World War I and the massive influx of immigration in the early decades of the twentieth century pushed Congress into the immigration quota system that continues to this day.[30] The Immigration Act of 1924 established a two percent quota per country—provided a given country's citizens were not wholly barred from immigrating—meaning that each year, a number totaling two percent of the existing U.S. population (i.e., the Irish population) would be allowed to immigrate into the United States.[31] The quota did not effectively limit immigrants from countries which already had sizable populations within the United States—thus allowing almost unchecked immigration from Ireland, Britain, and Germany—but did restrict the Asiatic Triangle and southern European countries, whose populations were smaller (and tended to have communist sympathies).[32] This tacit immigration regime aimed at curbing anarchists[33] and Asian immigration remained in place until 1952.[34]

2. From 1952 to 1986: The Era of the Immigration and Nationality Acts

Immediately following the conclusion of World War II and during the advent of the Cold War, Congress enacted the Immigration and Nationality Act (INA).[35] The purpose of the INA was to codify and clarify the plethora of federal statutes that regulated immigration but which lacked systematic and unified framework.[36] The INA retained a quota system held at roughly 154,000 immigrants per year for monitored countries, developed a preference system for skilled workers and their families, and repealed the earlier statutes

28. Chinese Exclusion Act of 1882 § 1, 22 Stat. at 61.

29. *See* Immigration Act of 1924 § 26, 43 Stat. at 167.

30. James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 232 (1995).

31. Immigration Act of 1924 § 11(a), 43 Stat. at 159.

32. *See id.* at 155.

33. *Cf.* Keisha A. Gary, Note, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 230 (1994) (describing timely passage of immigration quotas following the assassination of President McKinley by anarchist Leon Czolgosz).

34. CTR. FOR IMMIGRATION STUDIES, THREE DECADES OF MASS IMMIGRATION: THE LEGACY OF THE 1965 IMMIGRATION ACT (1995), *available at* http://www.cis.org/articles/1995/back395.html.

35. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (amended 1965) (codified as amended at 8 U.S.C. § 1101 (2006)).

36. H.R. REP. NO. 82-1365, at 27 (1952) ("[The Immigration and Nationality Act] represents the first attempt to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization, and nationality.").

barring Asian immigration by allocating 100 visa slots to each Asian country.[37] The INA lacked, however, provisions regarding labor. Thus, the INA did not make it unlawful to employ an illegal alien, nor did it establish any penalties for contributing to the black market of illegal labor.[38] The INA is an example of how immigration and economic interests do not always converge—while streamlining immigration policy to tighten security measures out of Cold War fears, the government, through the Bracero program, was actively encouraging temporary immigration of non-citizens to satisfy agricultural workforce needs.[39] The INA did not subject Latin America to any quota or numerical limitations.[40]

As the Civil Rights movement inspired the nation, legislators passed amendments to the INA (INAA), which abolished the quota systems and established new family- and skill-based standards in an attempt to equalize the playing field for all potential immigrants.[41] The standards took the form of eight priority levels, ranging from offspring of citizens to refugees fleeing from communism.[42] With the immigration from Western Europe slowing and abundant employment of undocumented workers in agriculture, manufacturing, and other industries leftover from the Bracero program, the INAA was violently silent on illegal immigration's relationship with labor until 1986.[43]

3. The Advent of Awareness: The Immigration Reform and Control Act (IRCA)

Between 1965 and 1985, there was a massive influx of immigrants—predominantly from Latin American countries—and, due to misguided policies, a correlated population of largely illegal and undocumented workers across the country.[44] For the first time in American history, there was a policy shift toward using economic strategy to curb immigration. Congress effected that shift by passing the IRCA, which focused almost exclusively on

37. *See* Immigration and Nationality Act, §§ 201(a), 202(c), 66 Stat. at 175, 178.

38. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892–93 (1984).

39. *See* Bickerton, *supra* note 8, at 896–97. The Bracero Program was a bilateral agreement between the United States and Mexico established during World War II to provide a cheap and steady labor force to U.S. industries affected by the absence of drafted workers. *Id.* Over five million undocumented workers would participate in the Bracero Program in the following decades. *Id.*

40. Immigration and Nationality Act, § 101(a)(27), 66 Stat. at 169.

41. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 1–3, 79 Stat. 911, 911–13 (codified as amended at 8 U.S.C. §§ 1101–1557 (2006)).

42. *Id.* § 3, 79 Stat. at 912–14.

43. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144–45 (2001) (noting Congress's failure to address the employment of illegal aliens in the INAA).

44. *Cf.* Bickerton, *supra* note 8, at 914–15 (noting the significant increase in Mexican immigration in the 1970s and 1980s and the incentive for illegal immigrants to remain in the United States).

employers and the hiring of illegal labor.[45] With the IRCA, Congress attempted to "close the back door" on illegal immigration by attacking the incentive to employ illegal workers without penalty—the rationale being that reduced job opportunities would curb illegal immigration.[46] The IRCA established an impressive verification scheme where the Bureau of Citizenship and Immigration Services would issue proper documentation to any alien legally entitled to work and which the alien would then present to prospective employers upon application for any job.[47] To effectuate this policy, Congress enacted both civil and criminal penalties for employers who either knowingly violated the IRCA by hiring an alien without documentation or did not terminate the employment of an alien upon gaining knowledge of the lack of documentation.[48] In a strange twist of legislative drafting, however, the IRCA penalized any alien who *provided* false documentation to obtain employment, but there was no penalty or discussion regarding a penalty for an alien simply working *without* documentation.[49]

Therefore, the IRCA finally established proactive policies to encourage employers to curb illegal immigration by prohibiting the hiring of aliens lacking proper documentation.[50] While not resolving all of the complexities of illegal immigration, this was a significant shift away from arbitrary quotas and into thoughtful policy and economic resolve. Despite this policy change, illegal immigration—particularly from Latin America—flourished as employers evaded penalties. From 1986 to 2005, the number of illegal immigrants increased from approximately two million to ten million.[51]

45. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (2006)).

46. H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650; *see also* Court E. Golumbic, Comment, *Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Control and Reform Act of 1986*, 15 YALE J. INT'L L. 162, 165 & n.11 (1990) (describing the growing importance of employer sanctions to immigration policy as recognized by Congress and President Reagan).

47. Immigration Reform and Control Act of 1986 § 101(a)(1), 100 Stat. at 3361–63.

48. *Id.* § 101(a)(1), 100 Stat. at 3360, 3366–68.

49. *Id.* § 103(a)(6), 100 Stat. at 3380.

50. *Id.* § 101(a)(1), 100 Stat. at 3360.

51. JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUDIES, BACKGROUNDER: TWO SIDES OF THE SAME COIN: THE CONNECTION BETWEEN ILLEGAL AND LEGAL IMMIGRATION 6–7 (2006), *available at* http://www.cis.org/articles/2006/back106.pdf (estimating that the number of undocumented migrants increased from 5 million in 1987, to potentially 10 million undocumented migrants in 2005).

4. Fences, Terrorists, and Refugees: Immigration Reform from 2002–2009

Since the passage of the IRCA in 1986, there has not been much evolution in policies regarding illegal immigration and labor from Latin America. Several acts have passed, but their effects have been questionable. The Immigration Act of 1990 increased resources for the border patrol and established lottery system for immigration quantities.[52] The Nicaraguan Adjustment and Central American Relief Act of 1997 provided relief from deportation from Latin American countries reeling from former Soviet bloc control, such as Cuba and Nicaragua.[53] Finally, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 formalized deportation and criminal penalties for illegal entry into the United States while again allocating resources for the border patrol and border fencing.[54] This last act did establish a stronger policy on illegal aliens in the United States by creating streamlined deportation procedures, but overall failed to address the economic reality of labor and illegal aliens.[55]

In the aftermath of the terrorist attacks of September 11, 2001, there was an outcry for border security and a scathing eye was directed upon illegal immigration.[56] While legislation did pass for issuing driver's licenses[57] and financing militarized borders,[58] there has not been any significant alteration to the INAA or the IRCA statutes.[59] In fact, as Mexico's economy began to collapse in recent years from the inception of NAFTA and its losing battle against agricultural subsidies, there existed a heightened economic incentive

52. Immigration Act of 1990, Pub. L. No. 101-649, §§ 162, 541, 104 Stat. 4978, 5009, 5057 (codified in part at 8 U.S.C. § 1153).

53. Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, §§ 201–203, 111 Stat. 2160, 2193–96 (codified as amended at 8 U.S.C. § 1101 (2006)).

54. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, §§ 101–102, 108, 110 Stat. 3009-546, 3009-553–3009-555, 3009-557–3009-558 (codified at 8 U.S.C. § 1101).

55. *See id.* §§ 301–309, 110 Stat. at 3009-575–3009-627 (creating procedures for deportation but omitting any mention of labor and illegal aliens).

56. JOHN TIRMAN, IMMIGRATION AND INSECURITY: POST-9/11 FEAR IN THE UNITED STATES 1 (MIT, Ctr. for Int'l Studies, Audit of the Conventional Wisdom Ser. No. 06-09, 2006)

57. REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101, 201–202, 119 Stat. 231, 302, 311–15 (codified at 8 U.S.C. § 1158(b)(1), 49 U.S.C. § 30301 (2006)) (requiring states to check legality of residency for applicants).

58. Secure Fence Act of 2006, Pub. L. No. 109-367, §§ 1–2, 120 Stat. 2638, 2638 (codified at 8 U.S.C. § 1101 (2006)).

59. *Cf.* Maurice Hew, Jr., *The Fence and the Wall (Mart) . . . Maginot Line Mentality*, 39 CONN. L. REV. 1383, 1386–88 (2007) (noting the failure of President Bush to come through on his promise of immigration reform).

for illegal immigration.[60] Despite the militarization of the border between the United States and Mexico, there is an thriving and powerful business rooted in illegal human trafficking from the deserts of Mexico across dangerous and deserted areas of Arizona, Texas, and New Mexico.[61] If, as Congress intended, the back door closed in 1986, then from 1987 to 2009, the windows opened and the debates raged onward towards massive deportation, guest visas, and amnesty.[62] Meanwhile, employers continued operating as they did half a century ago, profiting and accelerating the problem leading into the outcome in *Hoffman Plastic*.

B. The Labor Laws & Policies Concerning NLRA and Workers' Compensation

1. The NLRA and NLRB

Similar to the streamlining of immigration policy with the advent of the INA in 1952, the National Labor Relations Act (NLRA) in 1935 was an attempt to streamline the pitfalls and problems associated with earlier labor legislation such as the National Industrial Recovery Act (NIRA) of 1933.[63] In the midst of the Great Depression, workers needed an agency that could enforce workers' and unions' rights against employers.[64] The only governmental labor entity in this timeframe, the National Labor Board (NLB), lacked enforcement authority,[65] and in 1935, the Supreme Court invalidated NIRA as a violation of the Commerce Clause.[66] With unemployment soaring and the economy tumbling, the NLRA was passed on July 5, 1935.[67] It set forth a number of changes, including the listing of unfair employment practices to protect workers.[68]

The NLRA also established the National Labor Relations Board (NLRB), which had two overarching functions: first, to hold elections which in employees could decide whether and how to unionize, free from employer

60. Marla Dickerson, *Placing Blame for Mexico's Ills*, L.A. TIMES, July 1, 2006, at C1.

61. Alejandro Portes, *The Fence to Nowhere*, AM. PROSPECT, Oct. 2007, at 26, 27.

62. *Cf. id.* (arguing that border militarization has had the opposite effect its supporters desired). For a classic text providing useful background on the scope of the immigration problem, see LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY (2004).

63. *See* MICHAEL C. HARPER ET AL., LABOR LAW: CASES, MATERIALS, AND PROBLEMS 81–82 (6th ed. 2007) (citing National Labor Relations Act, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. § 151 (2006)); National Industrial Recovery Act, ch. 90, 48 Stat. 195, *declared unconstitutional by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

64. *See id.* at 80–81.

65. *Id.* at 81.

66. *Id.* at 82 (citing *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 549–50).

67. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

68. *Id.* § 8, 49 Stat. at 452–53 (codified at 29 U.S.C. § 158).

oppression; and second, to enforce the NLRA.[69] Penalties for violations could take the form of reinstatement orders, back pay awards, cease-and-desist orders, injunctions, and other remedies imposed on employers for violating workers' rights under the NLRA.[70] While illegal aliens are limited in their ability to recover workers' compensation,[71] other statutes still provide avenues of recovery for illegal aliens. Both the Fair Labor Standards Act (FLSA) and Title VII of the 1964 Civil Rights act allow back pay recovery for rights violations by employers, both of which currently remain beyond the scope of *Hoffman Plastic*.[72]

Procedurally, the NLRB conducts a hearing on an alleged violation of the NLRA and makes a ruling allowing or denying a penalty upon the employer for the violation; both the remedy and burden vary with the alleged violation.[73] These rulings are appealable to the local U.S. Court of Appeals.[74] The NLRA's definitions of unfair labor practices went hand-in-hand with the creation of the NLRB to enforce and protect workers' rights.[75] In the aftermath of *Hoffman Plastic*, the concern remains the same: that employers have *carte blanche* to hire illegal labor and—in direct contravention of the NLRA—fire them for unionizing without any penalty.[76] In effect, a slave-like immigrant labor class is being sustained and oppressed.

2. Workers' Compensation: Foundation and Rationale

Workers' compensation is a system of providing benefits to an employee for occupational injuries.[77] Usually—each state varies—the employee must

69. *Id.* §§ 3, 6, 9–10, 49 Stat. at 451–53 (codified at 29 U.S.C. §§ 153, 156, 159–61).

70. Thomas J. Walsh, Hoffman Plastic Compounds, Inc. v. NLRB*: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 318 (2003) (citing 29 U.S.C. §§ 160(c), 160(j) (2000)).

71. *See* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 151–52 (2002). Aliens' rights under workers' compensation statutes are limited by the deference given to a state's definition of an employee. *Cf.* Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INS. PRAC. L.J. 247, 254 (2008) (providing examples where states' definitions of employees have determined aliens' compensation rights).

72. Walsh, *supra* note 70, at 318–19 & n.43 (citing Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988) (interpreting FLSA to allow undocumented workers the right to back pay)). Title VII has not received as much judicial attention post-*Hoffman Plastic*, but at least one commentator believes that it retains its utility. *See, e.g.*, Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 147–50 (2003).

73. National Labor Relations Act § 10, 49 Stat. at 453–55 (codified at 29 U.S.C. § 160).

74. *Id.* § 10(f), 49 Stat. at 455 (codified at 29 U.S.C. § 160(f)).

75. *Cf.* HARPER ET AL., *supra* note 63, at 82–83.

76. *Id.*

77. Presmanes & Eisenberg, *supra* note 71, at 248.

prove the injury occurred during the course of employment, at which point the employer must provide medical care for the injured employee.[78] The driving force behind workers' compensation is to reduce litigation in courts and manage costs for employers by spreading the costs through the purchasing of insurance to cover workers' injuries.[79]

Prior to the modern workers' compensation systems, there existed a long and arduous road to resolving an injured worker's claim.[80] In principle, workers had the ability to file a tort suit against another worker who, through negligence, caused them to be injured.[81] This abstract right was curtailed in the 1842 case *Farwell v. Boston & Worchester Railroad Corp*., in which the Massachusetts Supreme Court imported the English doctrine of fellow-servant rule.[82] Under that doctrine, a servant had no claim against the master (employer) for injuries caused by another worker; rather, claims were limited to incidences where the employer was the party at fault.[83] Courts started to limit the fellow-servant rule by allowing dramatic and influential claims on a case by case basis.[84] Despite doctrinal limits, the system was still saturated with claims.[85] The rationale holding the nineteenth century employee compensation system together was that workers who took dangerous jobs would be compensated accordingly and, therefore, assumed the risk of injury, thereby freeing the employer from bearing any further costs.[86] This concept has returned in the wake of the *Hoffman Plastic* workers' compensation cases concerning illegal labor.[87]

In the nineteenth and early twentieth centuries, injured workers pursued recompense via tort—an inefficient and costly system for both sides, and a system which tended to favor employers.[88] Both employees and employers found this system to be arbitrary in its results. Employees faced a difficult choice in that if they tried to settle with the employer or insurance company

78. *See id.*

79. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 70–71 (1967).

80. *Cf. id.* at 53 (outlining the common law rules of tort applicable before the introduction of the workers' compensation system).

81. *Id.*

82. *Id.* at 55 (citing Farwell v. Bos. & Worchester R.R. Corp., 45 Mass. (4 Met.) 49 (1842)).

83. *Id.* at 53.

84. Friedman & Ladinsky, *supra* note 79, at 59.

85. *See id.* (noting that the narrowing of the doctrine did not succeed in stopping industrial accident litigation).

86. *Id.* at 55.

87. *See* Presmanes & Eisenberg, *supra* note 71, at 248 (questioning whether employers must pay workers' compensation benefits for injured illegal immigrants).

88. Friedman & Ladinsky, *supra* note 79, at 53, 65–67.

they faced a wait ranging anywhere from six months to six years,[89] or if they tried to litigate the matter, they faced an arsenal of defenses and much of any recovery was typically absorbed by attorneys' contingency fees.[90] Employers had the headache of unpredictable jury verdicts, courts costs, and haggling with insurance companies regarding these claims.[91] Even the courts themselves found the flood of litigation and the character of claims disheartening, as Chief Justice J.B. Winslow of Wisconsin stated:

> [T]he results to life and limb and human happiness [are] so distressing that the attempt to honestly administer cold, hard rules of law . . . make[s] drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself . . . .
>
> . . .
>
> These are burning and difficult questions with which the courts cannot deal . . . .[92]

Judge, employer, and employee would find relief in workers' compensation statutes.

In the opening years of the twentieth century, states began to pass workers' compensation statutes, creating a domino effect as employers and legislators on a state by state basis determined it was better to indemnify injured workers with set schedules, caps, and insurance, than to constantly risk a showdown in court where damages could vary wildly.[93] Between 1911 and 1948, all fifty states passed some form of workers' compensation statutes, reducing the flood of litigation by giving employers fixed liability for an employee's injury, provided the injury qualified.[94]

Despite these advancements, there are substantial critics of the system who find workers' compensation to be codified oppression of the worker.[95] The main contention is that by waiving the right to bring suit, the worker loses a fundamental right of recovery and leaves his or her fate to a set schedule of fees, damages, and medical care, all of which can be highly suspect depending on the state system.[96] Some common problems are that fee schedules are too

89. *Id.* at 66 (citing WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 23–24 (1936)).

90. *Id.* at 66, 70 (listing defenses including assumption of risk and contributory negligence).

91. *See id.* at 66–67.

92. *Id.* at 67 (third and fourth alterations in original) (quoting Driscoll v. Allis-Chalmers Co., 129 N.W. 401, 408–09 (Wis. 1911)).

93. Friedman & Ladinsky, *supra* note 79, at 70–71.

94. *Id.*

95. *See* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 679–80 (1998).

96. *See* Eston W. Orr, Jr., Note, *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 351–52, 356–57 (2002) (arguing that some

abstract—while someone who lost an arm might be unable to find work and needs substantial assistance, he is considered only proportionally disabled according to the schedules and, thus, is expected to expediently find work.[97] Another issue relates to new injuries or ongoing medical treatments that fall beyond the scope of the statutory framework or employer-insurance agreement.[98] Finally, many employers still contest the injuries as being self-imposed or falling beyond the scope of recovery, thereby leaving the injured worker to the clutches of the workers' compensation appeal process.[99] This process starts with administrative judges and, upon subsequent appeals, finds itself finally in the state court system, which can be a long and arduous process for an injured worker simply trying to get some medical assistance.[100]

Despite the criticisms and disadvantages of the workers' compensation system, it remains in full force and provides policy incentives for workplace safety and employee protection. Since it is a state-based system of rights, each state's definition of an "employee" becomes highly significant to recovery for illegal aliens.[101] Courts have recognized the ability for an illegal alien to recover when they have been injured on the job, irrespective of immigration policies.[102] The ability for state courts to hold state-based employers accountable for workplace injuries is of substantial concern and public policy.[103]

II. LABYRINTHS AND LOOPHOLES: THE CASE LAW PRIOR TO *HOFFMAN PLASTIC*

In deciding *Hoffman Plastic*, the Supreme Court was attempting to resolve more a decade of conflict involving immigration legislation, labor boards, and undocumented workers.[104] Among many others, four primary cases set the

states altered the balance crucial to workers' compensation altered by raising their compensability standards, lowering disability payments, limiting medical benefits, restricting litigation costs, and expanding employer immunity).

97. *Cf.* Ellen Smith Pryor, *Compensation and a Consequential Model of Loss*, 64 TUL. L. REV. 783, 818–20 (1990).

98. *See* McCluskey, *supra* note 95, at 681 (providing carpal tunnel syndrome and back sprain as examples).

99. *See* Edwin L. Felter, Jr. & Sarah A. Hubbard, *Erosion of the Exclusive Remedy in Workers' Compensation*, COLO. LAW., Dec. 2002, at 83, 84–85.

100. *See* Linda J. Starr, Current Issues, *Injured on the Job: Using Alternative Dispute Resolution to Improve Workers' Compensation in Minnesota*, 18 HAMLINE J. PUB. L. & POL'Y 487, 491–95 (1997) (describing the procession of workers' compensation claims in Minnesota).

101. *Cf.* Correales, *supra* note 72, at 151–52 (contrasting workers' compensation claims in jurisdictions that consider undocumented workers to be employees with those that do not).

102. Presmanes & Eisenberg, *supra* note 71, at 253; *see infra* Part IV.

103. *Cf.* Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403 (1998).

104. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142 n.2 (2002).

stage for *Hoffman Plastic*: *Sure-Tan, Inc. v. NLRB*;[105] *Local 512, Warehouse & Office Workers' Union v. NLRB*;[106] *Del Rey Tortilleria, Inc. v. NLRB*;[107] and *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc*.[108]

In 1984, Justice O'Connor authored a troublesome opinion in *Sure-Tan, Inc. v. NLRB*, where the Court stated that the NLRA applied to undocumented workers.[109] In the majority opinion, Justice O'Connor stated the employer violated the NLRA by reporting workers to INS for unionizing, thereby clearly establishing a violation of workers' rights.[110] Justice O'Connor affirmed that since the NLRB is entitled to define who qualifies as a worker, the NLRA's definitions are inclusive to undocumented workers.[111] The NLRB awarded reinstatement remedies to the workers, which the Seventh Circuit conditioned on their legal re-entry to the country.[112] The Court affirmed the Board's award of reinstatement as valid and binding.[113] On the other hand, the Court ruled that the Court of Appeals exceeded its authority under the NLRA when it modified the NLRB's order to include six months back pay for these undocumented workers.[114] Justice O'Connor stated that since under the NLRA, undocumented workers are not available to work, the remedy was speculative and thus not sufficiently tailored to the unfair labor practice.[115]

Conversely, in the very same holding, the Court clearly affirmed that the NLRA applies to undocumented workers and that there is little conflict between the INA and NLRA.[116] Justice O'Connor stated that effectuating the NLRA in protecting *undocumented* workers from discrimination and unfair working conditions implicitly ensures that *legal* employees are also protected at the same worksite.[117] In a moment foreshadowing *Hoffman Plastic*, the Court stated that holding employers culpable under the NLRA regarding illegal labor removes a perverse incentive to hire illegal labor; therefore, the

105. 467 U.S. 883, 891–92 (1984) (holding that undocumented aliens are "employees" under the NLRA).

106. 795 F.2d 705, 719–20 (9th Cir. 1986) (holding that illegal workers could collect back pay under the NLRA).

107. 976 F.2d 1115, 1121–22 (7th Cir. 1992) (holding that illegal workers could not collect back pay under the NLRA).

108. 134 F.3d 50, 56 (2d Cir. 1997) (holding that illegal workers could collect back pay under the NLRA).

109. *Cf. Sure-Tan*, 467 U.S. at 892, 902–05 (upholding the tolling of back pay until legal readmission into the United States).

110. *Id.* at 894–95.

111. *Id.* at 891–92.

112. *Id.* at 889.

113. *Id.* at 902–03.

114. *Sure-Tan*, 467 U.S. at 899.

115. *Id.* at 900–01.

116. *Id.* at 894.

117. *Id.* at 892.

immigration policies and congressional intent are efficiently fulfilled in this course.[118] This dissonance between the two foundational holdings in *Hoffman Plastic* was left unresolved; the Court in *Sure-Tan* lamented that while the courts can only work within the confines of each act, the legislature is free to resolve the issue with more clarity.[119] The resounding fear was that without NLRA protections and union involvement for undocumented workers, "there would be . . . a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining."[120]

In 1986, on the eve of Congressional action in passing the IRCA, the Ninth Circuit in *Local 512, Warehouse & Office Workers' Union v. NLRB* declared that not only were undocumented workers protected by the NLRA, but also determined that granting them back-pay "does not detract" from immigration policy goals.[121] There, the employer laid off three workers and then refused to honor a collective bargaining contract.[122] The court read *Sure-Tan*'s holding to say that it did not govern undocumented workers who remain in the United States and are not subject to any active deportation process.[123] The court interpreted *Sure-Tan* to be concerned with illegal border crossing—a view made possible since the INA was the only federal immigration policy controlling at the time and did not outlaw the employment of undocumented workers.[124] In fact, the INA did not even make it a crime to be employed after illegally entering the country; thus, the court found, as long as the workers remained in the United States and were available to work, they were entitled to the back pay remedies afforded by the NLRA.[125]

The first seminal case after the passing of the IRCA, *Del Rey Tortilleria, Inc. v. NLRB*, found that *Local 512* was misguided in its conclusions and now, under the IRCA, undocumented workers are not entitled to back pay.[126] The Seventh Circuit held that while the NLRA still considers undocumented workers as employees, the IRCA disavows any ability to grant back pay since employment of undocumented labor is now illegal and cannot be encouraged.[127] In a twist of fate, since the unfair labor practice at issue in *Del Rey Tortilleria* occurred before the passing of the IRCA, the court relied on

118. *Id.* at 903.
119. *Sure-Tan*, 467 U.S. at 904.
120. *Id.* at 892.
121. Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 722 (9th Cir. 1986).
122. *Id.* at 709.
123. *Id.* at 717, 719.
124. *Id.* at 719.
125. *Id* at 719, 722.
126. Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119–21 (7th Cir. 1992).
127. *Id.* at 1121.

Sure-Tan rationale: There cannot be any back pay for undocumented workers who were not legally available to work.[128] The Seventh Circuit concluded by urging any worker seeking to utilize a reinstatement remedy from the NLRB to produce documents proving they are legally allowed to work in the United States.[129]

The last major case prior to *Hoffman Plastic* was the 1995 decision *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,[130] in which the pendulum swung back towards finding justification to award undocumented workers back pay. The NLRB found that the NLRA and IRCA are not competing policies, but in fact "must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace."[131] The NLRB found that both acts were established with similar congressional intent for the workplace, in that both the NLRA and IRCA are to ensure lawful workers in the American economy are afforded proper protections both from unfair labor practices and unfair illegal labor competition.[132] The Board assessed the congressional intent in the IRCA and its emphasis on penalties on employers for hiring workers without proper documentation, characterizing the threat as "[a] ready supply of individuals willing to work for substandard wages in unsafe workplaces, with unregulated hours and no rights of redress, [which] enables the unscrupulous employers that depend on illegal aliens to turn away Americans and legally working alien applicants who hesitate to accept the same conditions."[133] The NLRB found that one way to discourage corrupt employers looking to put both illegal labor and the American working class at dangerous odds with each other is by requiring such employers to reinstate and award back pay to undocumented workers.[134] Any other outcome would provide employers with a windfall amid violations of both NLRA and the IRCA, allowing workplace abuses to increase, since undocumented workers will not report abuses in fear of deportation proceedings.[135]

As the case law and policy pendulum swung back and forth amid these cases, the Supreme Court had yet to speak to the issue since *Sure-Tan*. With the IRCA officially in effect for more than fourteen years, the *Hoffman Plastic* decision emerged, establishing a new paradigm of jurisprudence on labor, immigration, and the fate of the undocumented worker.

128. *Id.* at 1120–21.
129. *Id.* at 1123.
130. A.P.R.A. Fuel Oil Buyers Grp., Inc., 320 N.L.R.B. 408 (1995).
131. *Id.* at 408.
132. *See id.* at 414–15.
133. *Id.* at 414.
134. *See id.*
135. *A.P.R.A. Fuel Oil Buyers Grp.*, 320 N.L.R.B. at 414.

III. *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB*

A. Background to Hoffman Plastic Compounds

The factual and procedural background underlying *Hoffman Plastic* created a perfect policy paradox that was doomed to be inherited by the Supreme Court. In May 1988, Hoffman Plastic hired Jose Castro and seven months later fired him due to AFL-CIO union organizing activities at its plant.[136] The NLRB found the termination of Mr. Castro to be in direct violation of § 8(a)(3) of the NLRA, under which an employer terminating an employee in regards to his union activities is illegal.[137] The remedies awarded by the NLRB were reinstatement and back pay, thus requiring an administrative hearing to determine the amount of back pay.[138] At this hearing, Mr. Castro admitted that he was not a legal citizen of the United States and that he had provided false documentation to Hoffman when obtaining employment.[139] The administrative law judge (ALJ) held that both back pay and reinstatement were precluded by *Sure-Tan* and federal immigration law (IRCA).[140] The NLRB reversed the ALJ's finding and held that back pay was the best way to effectuate immigration policies, thereby curbing employers from being shielded by the IRCA for direct NLRA violations.[141] Hoffman Plastic appealed to the Court of Appeals for the District of Columbia; the petition was denied, affirming the NLRB's finding for back pay for Mr. Castro.[142] In the midst of the swirling case law of *Sure-Tan*, *APRA*, and two major congressional statutes at odds with each other (IRCA and NLRA), the Supreme Court granted certiorari.[143] The 5-4 decision was the result of a tense struggle, evidenced by the divergent rationales of the majority and dissent; each side concluded that their position resolved the crisis while asserting the other encouraged more immigration policy mischief.[144]

136. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

137. *Id.* (citing 306 N.L.R.B. 100 (1992); National Labor Relations Act, § 8(a)(3), 49 Stat. 449, 452 (codified as amended 29 U.S.C. § 158(a)(3) (2006)).

138. *Id.* at 140–41.

139. *Id.* at 141.

140. *Id.*

141. *Hoffman Plastic Compounds*, 535 U.S. at 141.

142. *Id.* at 142.

143. *Id.*

144. *See id.* at 151–52; *id.* at 155–56 (Breyer, J., dissenting).

B. Holding and Analysis of the Hoffman Plastic *Majority*

The majority opinion reversed the NLRB and D.C. Circuit Court of Appeals, holding that the IRCA precludes the NLRB from having power to award back pay to Mr. Castro.[145] Chief Justice Rehnquist, writing for the majority, found support in both Congress's express intent when passing the IRCA as well as case law.[146]

The majority relied upon two prior holdings in which the Supreme Court had held that the NLRB could not grant back pay due to an employee's illegal acts.[147] Justice Rehnquist reaffirmed that the NLRB's remedies are limited when employees' actions violate federal statutes.[148] Not one to ignore the elephant in the room, Justice Rehnquist directly asserted that the Supreme Court holding in *Sure-Tan* is still binding in that the NLRA applies to undocumented workers.[149]

The Court found that their decision in *ABF Freight* was distinguishable from the facts of *Hoffman Plastic*, notwithstanding both cases contained employees committing illegal acts.[150] In *ABF Freight*, the Court held that an employee's false testimony at a compliance proceeding does not by itself require the NLRB to deny back pay.[151] In the *Hoffman Plastic* opinion, Justice Rehnquist distinguished *ABF Freight* based on several factors, including the fact that federal statutes were not implicated and the fact that the testimony did not render the entire employment relationship illegal.[152] Justice Rehnquist asserted that unlike *ABF Freight*, here, all three of those distinctive factors were implicated when Mr. Castro provided false documents to gain employment.[153] These differences, the Court explained, required that the *Southern S.S. Co.* and *Fansteel* doctrines control when addressing the facts of *Hoffman Plastic*.[154]

145. *Id.* at 151–52.

146. *Hoffman Plastic Compounds*, 535 U.S. at 140, 145, 147, 149 ("We find . . . that awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.").

147. *Id.* at 143 (citing S. S.S. Co. v. NLRB, 316 U.S. 31, 46–47 (1942); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257–58 (1939)). In both cases cited, the Supreme Court had held that serious illegal conduct, such as the violent seizing of property (*Fansteel*) and inciting a mutiny (*S. S.S. Co.*), foreclosed the NLRB from being able to award back pay. *Id.* at 143–44 (citing *S. S.S. Co.*, 316 U.S. 46–47; *Fansteel Metallurgical Corp.*, 306 U.S. 240 at 257–58).

148. *Id.* at 144.

149. *Id.* at 144, 147–48 (citing 8 U.S.C. § 1324a (2006)). This assertion came despite the fact that the IRCA criminalized the actions underlying the *Sure-Tan* decision. *Cf. id.*

150. *Id.* at 145–46.

151. *Hoffman Plastic Compounds*, 535 U.S. at 145.

152. *Id.* at 146.

153. *See id.*

154. *Id.*

The majority's main conclusion was that Congress's intent in passing the IRCA' was to curb illegal immigration by making it a crime to provide false documents to gain employment in the United States.[155] The preliminary action by Mr. Castro, providing false documents, violated the IRCA; therefore, any latter violation of the NLRA would be a consequence of the original action—a violation of immigration law.[156] Justice Rehnquist stated that to award back pay to an undocumented worker who previously violated federal law "not only trivializes the immigration laws, it also condones and encourages future violations."[157] Bolstering his position, Justice Rehnquist explained that typically, workers must mitigate damages by searching for employment while their case is pending,[158] which in this case, would require Mr. Castro to further violate the IRCA by once again providing false documents to gain mitigating employment.[159] The Court explained that Hoffman was not getting a windfall; the company was issued a cease and desist order and was directed to post notice to employees of their rights under the NLRA.[160] In issuing this decision, the majority ended the era of the INA, *Sure-Tan*, and allowing NLRB to effectuate back pay remedies for undocumented workers.[161] The Court stated that the policy paradox is solved by squarely enforcing IRCA penalties over NLRA remedies when they pertain to illegal immigration and back pay of undocumented workers.[162]

C. Dissenting from the "Wink and Nod"

The four dissenting justices (Breyer, Stevens, Souter, and Ginsburg) concluded in their opinion that there is no conflict of immigration and labor policies and that awarding back pay is both within the scope of power for the NLRB as well as in accord with immigration policies.[163] The dissenting opinion, authored by Breyer, based its position on: 1) the importance of NLRA remedies; 2) the perverse incentives created by superseding IRCA over NLRA; 3) distinguishing the majority's case law; and 4) deferring to administrative agencies.[164]

The dissent argued that the importance of the NLRA—specifically the back pay remedy afforded by the NLRB—is evidenced by over thirty years of

155. *See id.* at 147–48.
156. *Hoffman Plastic Compounds*, 535 U.S. at 141, 148–49.
157. *Id.* at 150.
158. *Id.* at 150–51 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 901 (1984)).
159. *Id.* at 150–51.
160. *Id.* at 152.
161. *Cf. Hoffman Plastic Compounds*, 535 U.S. at 147–53.
162. *Cf. id.* at 151–52.
163. *Id.* at 153 (Breyer, J., dissenting).
164. *See id.* at 153–61.

case law,[165] spanning from *Golden State Bottling Co. v. NLRB*[166] to *A.P.R.A Fuel Oil Buyers Group, Inc.*[167] Justice Breyer found the remedy necessary to combat illegal conduct and protect both employees and the market economy from mischievous employers wanting to violate the NLRA.[168] The majority, Justice Breyer argued, erroneously believed that awarding back pay encourages violations, but socioeconomics is what drives migrants to illegally enter the country.[169] Thus, by removing penalties on employers, the majority created a "perverse economic incentive" to hire undocumented workers.[170] Therefore, what the majority has done actually creates a "wink and nod" black market labor economy where the very purpose behind the IRCA—the curbing of illegal hiring and illegal entry into the United States—is undermined by only slapping employers lightly on the wrists.[171]

Justice Breyer also found the majority's statutory analysis of the IRCA to be weak and unsupported, since nowhere in the IRCA does Congress speak to how providing false documents affects other agencies' awards, remedies, or powers.[172] Furthermore, the dissent illustrates that the IRCA and the very provisions upon which the majority bases its opinion are all intended to effectuate labor policies.[173] Therefore, curbing illegal immigration would be best effectuated by deferring to the NLRB, rather than to the IRCA.[174] In addition, the dissent noted that the Attorney General and other governmental agencies empowered to enforce immigration law fully supported the NLRB's decision to award back pay.[175] The dissent finally argued that there is no real tension between the NLRA and IRCA: the IRCA penalizes Mr. Castro for his providing of false documents,[176] and the NLRA penalizes Hoffman for violating the NLRA.[177] Thus, the immigration policy purpose argument made by the majority seems to fall apart upon a contextual glance.

Justice Breyer next found that the majority's endorsement of the *Southern Steamship Co.* and *Fansteel* decisions was misguided and *Hoffman Plastic's* facts are more analogous to *ABF Freight*.[178] Here, the dissent states, Mr.

165. *See id.* at 154.

166. *Hoffman Plastic Compounds*, 535 U.S. at 154 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973)).

167. *Id.* (citing A.P.R.A Fuel Oil Buyers Grp., Inc., 320 N.L.R.B. 408, 415 n.38 (1995)).

168. *Id.*

169. *Cf. id.* at 155.

170. *Id.*

171. *Hoffman Plastic Compounds*, 535 U.S. at 155–56.

172. *Id.* at 154–55.

173. *Id.* at 156–57.

174. *Id.*

175. *Id.* at 158.

176. *Hoffman Plastic Compounds*, 535 U.S. at 154–55.

177. *Id.* at 155–56.

178. *Id.* at 157–58.

Castro was fired entirely without cause, while in both *Southern Steamship Co.* and *Fansteel*, the employees—in addition to their unionization activities—had committed independent criminal acts which made their termination proper.[179] The *Hoffman Plastic* dissent felt that Justice Rehnquist's argument that an aggressive seizure of property and mutiny are somehow analogous to a worker fired for unionizing and later found to be undocumented was misplaced.[180] In *ABF Freight*, committing perjury did not preclude NLRA remedies, the dissent noted, and further, in that very case the Court explained that the NLRB has "broad discretion" to resolve a labor law violation with back pay despite civil or criminal infractions.[181] Thus, the dissent articulated, the controlling line of case law should have been *ABF Freight*, not case law based on mutinies and violent property seizure.[182]

Finally, the dissent argued that even if its finding that there was no policy tension between the IRCA and NLRA and that the NLRB is therefore empowered to award back pay was erroneous, *Chevron*'s deference-to-reasonable-agency-decisions doctrine should apply.[183] In *Chevron*, the Court held that if an administrative statute is ambiguous, then courts should grant a deference to reasonable interpretation by the administering agency.[184] Here, the dissent argued that the NLRB carefully considered the immigration and labor policy consequences, the Attorney General supported the Board's findings, and the finding was reasonable, and thus, the NLRB's findings should control on a matter within its authoritative scope.[185] The dissent concluded that not only is there no conflict of laws here, but the majority's usurping of enforcing labor law will actually defeat the purpose of the IRCA, dilute the power of the NLRA, and increase the flow of illegal immigration as a perverse economic loophole is now created.[186]

D. Hoffman Plastic *in its Own Backyard (NLRB Violations) 2002–2009*

The *Hoffman Plastic* decision has generated a large amount of scholarship, as well as stirring up controversy amongst Latino advocates. Many of these advocates believe that *Hoffman Plastic* has created a license to exploit;[187] this

179. *Id.* at 158–59.

180. *Id.*

181. *Hoffman Plastic Compounds*, 535 U.S. at 157.

182. *See id.* 157–59.

183. *Id.* at 160–61 (citing Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

184. *Chevron USA, Inc.*, 467 U.S. at 842–43.

185. *Hoffman Plastic Compounds*, 535 U.S. at 160–61.

186. *Id.* at 155–56.

187. *See, e.g.*, Correales, *supra* note 72; Dennise A. Calderon-Barrera, Note, Hoffman v. NLRB*: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119 (2003); Mohar Ray, Comment, *Undocumented Asian American*

contention has been made true by the increasingly novel ways employers have employed *Hoffman Plastic* in litigation.[188] More than academics and interest groups have commented on *Hoffman Plastic*. Among other governmental agencies giving a skeptical glance at the efficiency of the *Hoffman Plastic* decision for both labor and immigration law,[189] the GAO office estimated that *Hoffman Plastic* will have adversely affected over 5.5 million workers.[190] In short, while employers rejoiced, there arose a growing fear that the *Hoffman Plastic* precedent would be stretched to preclude other remedies to undocumented workers including Title VII, the Civil Rights Act, and Family and Medical Leave Act claims.[191] Many of these areas are still unexplored or left with limited state lower court opinions, thus leaving it unresolved whether *Hoffman Plastic* forecloses recovery.[192] Only the Ninth Circuit has distinguished the NLRA from Title VII, holding that undocumented workers are not precluded from recovery.[193] These inconsistent results have led many government agencies in "refus[ing] to expand *Hoffman* beyond back pay."[194]

Overall, the trend is for courts to hold that while back pay from a knowing violator of the IRCA is not within the NLRB's power by *Hoffman Plastic*, the

Workers and State Wage Laws in the Aftermath of Hoffman Plastic Compounds, 13 ASIAN AM. L.J. 91 (2006).

188. Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in* Latinos and the Law *and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53, 65–66 (2009) (describing employers' attempts to extend *Hoffman Plastic Compounds* to the Fair Labor Standards Act, Title VII, and various state laws).

189. Jill Borak, *A Wink and a Nod: The* Hoffman *Case and Its Effects on Freedom of Association for Undocumented Workers*, HUM. RTS. BRIEF, Spring 2003, at 20, 21 (noting the Attorney General's Office supported the dissent).

190. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 144 (2009) (citing U.S. GEN. ACCOUNTING OFFICE, GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 18 (2002)).

191. Lilah S. Rosenblum, *Mistakes in the Making: The Failure of U.S. Immigration Reform to Protect the Labor Rights of Undocumented Workers*, HUM. RTS. BRIEF, Spring 2006, at 23, 23.

192. *Cf. id.* at 23–24 & 27 n.12 (citing Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (declaring Michigan citizens' right to wage-loss benefits ends when the employer discovers they are unauthorized to work); *cf. also* Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (holding an undocumented worker seeking tort remedies could only recover lost wages at the wage rate of his country of origin, unless he could prove his employer knew about his undocumented status at the time of hiring).

193. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1075 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005); *see also* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J., 473, 501 (2005) (discussing *Rivera*).

194. Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 271 (2007) (citing Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 49–50 (2005)).

other avenues of recovery has not been foreclosed; this implies that the policy tension has not been resolved as both illegal immigration and substantial labor abuses are still prevalent in the United States. Nowhere has the battleground of litigation been more reactive and powerful as in the realm of workers' compensation, where Hoffman has been applied with staggering results.

IV. *HOFFMAN PLASTIC'S* APPLICATION TO WORKERS' COMPENSATION CASES

A. Hoffman Plastic *Applied in Workers' Compensation Cases*

Hoffman Plastic involved two competing federal laws, the NLRA and IRCA, each with a respective policy focus on labor and immigration; wherein the Supreme Court concluded that emphasizing the IRCA over the NLRA best resolves these national problems.[195] Workers' compensation cases, on the other hand, involve plaintiffs alleging under state law and workers' compensation frameworks that they were employees injured on the job and, therefore, should be able to recover against their employer regardless of their undocumented status.[196] The employers' defenses to and litigation strategy regarding these workers' compensation suits have commonly attempted to import *Hoffman Plastic*'s holding to prevent undocumented workers from recovering any remedies.[197] This action by employers has now levied the IRCA federal law against state workers' compensation laws, creating a firestorm of litigation that has led courts to weigh federal preemption against state police powers.[198] The responses vary by state due to each one having a slightly varied definition of "employee" and differing policy positions on workers' compensation; some courts have found (like the dissent in *Hoffman Plastic*) that there is no conflict[199] while others have held the criminal acts of providing false documentation to preclude recovery.[200]

B. Courts' Responses to Application of Hoffman Plastic *in Workers' Compensation Cases*

The use of federal preemption as a bar to claims of undocumented workers in workers' compensation cases via *Hoffman Plastic* is increasing and yet is being met with only limited success.[201] Preemption is an operation of congressional intent. "Congress may express its intent to preempt state law: '(1) by expressly defining the extent of preemption; (2) by regulating an area

195. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002).
196. Presmanes & Eisenberg, *supra* note 71, at 248–49.
197. *Id.* at 250.
198. *See id.* at 252–54.
199. *Id.* at 248–49, 251.
200. *Id.* at 251–52, 254.
201. Presmanes & Eisenberg, *supra* note 71, at 251.

so pervasively that an intent to preempt the entire field may be inferred; and (3) by enacting a law that directly conflicts with state law.'"[202] There have been a variety of responses by courts across the country to cases involving workers' compensation and *Hoffman Plastic* and two major trends have emerged: opinions employing and rejecting a preemption analysis[203] and opinions employing a police power policy analysis.[204] In both of these categories a majority of state courts have found that *Hoffman Plastic* is misplaced and not applicable to workers' compensation cases.

1. Category I: The IRCA & *Hoffman Plastic* Do Not Preempt States From Both Enacting Workers' Compensation Systems that Include Undocumented Workers and Allow Recovery

Many states have found that Congress intended neither express nor field preemption in the IRCA to disavow undocumented workers from being protected by workers' compensation state statutes.[205] These include Florida,[206] Georgia,[207] Minnesota,[208] and Pennsylvania.[209]

Relying upon statutory construction and Minnesota workers' compensation statutes against the purpose behind the IRCA, the Minnesota Supreme Court held, in *Correa v. Waymouth Farms, Inc.*, that not only is there no preemption but there is truly no conflict.[210] The court in *Correa* held that the Minnesota workers' compensation statute defines employees as "any person who performs services for another for hire including . . . an alien,"[211] thus making no distinction between documented/authorized and undocumented/ unauthorized workers. The Minnesota Supreme Court held that "[t]he IRCA is not aimed at impairing existing state labor protections," and thus, there was no federal preemption.[212]

202. Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60, 63 (Ga. Ct. App. 2004) (quoting Ga. Pub. Serv. Comm'n v. CSX Transp., Inc., 484 S.E.2d 799, 801 (Ga. Ct. App. 1997)).

203. *See id.* at 63 & n.8 (citing Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329 (Minn. 2003); Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo), 810 A.2d 99, 105–06, 108–09 (Pa. 2002)).

204. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 223 (2d Cir. 2006); Balbuena v. IDR Realty, Inc., 845 N.E.2d 1246, 1258 (N.Y. 2006); Amoah v. Mallah Mgmt., LLC, 866 N.Y.S.2d 797, 800 (N.Y. App. Div. 2008).

205. Presmanes & Eisenberg, *supra* note 71, at 248–49.

206. Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003).

207. *Wet Walls*, 598 S.E.2d at 63.

208. *Correa*, 664 N.W.2d at 329, 331.

209. Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo), 810 A.2d 99, 105–06, 108–09 (Pa. 2002).

210. *See Correa*, 664 N.W.2d at 329.

211. *Id.* (quoting MINN. STAT. § 176.011 subdiv. 9 (2002)).

212. *Id.*

Furthermore, the Minnesota legislature had impliedly addressed the issue by including aliens in their workers' compensation statutes; thus, by the will of the people, recovery was not precluded by *Hoffman Plastic*.[213] The Minnesota Supreme Court concluded that, due to Minnesota's labor statutes and the lack of federal preemption in the IRCA, the employer's reliance upon *Hoffman Plastic* was misplaced; until the legislature acted otherwise, undocumented workers were entitled to recover in Minnesota.[214]

In *Safeharbor Employer Services I, Inc. v. Cinto Velazquez*, a case of first impression of applying *Hoffman Plastic* to workers' compensation in Florida courts, the Florida appellate court affirmed the lower court's ruling for the undocumented worker on a workers' compensation claim.[215] This court, relying on *Correa* and its own workers' compensation statutes, found that the IRCA did not preempt state law.[216] In finding no federal field preemption, the court relied upon the Supreme Court's determination that workers' compensation is an area of state police power and that Congress had not occupied the field,[217] thus leaving Florida and its legislature free to enact workers' compensation statutes that are inclusive to undocumented workers.[218]

The Georgia Court of Appeals likewise found no federal preemption in *Wet Walls v. Ledezma*, which evaluated the workers' compensation claim of a disabled and deported worker.[219] The employer presented an affirmative defense, employing *Hoffman Plastic* as evidencing federal preemption doctrine, but the Georgia court found the argument unpersuasive; it held that there is no express or field preemption in the IRCA and no preclusion resulting from the *Hoffman Plastic* decision.[220] Georgia's Court of Appeals reaffirmed its position months later by issuing their decision in *Continental Pet Technologies, Inc. v. Palacias*, which allowed a worker to obtain benefits despite his status under the IRCA as undocumented.[221] Thus, across the

213. *Id.*

214. *Id.* at 331. Compare this result with *Reinforced Earth Co*. There, an employer of an injured undocumented worker claimed federal preemption and raised a public policy argument about escaped prisoners. The Pennsylvania Supreme Court held that an escaped prisoner is not analogous to an undocumented worker, and thus, such workers are not precluded from benefits due to public policy. *Reinforced Earth Co*., 810 A.2d at 103–05. The majority in *Reinforced Earth* did not address preemption despite the encouragement from two dissenting justices. *Cf. id.* at 111 (Newman, J., dissenting).

215. Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez, 860 So. 2d 984, 985 (Fla. Dist. Ct. App. 2003).

216. *Id.* at 985–86.

217. *Id.* at 986 (citing De Canas v. Bica, 424 U.S. 351, 356 (1976).

218. *Id.*

219. Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60, 62 (Ga. Ct. App. 2004).

220. *Id.* at 63.

221. Cont'l Pet Techs., Inc. v. Palacias, 604 S.E.2d 627, 629 (Ga. Ct. App. 2004).

country, state courts have concluded that the IRCA does not preempt recovery for undocumented employees under state workers' compensation statutes.

There are states that have swung the other way, as in *Sanchez v. Eagle Alloy, Inc.*, in which a Michigan court reversed the lower courts holding that undocumented workers were allowed recovery.[222] This Michigan court analogized to the *Hoffman* majority's rationale that an undocumented worker providing false work authorization documents committed a crime and is barred from recovering under Michigan workers' compensation statutes; thus, on state statutory application alone, the worker was precluded from protection.[223] The court did hold, however, that while being undocumented precluded wage loss benefits, it did not preclude making the employer liable for plaintiff's medical treatment expenses related to the work injury, for which the court held the employer responsible.[224] Along with *Sanchez*, there have been courts in other states that have applied *Hoffman Plastic's* rationale in workers' compensation cases, finding that the criminal act of providing false documents does, in fact, remove the worker from statutory inclusion where illegal conduct bars recovery; however, none of these cases have pulled upon the language of Congressional preemption.[225] While these courts are in the minority, it is illustrative that there remain trends across the country that leave a potential litigant—both employer and undocumented immigrant—unable to clearly predict results of a workers' compensation claim.

2. Category II: *Hoffman Plastic* Has no Application and No Policy Basis in Workers' Compensation Cases

While the aforementioned state courts have focused on the absence of preemption to allow undocumented workers to recover workers' compensation, New York has not only found no preemption but consistently finds *Hoffman Plastic* toxically misplaced in workers' compensation and tort claims.[226] The New York cases tend to incorporate the *Hoffman Plastic* dissent in maintaining that there is no conflict between labor and immigration policies, and even if there were, properly effectuated labor laws are the solution to immigration

222. Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 512 (Mich. Ct. App. 2003).

223. *Id.* at 518, 520.

224. *Id.* at 518 n.6.

225. *See, e.g.*, Martines v. Worley & Sons Constr., 628 S.E.2d 113, 114 (Ga. Ct. App. 2006) (holding benefits precluded where worker lacked documentation to assume new light-duty job after injury); Doe v. Kan. Dep't of Human Res., 90 P.3d 940, 947–48 (Kan. 2004).

226. *See* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 223 (2d Cir. 2006); Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246, 1257 (N.Y. 2006); Amoah v. Mallah Mgmt., LLC, 866 N.Y.S.2d 797, 801 (N.Y. App. Div. 2008); Cano v. Mallory Mgmt. 760 N.Y.S.2d 816, 817 (N.Y. Sup. Ct. 2003).

problems—not the inverted answer Rehnquist gave in *Hoffman Plastic* by allowing the IRCA to preempt NLRA penalties.[227]

New York courts captured the dissent from *Hoffman Plastic* in the *Cano v. Mallory Management* decision, where the New York Supreme Court, in ruling that an undocumented worker was not precluded from recovering for tortious conduct of the employer, stated "[i]t is also interesting to note that every case citing *Hoffman* [*Plastic*] since it was rendered has either distinguished itself from it or has limited it greatly."[228] The *Cano* Court foreshadowed a line of New York workers' compensation cases where courts would decline employers' usage of *Hoffman Plastic* on grounds of strong public policy and state-based safety considerations. *Cano* distinguished *Hoffman Plastic*'s facts from a negligence case about an undocumented employee sustaining severe injuries from electrocution while working.[229] The court authoritatively found the workers' status to be irrelevant to the tort claim and stated, "[i]t is contrary to the public policy of New York State that a person who claims to be injured as a result of tortious conduct may be barred from pursuing that claim in the courts of this State based upon the resident status of the claimant."[230] Responding to the employers' use of *Hoffman Plastic* to defend against the negligence suit, the court concluded: "Defendants can not [sic] negligently injure someone who is within this state legally or not, and then not be responsible to that injured person for the injuries sustained."[231] Already in 2003, just one year after *Hoffman Plastic*, the New York courts made it clear that employers violating labor laws will not evade responsibility simply because the petitioner is undocumented.[232] The workers' compensation cases following *Cano* reaffirmed the New York court's rationale.

In *Balbuena v. IDR Realty*, the New York Court of Appeals concluded that the best way to serve the purpose of the IRCA and curb the employment of illegal labor would be to punish employers who hire illegal labor and create unsafe working environments for them.[233] The court analyzed each preemption claim brought by the employer in turn. In regards to express preemption, the court found the IRCA only preempted civil or criminal sanctions on undocumented workers, and since workers' compensation is not a punishment but rather a compensation to the injured worker, Congress did not expressly preempt workers' compensation claims.[234] The preemption

227. *See Balbuena*, 845 N.E.2d at 1257; *Amoah*, 866 N.Y.S.2d at 801; *Cano*, 760 N.Y.S.2d at 817.

228. *Cano*, 760 N.Y.S.2d at 818.

229. *Id.* at 816–17.

230. *Id.* at 817.

231. *Id.*

232. *Cf. id.*

233. Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246, 1254, 1259 (N.Y. 2006).

234. *Id.* at 1255–56.

argument likewise fell on deaf ears; the court felt that Congress evinced no intention to disrupt state regulation of occupational safety and health.[235] The court finally found no conflict preemption, holding that while the federal government is in exclusive control of immigration law, the states historically have police power to ensure workplace safety; moreover, statutes to ensure workplace safety compliance for *all* state residents were not in conflict with the federal government's attempts to curb illegal immigration.[236] The court embraced the policy behind the *Hoffman Plastic* dissent, noting that limiting undocumented workers' recovery gives employers incentive to not comply with labor laws which places both undocumented and lawful residents at risk, endangering the entire state.[237] Far worse, the court continued, preemption would reward employers for not complying with the IRCA, since the worker whose claim would be denied had been employed without ever once being asked for proper IRCA-required documentation.[238] The court stated that allowing *Hoffman Plastic* into workers' compensation lends itself to a miscarriage of justice, since this usage of *Hoffman Plastic* defies the purpose of the IRCA by expressly encouraging illegal immigration and the hiring of undocumented workers.[239] The court proposed a solution to the federal and state tensions by suggesting that plaintiff's undocumented status could be one of many factors the jury considers in its deliberations, but the status cannot foreclose recovery nor should it be the sole factor to limit damages.[240]

The Second Circuit, following the New York state court's lead, held in *Madeira v. Affordable Housing Foundation, Inc.* that New York compensation laws were established to protect workers, they were not preempted, and that precluding recovery would encourage employers to create hazardous workplaces for all residents—legal and illegal.[241] In this case, an undocumented worker was injured and brought a workers' compensation suit against his employer in federal court for violating a New York scaffolding safety law.[242] The district court found for the worker, and the Second Circuit affirmed, after analyzing federal and state law as well as public policy regarding why disallowing recovery would establish a dangerous incentive for further illegal immigration, workplace safety violations, and exploitation of undocumented workers.[243]

235. *Id.* at 1256.
236. *Id.* at 1256–58.
237. *Id.* at 1257–58.
238. *Balbuena*, 845 N.E.2d at 1258.
239. *Id.* at 1260.
240. *Id.* at 1259.
241. Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 227–29 (2d Cir. 2006).
242. *Id.* at 224.
243. *See id.* at 248, 254.

The court explained that while the worker entering the country undocumented concerns the federal government, there still exists a workplace safety duty between the worker and his employer according to New York law.[244] Thus, like the dissent in *Hoffman Plastic*, the Second Circuit found the issues to be distinct and, here, found the labor safety laws of New York weighed in favor of a worker's ability—regardless of residency status—to be able to effectuate safety statutes by bringing suit when injured.[245] Borrowing reasoning from *Balbuena*, the Second Circuit found the nature of personal injury compensation to be unrelated to the IRCA's sanctions, as the employer, not the employee, had violated the law.[246] Nor had Congress evinced an intent to eradicate the traditional province of the states over employment compensation.[247] Thus, field and express preemption were found to be inapplicable and could not stop recovery under New York law.[248] Regarding conflict preemption, the Second Circuit stated that mere tension alone does not establish conflict preemption, especially when the area of law involves traditional police powers such as workers' compensation.[249] The Second Circuit, in finding no conflict, determined that it is possible to effectuate state workers' compensation laws while still adhering to federal law.[250]

The Second Circuit also explored the purpose behind both the IRCA and the New York workers' compensation laws, finding the former unrelated to the claim and the latter essential to allow recovery.[251] The New York workplace safety laws were created to provide "a swift and sure source of benefits to the injured employee,"[252] and New York courts had found the status of a worker to be irrelevant to the ability to recover.[253] This finding was particularly important since New York historically has been a beacon for immigrant employment and has a strong affinity for working immigrants.[254] Thus, while the IRCA did criminalize some behaviors, the workplace safety and recovery for workers remained in force.[255] In addition, New York law differed from other states' in that New York imposes absolute liability on worksites where

244. *Id.* at 242.

245. *Id.*

246. *Madeira*, 469 F.3d at 239–40 (citing Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246, 1255–56 (N.Y. 2006)).

247. *Id.* at 240–41.

248. *Id.* at 238–41.

249. *See id.* at 241.

250. *See id.* at 242.

251. *Madeira*, 469 F.3d at 242.

252. *Id.* at 229 (quoting O'Rourke v. Long, 359 N.E.2d 1347, 1350 (1976)).

253. *Id.* at 229 & n.10 (citing *O'Rourke*, 359 N.E.2d at 1351).

254. *Immigration City*, N.Y. SUN (Apr. 3, 2006), http://www.nysun.com/editorials/immigration-city/30243.

255. *Madeira*, 469 F.3d at 242.

general contractors fail to provide safe workplaces—even after *Hoffman Plastic*—and expressly extended such protections to undocumented workers.[256] The court did recognize that New York courts allow a jury to consider that lost earnings may be limited by deportation, as held in *Balbuena*, but reiterated that the employee's undocumented status cannot alone bar suit.[257]

Seemingly anticipating criticism from other courts, the Second Circuit directly addressed policy concerns of promoting proper incentives and curbing illegal immigration by exploring the purpose behind the IRCA.[258] The Second Circuit argued that the focus of Congress was to punish employers who incentivized illegal immigration and not to punish the worker who was simply responding to employers' pull.[259] The court noted that the sanctions are harsher on employers who, in patterned conduct, prey on undocumented workers[260] and, thereby, create an underpaid, overworked slave-class and dangerous work labor environments; whereas, the only penalties on workers apply to knowing violators who willfully provide false documents.[261]

Finally, the court illustrated how *Hoffman Plastic* is both factually and legally distinguishable from a workers' compensation case.[262] In *Hoffman Plastic*, the employee deceived the employer into illegally employment, but here, the employer knowingly violated the IRCA by hiring an employee without any documentation.[263] In terms of law, *Hoffman Plastic* involved two competing federal laws (NLRA, IRCA), and here, the employer was importing the IRCA into an otherwise simple state law claim involving workers' compensation.[264] The Second Circuit recognized the growing nationwide trend of employers citing *Hoffman Plastic* to avoid compensating injured employees strictly on the basis of their immigration status—despite many state courts refusing to allow windfalls for such employers.[265] The court further stated that while the Supreme Court may have thought in *Hoffman Plastic* that allowing the IRCA to supersede the NLRA was the best policy, here in New York, the residents' lives would be placed at risk by extending that holding to workers' compensation cases.[266] The Second Circuit, by limiting *Hoffman Plastic* to its own facts, supported the finding that workers' compensation and illegal

256. *Id.* at 229.
257. *Id.* at 225, 228.
258. *Id,* at 231.
259. *Id.* at 231 & n.13 (quoting H.R. REP. NO. 99-682(I), at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653).
260. *Madeira*, 469 F.3d at 231 (citing 8 U.S.C. § 1324a (2006)).
261. *Id.* (citing § 1324c).
262. *Id.* at 236–37.
263. *Id.*
264. *Id.* at 237.
265. *See Madeira*, 469 F.3d at 245 & n.26.
266. *See id.* at 246.

immigration can be squared by hitting the strongest and most powerful economic target, the employers.[267] To hold otherwise, the court hinted, would give credence to the 'nod and wink' undocumented labor empires of employers which encourage unsafe workplaces and worker abuse, and which fan the flames of illegal immigration—a grotesque outcome not desired by either New York or, arguably, by the federal government.[268]

CONCLUSION

Eight years have passed since *Hoffman Plastic Compounds*, and it remains a demon haunting the Supreme Court by showing up across the United States in federal and state courts, while illegal immigration races onward, undeterred by its holding. While the *Hoffman Plastic* majority presumed that IRCA's precluding NLRA back pay remedies would curb illegal immigration, instead a perverse usage has emerged. Employers cite *Hoffman Plastic* preemption as an affirmative defense, which would allow them to hire undocumented workers, fire them when they organize for better working conditions, and then evade liability by denying remedy for someone who happened to be undocumented. *Hoffman Plastic*, as critics contend, has in fact led to the erosion of labor statutes stretching back a century to protect both the resident and immigrant. Resultantly, the undocumented laborer has few labor rights in a country built on immigration, equality, and opportunity.

In a more disturbing twist, *Hoffman Plastic* has crept into workers' compensation cases, where it threatens not merely back pay, but injured human beings suffering loss of limbs and excruciating pain sustained while working for the profit of an employer. These employers attempt to use *Hoffman Plastic* to preclude recovery for such injuries—alleging federal preemption of state-based workers' compensation statutes. The application of *Hoffman Plastic* in workers' compensation would further dehumanize undocumented worker by not only taking their labor rights but also their human rights.

So far, the response by courts across the country has been to limit *Hoffman Plastic* to its facts, with few cases allowing the extension of *Hoffman Plastic* to workers' compensation. The opinions, statutes, and outcomes vary because the incentives and issues behind illegal immigration, employee rights, and state police powers fluctuate per jurisdiction. A growing trend evidenced in New York and the Second Circuit cases is that workplace safety and state police powers mandate recovery for workers regardless of their citizenship status. These courts do not support illegal immigration—in fact, quite to the contrary—they find the best way to curb it is what the *Hoffman Plastic* dissent realized: it is the one with the capital, the worksites, and the foremen hiring the

267. *Id.* at 254.
268. *Cf. id.* at 235 n.16.

workers that must be disincentivized; anything else is a band-aid on the already gangrenous wound of economic exploitation.

Illegal immigration is not a problem that can be deported. Already, employers disregard the IRCA by actively hiring undocumented workers. To preclude recovery for workers' compensation is to encourage these employers by creating a license to exploit. Furthermore, precluding the workers' recovery inflicts collateral damage upon the U.S. economy and legitimately creates a twenty-first century class of disposable peasant workers. This policy outcome defies our traditions, our Bill of Rights, and our intent to secure both the borders and the labor markets. Congress must pass effective and economically thoughtful legislation to curb illegal immigration. The IRCA is not enough. The Supreme Court and lower courts must protect the NLRA and workers' compensation statutes from the perverse and dangerous usage made possible in *Hoffman Plastic*. Then, and only then, will the "wink and nod" industries start to collapse and will *Hoffman Plastic's* undocumented box be closed.

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